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# Privacy is the Problem

Raymond Shih Ray Ku
*Case Western University School of Law*, raymond.ku@case.edu

# PRIVACY IS THE PROBLEM

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A local school district remotely activates laptop web cameras that allegedly record the activities of students, even in their bedrooms.[1] The President authorizes the National Security Agency (NSA) to monitor the telephone calls and electronic communications of individuals within the United States on an unprecedented scale in the interest of national security.[2] Even a cursory examination of the news suggests that the activities and communications of Americans are increasingly subject to government surveillance from every level of government. Whatever we may think about the necessity for this surveillance, we should question how such programs come into being; in other words, who made the decision to use web cameras or wiretap international communications and how was that decision made and how did the government decide when to turn on a particular web camera or to monitor a particular telephone call or e-mail? And, for the purposes of this discussion, what does the United States Constitution have to say about both of these processes?

Currently, whether government may engage in surveillance under the Constitution or whether the Constitution shields individuals from such surveillance turns on whether courts will

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* Professor of Law and Co-Director of the Center for Law, Technology & the Arts, Case Western Reserve University School of Law. This essay draws heavily from my prior work, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, with permission of the *Minnesota Law Review*. Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325 (2002).

[1] Maryclaire Dale, *Official: FBI Probing Pa. School Webcam Spy Case*, ASSOCIATED PRESS, Feb. 19, 2010, http://abcnews.go.com/Technology/WireStory?id=9890037.

[2] *See* James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A.1. *See generally* OFFICES OF INSPECTORS GEN. OF THE DEP'T OF DEF. ET AL., UNCLASSIFIED REPORT ON THE PRESIDENT'S SURVEILLANCE PROGRAM (2009), *available at* http://www.dni.gov/reports/report_071309.pdf [hereinafter SURVEILLANCE REPORT] (reviewing President Bush's surveillance program).

recognize that the individual subject of the surveillance has a reasonable expectation of privacy.[3] If there is such an expectation, then the Fourth Amendment to the United States Constitution applies and the surveillance may only occur if it satisfies the requirements of the Warrant Clause.[4] If not, then the government's power is essentially limitless, subject only to the discretion of the government agent and the executive branch, at least as far as the Constitution is concerned.[5]

For example, in defending the legality of the President's Surveillance Program, in which President George W. Bush authorized the NSA to intercept telephone and Internet communications between individuals within the United States and abroad, the Office of Legal Counsel (OLC) argued that the Fourth Amendment did not apply because there was no reasonable expectation of privacy in such communications in light of the government's interest in protecting national security, which easily outweighed any individual privacy interests.[6] Likewise, courts are currently divided over whether the government should be required to obtain a warrant in order to acquire information from cellular providers that would allow the government to pinpoint the physical location of individual cellular telephones.[7] Once again, the government argues that warrants are not required because cellular

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[3] *See generally* Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 MINN. L. REV. 1325, 1343-56 (2002) (discussing modern technology and its implications on Fourth Amendment rights).

[4] U.S. CONST. amend. IV.

[5] Ku, *supra* note 3, at 1357-62 (discussing a lack of the Fourth Amendment's role and the substitute discretion to law enforcement).

[6] SURVEILLANCE REPORT, *supra* note 2, at 12-13 (discussing Memorandum from John Yoo, Deputy Assistant Attorney Gen., to John Ashcroft, Attorney Gen., Op. Off. Legal Counsel 131 (Nov. 2, 2001) [hereinafter OLC 131]); *see also* Eric Posner & John Yoo, *The Patriot Act Under Fire*, WALL ST. J., Dec. 9, 2003, at A.26.

[7] *See generally In re* U.S. for an Order Directing a Provider of Elec. Commc'n Serv. to Disclose Records to the Gov't (*In re U.S.*), 534 F. Supp. 2d 585 (W.D. Pa. 2008), *aff'd*, No. 07-524M, 2008 WL 4191511 (W.D. Pa. Sept. 10, 2008) (citing several cases related to the constitutional dispute regarding the issue).

telephone users have no reasonable expectation of privacy in this information.[8] Under this approach, privacy is the problem.

