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The Rise and Fall of the Fourth Amendment

A Paper  
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The Framers of the constitution had to have known it was impossible to dictate every detail of the new American government, but they had an idea which direction the laws should take. There are changes to the implementation of the fourth amendment that the framers would likely have disagreed with. The idea of privacy, one's right to be left alone from government intrusion, partly emanates from the fourth amendment of the constitution. It is often the first legal principle looked at by defense attorneys. Some would argue, probably correctly, that a "technicality," under a suspect's fourth amendment rights, has caused murderers or other criminals to be set free. On the opposite hand people have had unnecessary and sometimes illegal invasions into their private lives. Like all laws there is a necessity of balance, in this case it is between freedom and security. America has generally been called the land of the free, but if it continues to allow fourth amendment rights to be eroded it may just become the land of the secure. The balance has shifted too much to security over freedom as a result of judicial exceptions to the fourth amendment, use of new technology, and the implementation of the USA PATRIOT act.

The fourth amendment has a notable history among the other amendments. The colonists were very familiar with the concept of warrants, even before they were introduced in the requirements of the fourth amendment; however they would have had a much different perspective on warrants than we do. Our warrants are supposed to have a judicial officer that: determines if probable cause exists and limits the scope of a search to be performed. What the colonists would have been familiar with was called a general warrant or a general writ of assistance. It was used by the English crown and "gave the officials of the crown license to search all places and for everything in a given place, limited only by their own discretion." (Douglas). These warrants allowed servants of the crown to search without probable cause and without limitation. The colonists were angered by the fact that their entire home could be ransacked based on the discretion of the officer whose duty is the detection of crime. They wanted an authority who was removed from that position to be a neutral judge in deciding that a crime had probably occurred and that there was sufficient evidence that a specific search ought to be performed. James Otis, speaking in 1761, described the colonist's dissatisfaction with the general warrant and in his speech envisioned an acceptable warrant. He stated "I admit that special writs of assistance, to search special places, may be granted to certain persons on oath" (Douglas). This approach reflected the sentiments of most early Americans and eventually became part of the Bill of Rights; it is the reason the fourth amendment has the requirements that it does. The fourth amendment states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The key requirements that the colonists wanted were that a magistrate decide that probable cause exists and create a limited warrant describing what places are to be searched and what the officers are to looking for.

The fourth amendment contains a civil liberty, meaning it is a limitation on the government. Its applications to real life are found in the exclusionary rule, which restricts the use of evidence obtained illegally by police officers. The purpose of the exclusionary rule is to protect Americans (and residents in our borders) against government intrusions into privacy. The opinion delivered by the Supreme Court about the actual purpose of the exclusionary rule is disturbing. Instead of making the exclusionary rule about the rights of the accused, they stated the purpose is to deter police officers from violating fourth amendment rights (*Illinois v Krull*). There are many problems that exist in this ideology. The court

decided as a result of this idea that if an officer acts in good faith in reliance of a law that is found to be unconstitutional, then it is not his or her fault, but the fault of the legislators. The evidence will be used in a criminal prosecution, even though it is admitted that the defendant's rights were violated under the fourth amendment, because there is no evidence that the exclusionary rule deters legislators from creating unconstitutional laws (*Illinois v. Krull*). This injustice is not limited to just one case, but many. In the case of *Illinois v. Rodriguez* the court again put the focus on the officers when they ruled that evidence obtained by police could be admitted to court even though it was obtained illegally. In this case Gail Fischer, Rodriguez's ex-girlfriend, gave permission to officers to enter his residence from a separate location and admitted them with a key she had taken without his knowledge. The Supreme Court ruled that officers reasonably believed Ms. Fisher had authority to consent to a search and therefore excluding the evidence would not deter future police violations of the fourth amendment. By shifting the emphasis from the defendant who has had their rights violated the court has caused the pendulum to swing of closer to security over freedom.

