from

Upholding the Law

and Other Observations

by

Peter E. Hendrickson

An Unreasonable Assault On The Fourth

"Necessity is the plea for every infringement of human freedom. It is the argument of tyrants; it is the creed of slaves."
-William Pitt

The Supreme Court heard arguments in 2001 in a significant case testing the limits of warrantless searches, a degenerate abuse of police power becoming increasingly common under the auspices of the ‘War on Drugs’, and the 'War on Terrorism'. The immediate issue was the use of an infrared sensor by police to remotely explore the home of one Danny Lee Kyllo, suspected of growing marijuana indoors, without the benefit of a warrant. The infrared sensor registers the emanations of heat from the object of its attention, and the growing of plants indoors (whether marijuana or any other) requires the extensive use of high output lights, which shed a lot of heat. No particular justification, such as immediacy of need, was a factor in the police’s failure to seek a warrant; they just didn’t think they had to bother, and indeed, the use of such sensing devices without judicial oversight is widespread among police departments. The practice is felt to fall under the 'plain

view' doctrine, whereby the courts have held that whatever a citizen presents to public view or access, or fails to take steps to conceal, is fair game for police examination on what amounts to the whim of the officer.

Although originally more modest, the 'plain view' doctrine has been promiscuously expanded by application of a 'reasonable expectation of privacy' standard in defining what 'plain view' means. This standard, as its name suggests, transforms 'plain view' into a subjective and evolving concept. Thus, the 'plain view' concept, which used to be most widely applied to the picking through of garbage put out on the street, is increasingly being relied upon in the defense of forms of surveillance unanticipated when it was first conceived.

It will be called upon, for instance, to counter challenges to the use of 'sniffers', which test exhalations for the presence of alcohol, a device increasingly popular with police traffic units, and deployed without either the knowledge of the subject or any prior finding of probable cause or even reasonable suspicion. They are simply applied at every traffic stop. The theory is that in exhaling, a citizen has willingly offered the contents of his or her bloodstream for public analysis, waiving all expectations of privacy. Those seeking to establish a sufficient legal basis for the assertion of their right to privacy are advised to refrain from such wanton indiscretions.

In the Kyllo case, the state suggested that if Mr. Kyllo wished to enjoy any reasonable expectation of privacy, he should have lined his home with heat shields in order to prevent government agents from peering within. In so doing, the state is essentially arguing a fundamentally corrupt intellectual palindrome to the effect that only upon directing its devices at Kyllo's home and failing to detect what it thought it might did it become possible to establish (or needful to consider) that it lacked justification to have looked in the first place?!

Actually, of course, the state denies the need to paste even so contrived a fig-leaf over its behavior. The position of the state is that the police have the authority to search you or your home by every means short of physical entry whether cause can be cited or not, per the 'plain view/reasonable expectation' concept. For instance, it has lately become 'reasonable' for Americans to expect to be frisked (albeit electronically) every time they prepare to board a plane or enter many buildings-- a procedure which is being upgraded to X-raying in some cases.

Likewise, officially-recognized 'reasonable expectations' have evolved (or devolved) as law enforcement has embraced such practices as flying over remote private property while deploying high-powered optics; installing cameras and ultra sensitive microphones on city streets; and watching activity on citizens computers via remote devices that read electromagnetic emanations from monitors (along with devices like the 'sniffers' and infrared sensors previously discussed); all without warrants or probable cause. Reflect on what could be said to be the 'reasonable expectation of privacy' of a North Korean, to get a good perspective on the potential of this moving-target dynamic. But don't worry; be happy. The innocent have nothing to fear.

Considered from any perspective other than abject submission to government contemptuous of its proper limits, the entire foundational concept of 'reasonable expectation' is absurd and indefensible. In a Constitutional system of government in which the Fourth Amendment is a part of the supreme law of the land, a 'reasonable expectation of privacy' comprises an expectation that your person, house, papers and effects will be utterly free of direct contemplation *in any form* by the law-enforcement agencies of government unless probable cause sufficient to satisfy an independent (and, theoretically, skeptical)

judge has been previously established by other means, the only exception being in times of immediate danger. In other words, *an expectation of scrupulous respect, on the part of all state actors, for both the letter and the spirit of the Fourth Amendment*. The only alternative is the corrupt circular argument discussed earlier.