## I. PRIVACY IS OVERPROTECTIVE

In one sense, privacy is the problem because assertions of a right to privacy are perceived or portrayed as standing in the way of legitimate efforts to protect the public from crime or from terrorism. Rhetorically, privacy is often framed as a right to deny government access to relevant information. And the critique of privacy is often framed by the question: If you are innocent, what do you have to hide? While some, myself included, will agree with Benjamin Franklin that " '[t]hey who can give up essential liberty to obtain a little temporary safety, deserve neither liberty nor safety,' " others will not.[9] And, when the government seeks information relevant to protecting the public, it should come as no surprise that judges are reluctant to conclude that even a legitimate expectation of privacy is insufficient to deny government access to that information.[10] So if the Fourth Amendment is intended to protect privacy, judges often have difficulty concluding that the Fourth Amendment should apply.[11] This is a binary world in which recognizing a right of privacy is portrayed as necessarily sacrificing some degree of public safety and security. This is clearly the thrust of the OLC's reading of the Fourth Amendment with respect to the President's Surveillance Program: if we protect individual privacy, lives will be put at risk, and that is a trade-off that the Constitution does not require us to make.[12] In other words,

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[8] *In re U.S.*, 534 F. Supp. 2d at 613-14.

[9] 1 BENJAMIN FRANKLIN & WILLIAM TEMPLE FRANKLIN, MEMOIRS OF THE LIFE AND WRITINGS OF BENJAMIN FRANKLIN 270 (London, A.J. Valpy 1818).

[10] *See, e.g.*, United States v. Goldstein, 635 F.2d 356, 361 n.6 (5th Cir. 1981) (citation omitted) (recognizing a relaxed standard of reasonableness when public safety is at risk).

[11] *See id.* Of course, this overlooks the fact that even when framed in terms of privacy, the Fourth Amendment does not deny government access to relevant information, but instead requires the government to demonstrate to an independent decision maker that it is seeking information relevant to public safety. *See, e.g.*, *id.*

[12] *See* SURVEILLANCE REPORT, *supra* note 2, at 13 (discussing OLC 131, *supra* note 6); *see also* Risen & Lichtblau, *supra* note 2, at A.1.

for those interested in public safety, privacy is a problem because it stands in the way of (and should give way to) effective law enforcement.

## II. PRIVACY IS UNDER-PROTECTIVE

Ironically, privacy is also the problem for those interested in protecting privacy. Rather than treating privacy as an underlying interest protected by the Fourth Amendment, the Supreme Court of the United States currently uses it as a limiting principle, narrowing the scope and circumstances in which the Amendment applies. For most of the twentieth century, the right of privacy protected by the Amendment was only implicated when the search conducted by the government invaded privacy in a manner equivalent to the types of searches that troubled the Framers of the Constitution.[13] As Anthony Amsterdam described years ago:

> [this] approach proceeds from the premise that the fourth amendment is addressed essentially to the forcible rummagings of the English messengers and colonial customs officers. It concedes that the amendment extends to similar cases, identifies the relevant attributes of similarity, and ends by asking whether the police practice now in issue is sufficiently similar to the messengers' and customs officers' rummagings in the relevant regards.[14]

As advances in technology make it possible for government to gather information without having to trespass on property, rummage through drawers, or open locked cabinets, the Supreme Court has often concluded that the searches made possible by new technology are not equivalent to the searches the Framers feared and, therefore, are not searches subject to the Fourth Amendment.

Consider the Supreme Court's decisions in *United States v. Knotts*[15] and *United States v. Karo*,[16] in which the Court

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[13] *But see generally* Kyllo v. United States, 533 U.S. 27 (2001) (holding that using technology not commonly available to the public, such as thermal imaging, to peer inside the home is considered a search).

[14] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 363 (1974).

[15] United States v. Knotts, 460 U.S. 276 (1983).

considered whether using electronic tracking devices constituted a search under the Fourth Amendment. In *Knotts*, the police placed a "beeper," or radio transmitter, in a five-gallon drum of chloroform.[17] Using the beeper, they were able to track the drum from its place of purchase in Minnesota to the Knotts' cabin in Wisconsin in which they discovered a drug laboratory.[18] In upholding the warrantless use of the beeper, the Supreme Court concluded that the information provided by the beeper was no different than what the officers could have observed visually.[19] Accordingly, "[n]othing in the Fourth Amendment prohibited the police from augmenting the sensory faculties bestowed upon them at birth with such enhancement as science and technology afforded them in this case."[20] In contrast, government agents in *Karo* used a beeper to track fifty gallons of ether, not only on public roads but within specific residences.[21] The Court began by describing private residences as "places in which the individual normally expects privacy free of governmental intrusion not authorized by a warrant."[22] It then held that monitoring of the beeper within private residences violated the Fourth Amendment because it allowed the government "to obtain information that it could not have obtained by observation from outside the curtilage of the house."[23]

Another illustration of this approach and its formalistic reliance on "public exposure" can be found in *Smith v. Maryland*.[24] In *Smith*, a victim of a robbery received threatening and obscene telephone calls from an individual "identifying himself as the robber."[25] When police subsequently identified Smith as fitting the robber's description, they had the telephone company install a pen register to record the phone numbers dialed by Smith.[26] The

