

Civil Liberties: The Erosion of the 4th Amendment to the U.S. Constitution

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The civil liberties of U.S. citizens, their Fourth Amendment rights in particular, are being eroded at a rapid pace. The pretext for the destruction of Americans' civil liberties is the "global war on terror," which – according to all three branches of government – requires that Americans surrender their liberties for security and protection from foreign and domestic threats. The nine-year erosion of civil liberties has been spearheaded by federal agencies, but individual states of the U.S.A. are now following in the federal government's wake as local law enforcement agencies are increasingly becoming a tool of state authority and state security rather than performing functions as civil service agencies designed to protect and serve citizens. The trend will soon lead to a new framework for law enforcement activities. Without a reversal of this trend, law enforcement will soon exist primarily to protect the interests of government.

The Fourth Amendment, enacted in 1791, is designed to protect both individual and property rights by recognizing and affirming that that citizens are endowed with the right to be free from tyrannical government intervention in their personal lives. It respects the individual and requires law enforcement to be subservient to individual rights by barring law enforcement from conducting unreasonable searches and seizures. Further, it clearly states that search warrants that enable the government to enter a person's property and seize property pursuant to a criminal investigation must be based on probable cause [1] not the mere discretion or desire of law enforcement agencies to assume an entitlement to conduct a search for the mere fact that they hold police power. This amendment is rooted in 17th century English law designed to prevent the King from exercising unchecked authority over landowners, and it is what has separated the United States from totalitarian nations in the 19th and 20th centuries. Under U.S. law, the doctrine of probable cause was eventually expanded to include all citizens from the intrusive police powers of the state.

At the federal level the USA PATRIOT Act, passed soon after the events of September 11, 2001, is the keystone of America's new security state apparatus. The law originally required third party holders of private personal information to turn that information over to federal authorities upon request. This meant that doctors, libraries, bookstores, universities, and internet service providers [2] would have to provide the government with information on the actions, purchases, health, or activity of private citizens without anything more than a demand from federal authorities. Moreover, secret searches of personal residences and other property could be conducted without notice to the owner that such a search has ever occurred. [3] This expansion of federal power was a clear and unambiguous violation of the Fourth Amendment and fortunately portions of the PATRIOT Act, including its "sneak and peek" provision, were struck down as unconstitutional violations of the Fourth Amendment. This did not, however, prevent the federal government from continuing to press for the

ability to obtain private information or conduct secret searches by other means under the guise of national security. Efforts to mine data and track citizens' activities are ongoing as are efforts to undermine court authority to review the application of these police powers.

One of law enforcement's newest tools is the GPS tracking device, and recent court decisions have said that police can enter your property and place a tracking device on your vehicle without showing probable cause or obtaining a warrant. One of the most visible cases is *United States of America v. Juan Pineda-Moreno*. [4] In this case, DEA agents snuck onto Pineda-Moreno's property at night and attached a tracking device to his car which was parked in his driveway. The agents, who suspected Pineda-Moreno of drug trafficking, did not demonstrate probable cause nor obtain a warrant from a court to attach the device. They merely decided they had the right and the power to do so without judicial oversight. They tracked Pineda-Moreno's movements for a four month period until the tracking devices eventually led them to a suspected marijuana grow site. Pinedo-Moreno was then arrested.

Traditionally, one of the keys to whether or not law enforcement is violating a citizen's rights under the Fourth Amendment relates to whether or not the person's property to be searched is on public or private property. Historically, one's driveway is considered private property, part of a person's "curtilage," and therefore subject to the protections of the Fourth Amendment. Curtilage is defined as "the area to which extends the intimate activity associated with the 'sanctity of a man's home and privacies of life,' and therefore has been considered part of the home itself for Fourth Amendment purposes." [5] Clearly, a person's driveway is a part of their curtilage, and the government in the case even conceded the point that Pineda-Moreno's driveway is in fact curtilage. The court disregarded the concession as well as the concept of private property and ownership and decided that it was not curtilage. The court stated that one's driveway is "semi-private" unless enclosed or blocked with a barrier or other feature. The fact that Pineda-Moreno had a "No Trespassing" sign posted on his property was inconsequential. The court went even farther in saying that one has no reasonable expectation of privacy to the undercarriage or exterior of their car - which is where the GPS device was placed.