When the fourth amendment was written it dealt with persons, houses, papers, and effects. In a more technologically advanced world the fourth amendment deals with phone calls, emails, chats, text messages, and all other forms of electronic communication. It is not surprising with the simplicity of the warrant requirement without technology that the colonists did not even fathom there being exceptions to the rules outlined in the fourth amendment. The Supreme Court would, for a time, reflect this sentiment. With the introduction of the telephone and the high place it took in society as the principal mode of communication it is sensible that cases involving this technology would reach the courts. In 1967 a landmark decision in *Katz v. United States* the standard was changed. In the *Katz* case Justice Harlan articulated that the standards of the fourth amendment were based on a two-part test: has the defendant exhibited a subjective expectation of privacy and is it an expectation of privacy that society would be prepared to consider reasonable? The court began to recognize that although the framers of the constitution did not include a provision for new technologies they should be covered. Therefore a phone call should be protected even though it was not strictly written into the constitution. Despite the decision in *Katz* some have argued that the introduction of new technology, the decisions of the courts, and new legislation have eroded the fourth amendment to the point that it no longer protects people (Thompson).

The purpose of the courts is to act as a horizontal check on the executive and legislative branches. However, in many cases the courts, instead of checking the other branches, simply justify them, some examples include *Korematsu v. U.S.* in which Japanese internment was deemed constitutional by the courts, *Silverman v. United States*, and *Olmstead v. United States*; In these rulings the court decided that because there was no physical trespass or physical evidence seized that the police could not be held to the standards of the warrant requirement. On other occasions though the court has acted more responsibly and checked the other branches. Benjamin Franklin once said "Those who desire to give up freedom in order to gain security will not have, nor do they deserve, either one." When the United States was attacked on September 11, there soon followed landmark legislation. With a presidential approval rating higher than any in history President Bush was able to get anything through Congress that he wanted. When Congress passed the USA PATRIOT Act America further diminished its privacy and traded freedom for perceived security. Under the act the police can perform roving wiretaps, which means when it is determined that you can be searched officers can search everywhere and anywhere in your life without needing a new warrant. This ability to search anywhere and everywhere is the exact civil liberty that the colonists wanted to limit when they complained against the general writ of assistance. It is being used against citizens and

suspected terrorists. It is apparent that the fourteenth amendment, which allows all persons not just citizens, equal protection under the law is being ignored. The police are gaining more and more discretion in searches they perform and neutral magistrates are being removed from determining probable cause. In *Katz* standard is supposed to be that if society expects an area to be private then the government must have a warrant, but with all the exceptions that have been created areas such as emails and chats, which most would consider private, are not protected under the fourth amendment. The government is now using old tools in new ways to get around fourth amendment requirements. Federal agents can subpoena electronic information under an act written in 1986 when the internet did not hold the place it does today. 18 USC sections 2703 and 2705, known as the Stored Communications Act, allows agents to obtain electronic information without the requirement of getting a warrant from a neutral magistrate. Furthermore "In the last few years, the FBI began using another tool that it has had for several years, the National Security Letter, to avoid the procedures required by the courts." Thus legislation from Congress and Executive actions have further diminished expectations of privacy. Even the books checked out at the library are considered information the government can subpoena without a showing of probably cause. Congress has continued to renew the provisions of the PATRIOT Act, citing for its evidence that we have not experienced a major attack since 9/11, even though they have provided no concrete examples that exceptions to the fourth amendment have been used to stop any such acts. If America continues down the path of trading freedom for security we may just end up with neither one like Benjamin Franklin warned. Many people don't realize that the goal of terrorists is often to get the attacked country to change dramatically. Let us hope that we change for the better and not for the worse.

It may be true that the framers lived in a different time and may not have understood all the changes that would take place in American society, but when the government is in contradiction to the constitution the framers wrote then it has gone too far. Democracy is supposed to be government by the people, but if the people don't care to participate in the government someone else will decide issues for them. Thomas Jefferson stated: "When the people fear their government, there is tyranny; when the government fears the people, there is liberty." So, which does America have? We decide.

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