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[16] United States v. Karo, 468 U.S. 705 (1984).
[17] *Knotts*, 460 U.S. at 277.
[18] *Id.* at 278-79.
[19] *Id.* at 282.
[20] *Id.*
[21] *Karo*, 468 U.S. at 708.
[22] *Id.* at 714.
[23] *Id.* at 715.
[24] Smith v. Maryland, 442 U.S. 735 (1979).
[25] *Id.* at 737.
[26] *Id.*

register revealed that Smith subsequently called the victim.[27] In holding that the use of the pen register was not a search, the Court concluded that Smith had no reasonable expectation of privacy in the numbers he dialed because his use of the phone "voluntarily conveyed numerical information to the telephone company and 'exposed' that information to its equipment in the ordinary course of business."[28] Not only was the information collected by the pen registry more limited than that collected by wiretaps, it did not divulge the contents of the communication.[29] Having thus exposed this information, the Court concluded that Smith " 'assumed the risk' " that the telephone company might turn this information over to the police.[30] The Court reached this conclusion by defining away, rather than examining, the privacy interests at stake.[31] As such, while the Supreme Court may interpret the Fourth Amendment as protecting privacy with respect to emerging technologies, this approach leaves open the possibility that, despite the information-gathering capabilities of these technologies, their use may not be regulated at all under the Constitution. This is because, semantically, the Court may not consider their use to be a search. As others have noted, "[t]his approach fails to protect privacy rights, and permits their gradual decay with each improved technological advance."[32]

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[27] *Smith*, 442 U.S. at 737.

[28] *Id.* at 744.

[29] *Id.* at 741 ("[A] pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the *contents* of communications.").

[30] *Id.* at 744.

[31] *See id.*

[32] Melvin Gutterman, *A Formulation of the Value and Means Models of the Fourth Amendment in the Age of Technologically Enhanced Surveillance*, 39 SYRACUSE L. REV. 647, 650 (1988) (citations omitted); *see also* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L.J. 549, 554 (1990) (noting that the Court has applied the reasonable expectation of privacy standard "to reduce rather than enhance fourth amendment protections"); David E. Steinberg, *Making Sense of Sense-Enhanced Searches*, 74 MINN. L. REV. 563, 565, 613-27 (1990) (criticizing the incoherence of the Supreme Court's sense-enhanced search cases and suggesting three factors that may better protect Fourth Amendment privacy). *See generally* Timothy Casey, *Electronic Surveillance and the Right to be Secure*, 41 U.C. DAVIS L. REV. 977 (2008)

## III. POWER, NOT PRIVACY

More importantly, privacy is the problem because, as I have argued elsewhere, "[t]he Fourth Amendment protects power not privacy."[33] By its terms, the Amendment protects "[t]he right of the people to be secure."[34] While privacy is certainly an interest that falls within a right to be secure, it is not mentioned in the text, nor was it the primary motivation for the Amendment's adoption. As such, protecting privacy was not and should not be considered the Amendment's primary purpose, and determining whether a right to privacy is invaded should not be our focus or the dispositive question.

Moreover, the Supreme Court's focus upon privacy undermines the right to be secure because, under the Court's current interpretation of the Fourth Amendment, privacy is an arbitrary, limiting concept that does not limit abusive government power as much as it limits the circumstances in which constitutional safeguards are applied to government surveillance. In other words, if a court decides that there is no reasonable expectation of privacy from a particular form of surveillance, the Constitution has nothing to say about the matter. As I have argued elsewhere, privacy is a problem under these circumstances because it undermines the very purpose behind the Fourth Amendment in particular, and behind the Constitution in general–ensuring that the people determine what power the government may exercise and how that power should be exercised.[35]

According to conventional wisdom, the Fourth Amendment embodies the Founders' concerns over general warrants and writs of assistance, as illustrated by three preconstitutional search and seizure cases:[36] *Wilkes v. Wood*,[37] *Entick v. Carrington*,[38] and the

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(discussing recent developments in electronic surveillance and the Fourth Amendment).

[33] Ku, *supra* note 3, at 1326.

[34] U.S. CONST. amend. IV.

[35] *See* Ku, *supra* note 3, *passim*.