Pineda-Moreno's petition to have the full Ninth Circuit Court of Appeals hear his case was denied, leaving a new definition of curtilage and privacy rights in place. In a blistering dissenting opinion, Chief Judge Kozinski, a former citizen of communist Romania, blasted the court for destroying a fundamental American civil right, stating that "[t]he very rich will still be able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols, but the vast majority of the 60 million people living in the Ninth Circuit will see their privacy materially diminished by the panel's ruling. . . . Yet poor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it." [6] Kozinski closed his dissenting opinion by warning that there "is something creepy and un-American about such clandestine and underhanded behavior. To those of us who have lived under a totalitarian regime, there is an eerie feeling of déjà vu. We are taking a giant leap into the unknown, and the consequences for ourselves and our children may be dire and irreversible. Some day, soon, we may wake up and find we're living in Oceania." [7]

Since the ruling, other agencies have used the ruling to justify aggressive police activities. The FBI, in Santa Clara, California conducted a warrantless tracking of a young community college student and computer salesman's car by placing a tracking device on it - as in the Pineda-Moreno case. Yasir Afif, who was emotionally devastated by the operation that

targeted him, noticed the tracking device hanging from his car when a mechanic at an oil changing station brought it to his attention. [8] The day after the mechanic removed the strange device from the car, FBI agents showed up at Afifi's apartment door demanding the return of the device.

These are just two examples of many surrounding the proliferation of GPS tracking devices and the erosion of the Fourth Amendment protections historically granted to U.S. citizens. Police powers are supplanting Constitutional rights all across the United States and a number of lawsuits challenging the violation of rights are being heard in courts across the country. While some states have followed the U.S. Ninth Circuit Court of Appeals, courts in other jurisdictions like Massachusetts and Washington D.C. have not. The variance of rulings from state to federal jurisdictions has set the stage for an eventual U.S. Supreme Court decision on the matter. The Supreme Court decision, if it falls on the side of law enforcement, will effectively rewrite the Constitution and forever change the interface between police power, individual liberty, and private property.

The issues of unlawful search and seizure and invasion of privacy have become extremely urgent matters, particularly with respect to recent scandals involving Transportation Security Administration (TSA) agents' application of radiation body scanners and aggressive frisking techniques at the many of the nation's airports. A groundswell of grass roots opposition is lashing back against the technology and TSA techniques, and many lawsuits have been filed challenging the implementation of procedures that target every American citizen as a prospective threat.

The direct and heavy application of government police power in a manner that challenges Constitutional limits on power is a trend that will continue until the courts resolve the limits of power this new age. The coming court decisions promise to alter the American legal landscape for decades to come.

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Notes

[1] See "U.S. Constitution: Fourth Amendment, Search and Seizure," Findlaw.com, "The concept of 'probable cause' is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define 'probable cause; 'the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. 'In determining what is probable cause . . . [w]e are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant.' <http://caselaw.lp.findlaw.com/data/constitution/amendment04/02.html>

[2] ACLU, "Surveillance under the USA PATRIOT Act," April, 2003, <http://www.aclu.org/national-security/surveillance-under-usa-patriot-act>

[3] Ibid.

[4] No. 08-30385, D.C. No. 1:07-CR-30036-PA OPINION; motion for rehearing en banc denied, 591 F.3d 1212, 1214-15 (9th Cir. 2010).

[5] *Oliver v. United States*, 466 U.S. 170, 180.

[6] Op. Cit. Footnote 4.

[7] Ibid.

[8] Elias, Paul, "FBI's warrantless GPS tracker on car becomes privacy issue; judge cites Orwell's '1984,'" *Cleveland.com*, October 17, 2010, http://www.cleveland.com/nation/index.ssf/2010/10/fbis_warrantless_gps_tracker_o.html

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