[36] *See, e.g.*, Olmstead v. United States, 277 U.S. 438, 463 (1928) ("The well known historical purpose of the Fourth Amendment [was] directed against general warrants and writs of assistance . . . ."). There is some debate over the relative importance of the writs of assistance. *Compare* AKHIL REED AMAR, THE

*Writs of Assistance Case*.[39] These decisions are important because of two connecting themes: (1) concern about the privacy of an individual's home and papers against the government and (2) a staunch rejection of unbridled official power and discretion.[40] For example, the *Wilkes* case arose in response to efforts to punish John Wilkes, a well-known member of Parliament, for seditious libel as the author of a series of anonymously published pamphlets that were critical of King George III.[41] Lord Halifax, the British Secretary of State, issued a warrant that did not name Wilkes or any other individual by name, but instead directed officials "to make strict and diligent search for the authors, printers and publishers of a seditious and treasonable paper" and "to apprehend and seize, together with their papers."[42] The officials carrying out the warrant arrested Wilkes and forty-nine other suspects by breaking into their homes and seizing their personal papers.[43]

In response, Wilkes and several of the other suspects challenged their arrest by bringing trespass actions against the

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BILL OF RIGHTS: CREATION AND RECONSTRUCTION 66 n.* (1998) ("The Boston writs of assistance case . . . played very little role in the discussion leading up to the Fourth Amendment"), *with* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 223-28 (1993) (arguing that the disputes over writs of assistance played an important role in colonial understanding of unreasonable searches and seizures). Because my argument does not depend upon the proper resolution of this debate, I include the *Writs of Assistance Case* in this discussion. *See* William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 396-97 & n.9 (1995) (citations omitted) (treating "the Boston *Writs of Assistance Case*" as part of the Fourth Amendment canon despite this debate).

[37] Wilkes v. Wood, 19 Howell's State Trials 1153 (C.P. 1763), 98 Eng. Rep. 489.

[38] Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765), 95 Eng. Rep. 807.

[39] *See* M.H. SMITH, THE WRITS OF ASSISTANCE CASE 524, at app. C (1978).

[40] Stuntz, *supra* note 36, at 399-400, 406-08 (discussing these two themes that emerged from the cases).

[41] *Wilkes*, 19 Howell's State Trials at 1159-61, 98 Eng. Rep. at 493-94.

[42] *In re* Wilkes, 19 Howell's State Trials 981, 981 (C.P. 1763), 95 Eng. Rep. 737, 737.

[43] *See Wilkes*, 19 Howell's State Trials at 1153, 98 Eng. Rep. at 493-94; *see also* Stuntz, *supra* note 36, at 399 (citations omitted).

officials involved.[44] In *Wilkes*, Chief Justice Pratt instructed the jury:

> The defendants claimed a right, under precedents, to force persons' houses, break open escrutores, seize their papers . . . upon a general warrant . . . and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a secretary of state, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.[45]

The jury found for Wilkes, awarding him one thousand pounds in damage,[46] and in a separate suit against Lord Halifax, Wilkes was awarded an additional four thousand pounds.[47] As William Stuntz notes, the cases arising out of these arrests "stand for the proposition that [general] warrants are invalid . . . and that arrests must be grounded in some cause to suspect the arrestee personally of a crime."[48] To the extent that the *Wilkes* decision influenced the Founders, it suggests that the Fourth Amendment was adopted as a means of restraining official discretion. As the Chief Justice emphasized in his jury instruction, the question raised by the case is whether anyone in government has the power "to search wherever their suspicions may chance to fall."[49]

The concern over official discretion was similarly echoed with respect to writs of assistance. In the seventeenth and eighteenth centuries, British statutes gave customs officials virtually unlimited authority to search for and to seize goods in violation of existing trade rules.[50] These writs of assistance did not grant the authority

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[44] *Wilkes*, 19 Howell's State Trials at 1153, 98 Eng. Rep. at 493-94.

[45] *Id.* at 1167, 98 Eng. Rep. at 498.

[46] *Id.* at 1168, 98 Eng. Rep. at 499.

[47] Stuntz, *supra* note 36, at 399 (citation omitted).

[48] *Id.* at 400 (citations omitted); *see also* Maryland v. Garrison, 480 U.S. 79, 84 (1987) (noting that the prohibition of general warrants was one of the central purposes of the Fourth Amendment); Payton v. New York, 445 U.S. 573, 583-85 (1980) (stating a similar proposition).

[49] *Wilkes*, 19 Howell's State Trials at 1167, 98 Eng. Rep. at 498.

[50] For example, the Act of Frauds of 1662 authorized customs officers "to enter, and go into any House, Shop, Cellar, Warehouse or Room, or other Place,

to search; "rather, they enabled customs officers to compel others—constables, local officials, or even private citizens—to assist in carrying out the necessary searches and seizures."[51] Nonetheless, as Stuntz notes, because they permitted searches based only upon the suspicion of the customs officer, "the writs became wrapped up with the search authority they sought to confirm."[52] As another commentator observes, much like the general warrant, "[t]he odious features of writs of assistance were the unbridled discretion given public officials to choose targets of the searches [and] the arbitrary invasion of homes and offices to execute the writs."[53]

Consider James Otis's now famous argument against the writs. According to Otis:

> A man's house is his castle; and while he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege. Custom house officers may enter our houses when they please-we are commanded to permit their entry-their menial servants may enter-may break locks, bars and every thing in their way-and whether they break through malice or revenge, no man, no court can inquire-bare suspicion without oath is sufficient.[54]

While Otis rhetorically invokes the right of privacy with his reference to the sanctity of the home, this right is clearly not absolute. The home is considered a castle only so long as the individual is "quiet" in it.[55] This concession is quite appropriate

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and in Case of Resistance, to break open Doors, Chests, Trunks and other Package, there to seize, and from thence to bring, any Kind of Goods or Merchandize whatsoever, prohibited and uncustomed." SMITH, *supra* note 39, at 25 (quoting ACT OF FRAUDS § 5(2) (1662)).

[51] Stuntz, *supra* note 36, at 405.

[52] *Id.*

[53] Shirley M. Hufstedler, *Invisible Searches for Intangible Things: Regulation of Governmental Information Gathering*, 127 U. PA. L. REV. 1483, 1487 (1979).

[54] JAMES OTIS, ADDRESS, *in* SMITH, *supra* note 39, at 344. Put another way, the writs place "the liberty of every man in the hands of every petty officer." *Id.* at 331.

[55] *See id.* at 331.

and reasonable. Aside from questioning the validity of the underlying substantive crime, it is difficult to imagine any value that would justify an absolute right to hide evidence of a crime.[56] Accordingly, the problem with the writs was not the invasion of the castle, which is how privacy is commonly conceived, but with the process justifying the invasion. The writs gave customs officers and their "menial servant[s]" the right to enter any home whenever they pleased.[57] The "liberty" Otis so eloquently argued for was not an absolute right of privacy, however defined. Instead, his liberty is the liberty recognized in *Wilkes*–freedom from arbitrary and unlimited government power.

The relative importance of limiting governmental power and discretion versus defining what is private is apparent when one considers that only one of the cases in the triumvirate turned on an absolute right to keep information from the government. Like Wilkes, John Entick authored a series of pamphlets that authorities considered libelous.[58] Unlike the warrant in *Wilkes*, this was not a general warrant because Entick was specifically named.[59] Nonetheless, Entick sued in trespass and was awarded three hundred pounds.[60] In upholding the jury's verdict, Pratt, who at this time was known as Lord Camden, concluded that "[p]apers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection."[61] Despite the fact that the government had obtained a valid warrant, the court concluded that searching and seizing of papers themselves was impermissible.

While the decision in *Entick* clearly recognizes the private nature of papers, most of Pratt's decision is spent questioning the authority and process by which the warrant was issued. In

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[56] As Professor Stuntz has argued, *Wilkes* and *Entick* were essentially First Amendment cases in a regime in which there was not opportunity for direct substantive review. Stuntz, *supra* note 36, at 403.

[57] *See* Wilkes v. Wood, 19 Howell's State Trials 1153, 1165 (C.P. 1763), 98 Eng. Rep. 489.

[58] Entick v. Carrington, 19 Howell's State Trials 1029, 1031 (C.P. 1765), 95 Eng. Rep. 807, 808.

[59] *Id.* at 1033-34, 95 Eng. Rep. at 809-10.

[60] *See id.* at 1036, 95 Eng. Rep. at 811.

[61] *Id.* at 1066.

affirming the trespass verdict, Entick rejected the power and authority of the Secretary to issue a lawful warrant as well as the lawfulness of the process by which the warrant was issued and executed.[62] Criticizing the power of the Secretary of State as "pretty singular,"[63] he rejected the idea that the Secretary of State had the power to issue warrants that could not be challenged and reviewed by the judiciary[64] or the power to immunize its issuer and agents from subsequent prosecution.[65] According to Pratt, the laws of England did not grant the Secretary such power.[66] Instead, the Secretary's claim "stands upon a very poor foundation, being in truth no more than a conjecture of law without authority to support it."[67] Similarly, Pratt considered the warrant unlawful because, even assuming that it was supported by oath, it was executed ex parte, without notice or a chance to be heard, and executed upon unknown information and informants, and its execution did not have to occur in the presence of a constable or the party.[68] These procedures were especially troubling because, if such a warrant was issued and executed against an innocent party,

> he is as destitute of remedy as the guilty: and the whole transaction is so guarded against discovery, that if the officer should be disposed to carry off a bank-bill, he may do it with impunity, since there is no man capable of proving either the taker or the thing taken.[69]

Fear of government power and abuse of discretion, therefore, runs through even the most privacy-centric decision.

It should be apparent, from these examples, that a primary goal of the Fourth Amendment is the same as that of the entire Constitution–to define and to limit governmental power. While the

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[62] *Entick*, 19 Howell's State Trials at 1036-39, 95 Eng. Rep. at 811-13.
[63] *Id.* at 1045.
[64] *See id.* at 1036-38, 95 Eng. Rep. at 811-12.
[65] *See id.* at 1041-42, 95 Eng. Rep. at 813-14.
[66] *See id.* at 1057 ("The whole body of the law, if I may use the phrase, were as ignorant at that time of a privy counsellor's right to commit in the case of a libel, as the whole body of privy counsellors are at this day.").
[67] *Id.* at 1053.
[68] *Entick*, 19 Howell's State Trials at 1064-65, 95 Eng. Rep. at 807.
[69] *Id.* at 1065.

sanctity of one's home and papers,[70] as well as public disagreement with the substantive offenses,[71] clearly played an important role in these early cases, fear of unfettered governmental power resonates even more clearly. Moreover, to the extent the house and papers are to be protected, the text of the Amendment and its history suggest that the protection flows from restraining governmental discretion even when that discretion is specifically granted by statute. As Akhil Reed Amar suggests, the Fourth Amendment, therefore, is concerned with "the agency problem," that is, "protecting the people generally from self-interested government."[72] The Amendment affords this protection not by defining what is private, but by expressly limiting government's power to conduct searches.[73] Accordingly, searches must be reasonable, and warrants may only be issued when supported by probable cause.[74]

For the purpose of this discussion, this history is also important because of what it suggests about how government discretion and power might be limited. While the Fourth Amendment speaks of the reasonableness of searches and the issuing of warrants except upon probable cause in the disjunctive, the Supreme Court has collapsed the two requirements, creating a general rule that warrantless searches are per se unreasonable.[75]

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[70] For example, in the *Writs of Assistance Case*, James Otis argued that "[a] man's house is his castle." JAMES OTIS, ADDRESS, *in* SMITH, *supra* note 39, at 344. In *Entick*, Pratt argued that "[p]apers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection." *Entick*, 19 Howell's State Trials at 1066, 95 Eng. Rep. at 811.

[71] *See* Stuntz, *supra* note 36, at 406-07 (arguing that the response to these decisions can be explained by public opposition to the underlying charges and offenses).

[72] AMAR, *supra* note 36, at 67-68.

[73] *See* U.S. CONST. amend. IV.

[74] *Id.*

[75] *See* United States v. United States Dist. Court, 407 U.S. 297, 315 (1972) ("[T]he definition of 'reasonableness' turns, at least in part, on the more specific commands of the warrant clause"); Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted); AMAR, *supra* note 36, at 68 (citation omitted) ("The modern Supreme Court has intentionally collapsed the two

Under this approach, the Supreme Court has made itself the principal arbiter for deciding which government acts are or are not reasonable. This interpretation of the Amendment is certainly not compelled by its history and origins.[76] Instead, the Founders believed that " 'the people,' " and not judges, were "to protect both individual persons and the collective people against a possibly unrepresentative and self-serving officialdom."[77]

The people exercised considerable power in these preconstitutional cases because juries, not judges, determined the reasonableness of a search. As evidenced by *Wilkes* and *Entick*, the people would have an opportunity to evaluate searches in a common-law action for trespass.[78] As such, "a jury, guided by a judge in a public trial and able to hear arguments from both sides of the case, could typically assess the reasonableness of government action in an after-the-fact tort suit."[79] As Amar has argued, in light of this background, it is not hard to imagine that 'the people' were to play a similar role in restraining governmental power under the Fourth Amendment.[80] Large civil verdicts against the government agents conducting a search would deter similar behavior in the future.[81] Moreover, once a jury concludes that the search is unreasonable, the search would be considered unlawful by definition under the Fourth Amendment.[82]

Under this regime, warrants were undesirable "pro-government tool[s]."[83] A lawful warrant effectively immunized the government agent from liability[84] and removed the legality of the

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requirements . . . ."); *see* Amsterdam, *supra* note 14, at 358 (discussing the few types of exceptions to the warrant requirement).

[76] *See* AMAR, *supra* note 36, at 64-77.

[77] *Id.* at 68.

[78] *See supra* text accompanying notes 41-49, 58-69.

[79] *See* AMAR, *supra* note 36, at 70.

[80] *Id.* ("We can now see the Fourth Amendment with fresh eyes.").

[81] *Id.* (discussing the deterrent effect of tort actions against government agents).

[82] *Id.* ("If the properly instructed jury deemed the search unreasonable, the plain words of the Fourth Amendment would render the search unlawful.").

[83] Stuntz, *supra* note 36, at 410 ("Warrants were a pro-government tool, not a protection for the citizenry.").

[84] AMAR, *supra* note 36, at 69 (citation omitted) ("A lawful warrant, in effect, would compel a sort of directed verdict for the defendant government

search from the decision-making authority of the civil jury.[85] Warrants, therefore, were generally disfavored and viewed with hostility, which explains why the Fourth Amendment circumscribes, rather than encourages, their use.[86] As Stuntz argues, this hostility stems from the fact that warrants "transferred the issue of the legality of the search from the jury . . . to a judge or executive official . . . acting both *ex parte* and *ex ante*."[87] Hostility towards warrants represented hostility to this shift in power.[88] As Amar documents in *The Bill of Rights*, throughout the ratifying debates the Founders expressed their belief that this power was best entrusted in the people as represented by the institution of the jury rather than by the judiciary.[89] As one essay at the time argued, if an officer searching

> for stolen goods, pulled down the clothes of a bed in which there was a woman, and searched under her shift . . . a trial by jury would be our safest resource, heavy damage would at once punish the offender, and deter others from committing the same: but what satisfaction can we expect from a lordly [judge] always ready to protect the officers of government against the weak and helpless citizens . . . ?[90]

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official in any subsequent lawsuit for damages."); Stuntz, *supra* note 36, at 409-10 ("A warrant provided an effective defense against a trespass claim because it established the legality of the search, creating a kind of legal 'safe harbor.' ").

[85] AMAR, *supra* note 36, at 69; Stuntz, *supra* note 36, at 410.

[86] *See* TELFORD TAYLOR, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 41 (1969) ("Far from looking at the warrant as a protection against unreasonable searches, they saw it as an authority for unreasonable and oppressive searches, and sought to confine its issuance and execution in line with the stringent requirements applicable to common-law warrants for stolen goods . . . .").

[87] Stuntz, *supra* note 36, at 410.

[88] *Id.*

[89] *See* AMAR, *supra* note 36, at 74-76. As Professor Amar further notes, this also meant that state law would play a significant role in protecting individual liberties. *Id.* at 76.

[90] *Id.* at 74 (quoting *Essay of a Democratic Federalist*, PA. HERALD, Oct. 17, 1787, *reprinted in* 3 THE COMPLETE ANTI-FEDERALIST 58, 61 (Herbert J. Storing ed., 1981)).

By limiting lawful warrants to only those based "upon probable cause, supported by Oath or affirmation," the Fourth Amendment protects the people's power to determine the lawfulness of a search.[91]

By emphasizing the importance of the jury at common law, I do not suggest that the jury is the only appropriate body for determining the reasonableness of a search, or that the jury deserves a greater role today.[92] Rather, this discussion illustrates the importance the Founders placed on having the decision of what constitutes a reasonable search made by 'the people' rather than by government officials. And one may clearly argue that for the Framers, the Constitution, rather than the jury, ultimately became the primary means for expressing the will of the people.

In light of this history, it should be apparent that the Fourth Amendment complements the doctrine of separation of powers, which addresses one of the most perplexing problems of a government of laws and not of men–ensuring that the power wielded by the executive branch of government, "whether wielded by a Prince or a President, is itself governed by and answerable to the law."[93] Under American constitutional law, this is accomplished by requiring, at least in the domestic sphere, executive power to be governed either by the Constitution or by statute. The executive's domestic role under the Constitution is best illustrated by the Supreme Court's landmark decision in *Youngstown Sheet & Tube Co. v. Sawyer*.[94]

In 1951, a labor dispute between steel companies and their employees threatened steel production during the Korean War.[95] Believing that a work stoppage would jeopardize the war effort, President Truman ordered the Secretary of Commerce to take

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[91] U.S. CONST. amend. IV.

[92] This nation and the United States Constitution have undergone significant changes since the eighteenth century, including the rise of the professional police force, the adoption of the Fourteenth Amendment, and the fact that we are a much larger and more heterogeneous community, weakening the common law jury as a safeguard.

[93] 1 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 4-1, at 630 (3d ed. 2000).

[94] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[95] *Id.* at 582-83.

possession of and to run the steel mills.[96] The steel companies argued that the President's order violated the Constitution because it was not authorized by an act of Congress or by any constitutional provision.[97] In response, the President argued, inter alia, that he had the inherent power to issue such an order or, at the very least, that it was part of his power to "take Care that the Laws be faithfully executed."[98] Writing for the Court, Justice Black agreed with the steel companies and held that "[t]he President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself."[99] With respect to the President's argument that the order was consistent with his power to execute the laws, Black responded that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."[100] Instead, the Constitution limits his role to directing "that a congressional policy be executed in a manner prescribed by Congress," and the Constitution does not permit him to direct "that a presidential policy be executed in a manner prescribed by the President."[101] Because Congress did not authorize the President's actions, a majority of the Justices concluded that Truman's order was unconstitutional.[102]

In his now famous concurring opinion, Justice Jackson argued that the President claimed a power that "either has no beginning or it has no end. If it exists, it need submit to no legal restraint."[103] Recognition of such a power, he argued, would be a step toward dictatorship and was precisely what the Founders hoped to avoid by limiting the President's legislative power to recommendation

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[96] *Youngstown Sheet & Tube Co.*, 343 U.S. at 582-84.

[97] *Id.* at 583-84.

[98] *Id.* at 587 (quoting U.S. CONST. art. II, § 3).

[99] *Id.* at 585.

[100] *Id.* at 587.

[101] *Id.* at 588.

[102] *Youngstown Sheet & Tube Co.*, 343 U.S. at 588-89. In fact, when it enacted the labor laws the President claimed to be enforcing, Congress had specifically considered and rejected the idea of giving the President the power to seize striking facilities. *See id.* at 656-57 (Burton, J., concurring).

[103] *Id.* at 653 (Jackson, J., concurring).

and veto.[104] According to Jackson, "With all its defects, delays and inconveniences, men have discovered no technique for long preserving free government except that the Executive be under the law, and that the law be made by parliamentary deliberations."[105]

Similarly, quoting Brandeis, Justice Douglas argued,

> "The doctrine of the separation of powers was adopted by the Convention of 1787, not to promote efficiency but to preclude the exercise of arbitrary power. The purpose was, not to avoid friction, but, by means of the inevitable friction incident to the distribution of the governmental powers among three departments, to save the people from autocracy."[106]

Thus the doctrine of separation of powers protects against arbitrary and unfettered executive power by requiring executive decisions to be governed by either constitutional or statutory law.

It should be apparent that the Fourth Amendment and the doctrine of separation of powers share the same goal and are intended to serve the same function. As a complement to the doctrine of separation of powers, the Fourth Amendment may play one of two roles. Either the Amendment establishes the minimum requirements that must be satisfied before the government may conduct a search when those searches are authorized by statute, or it guarantees that searches are always regulated by the Constitution even if they are not specifically authorized by statute.

This brief discussion of the Fourth Amendment's history and its relationship to the Constitution's separation of powers highlights two important principles. First, the Fourth Amendment was not intended as a vehicle to define privacy; rather, like the rest of the Constitution in general and the doctrine of separation of powers in particular, it is intended to limit executive power and discretion. Second, the only legitimate authority for determining the reasonableness of any exercise of governmental power is the people themselves through the Constitution or through their legislative representatives by statute. It should be clear that our

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[104] *Youngstown Sheet & Tube Co.*, 343 U.S. at 653-55.

[105] *Id.* at 655.

[106] *Id.* at 629 (Douglas, J., concurring) (quoting Myers v. United States, 272 U.S. 52, 293 (1926)).

current practice–in which school districts decide to use webcams to spy on students or the President decides to use the NSA to spy on Americans and judges may entirely exempt such decisions and searches from the Fourth Amendment based upon their understanding of privacy–is absolutely inconsistent with these principles.

Under the Supreme Court's current interpretation of the Fourth Amendment, the Constitution plays only a small role in restraining government power, and the people play virtually no role in defining the scope of that power. The irony is, of course, that what the Framers feared was not the invasion of privacy per se, but how and when those invasions would occur. The Framers were more concerned about limiting government's power to invade any aspect of life without sufficient cause than with defining what aspects of life should be off limits to government. The Founders also believed that the people should play a significant role in making this determination. The Supreme Court's current approach does more than ignore these concerns–it undermines them. As it stands, the Supreme Court has transformed the Fourth Amendment from a constitutional provision delineating the scope of governmental power generally, as determined by the people, into a provision that protects only isolated pockets of interests, as determined by judges. And, once again, privacy is the problem.