*****

Since the advent of the 'War on Terror', yet another government effort to exploit the inherent slipperiness of the term 'reasonable' has found favor with those to whom the conveniences of the state are more important than the liberties (and clearly expressed instructions) of those who created the institution in the first place. This attempt to escape the bonds of the Fourth Amendment is a far more egregious offense than even the grossly cynical 'reasonable expectation of privacy' argument, as it involves the deliberate misconstruction of an eminently demonstrable truth regarding the meaning of the amendment. It has seen recent prominent expressions in an appellate panel's overruling of the refusal of a secret Foreign Intelligence Surveillance Act oversight court to permit wider license to the Justice Department in wiretapping Americans without a warrant; and in the Pentagon's initiative to track and record information on all activities of all Americans-- originally unveiled as the 'Total Information Awareness' program, but put back in the closet after a properly outraged and horrified public reaction.

Both the appellate panel's dicta, and the Pentagon's defense of its program, attempt to capitalize upon the presence of the word 'unreasonable' in the text of the Fourth Amendment. The argument offered is that the Fourth Amendment should be understood as prohibiting only 'unreasonable' searches and seizures without a warrant. Thus (the argument proceeds), warrantless searches are permitted,

as long as they are 'reasonable'. (No explanation is offered for why an 'unreasonable' search or seizure should be provided for under any circumstances...)

This specious argument continues a durable tradition. Enthusiasts for a promiscuous expansion of state police power always deploy one or another version of the claim that, *"... the Constitution makes clear that the scope of our rights is reduced during crises"*, and characterize the Fourth Amendment as particularly fragile in this respect-- in utter (or willful) ignorance of both its context, its construction, and simple logic.

In this regard, these advocates propose that the inclusion of 'unreasonable' in the amendment means not only that 'unreasonable' searches are permitted as long as they are conducted with a warrant, and that 'reasonable' searches need no warrant-- but also that the amendment's governance of the state operates on a sliding scale, by virtue of which what is 'unreasonable' can and should diminish in an inverse relationship to the magnitude of the current crisis. To a population largely ignorant of the history behind the Fourth Amendment, and accustomed to viewing all law as a mystery, these proposals sound superficially plausible. Nonetheless, they are completely contrary to the facts. The Founder's intention in providing the Fourth Amendment was to recognize that *any* search or seizure which did not conform to the standards of both probable cause attested to under oath, and specificity as to object, was *inherently* unreasonable. They constructed the amendment in order to ensure that no search or seizure would ever take place without a warrant, and that all warrants under which searches and seizures were authorized conformed to the standards provided.

After all, the Fourth, in addition to embodying the fundamental character of the proper relationship between government and citizen, was erected in response to a particular practice of the English government against the pre-revolutionary

colonists: The issuance of what were known as 'general warrants', under which agents of the government exercised the power to poke through the property, papers and effects of citizen at the whim of the government, based upon any handy pretext. Such general warrants were identical in character to those sought by today's Justice Department and Pentagon (and others) based upon this assertion of a 'reasonableness' exception in the Fourth.

The Fourth Amendment reads as follows, *"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."* While I will grant that its construction could be slightly improved with the addition of a period after "*violated*" and the removal of the following "*and*", this would only be an improvement because it would make more difficult its willful distortion by apologists for the state. But modification is not necessary. Plenty of evidence as to the meaning of the Amendment is readily at hand.

For instance, the Virginia Declaration of Rights, one of the earlier versions of the Fourth upon which the federal Constitutional amendment was modeled, reads in pertinent part,

> *"That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted"*.

Similarly, the Declaration of Rights in the Pennsylvania Constitution of 1776, another precursor to the Fourth, says,

> *"That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure, and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted".*

James Madison, in arguing for the inclusion of the Bill of Rights before Congress, described his intent for the Fourth thusly:

> *"The rights of the people to be secured in their persons; their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized".*

That he meant that it was OK that such rights be violated as long as no warrant was involved-- which is what the 'reasonable' exception argument really amounts to-- is absurd.

Massachusetts, in its Constitution of 1780, put it this way:

> *"Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation*

> *of the persons or objects of search, arrest, or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws".*

Thus, the record makes clear, to all except those who do not wish to understand, that by virtue of the Fourth Amendment, the federal government is denied the power to conduct warrantless searches or seizures under any circumstances; and that those conducted by means of a warrant must conform to the careful prescriptions of probable cause previously established under penalty of perjury, and particularity and explicitness as to the evidence to be sought and seized.

The idea is simple... the power of the state is great and onerous to counter, and citizens should be spared having to bear the stress of its regard, and of having to defend themselves against its allegations, unless justifications convincing to an objective arbiter are at hand. This is the first and most significant aspect of the principle of *"presumed innocent until proven guilty"*. That there is a point at which a search of the likeliest place in which the state has probable cause to believe particularly identified evidence of a crime exists is undoubted. However, to suggest that anyone can be subjected to the state's scrutiny based on anything less than probable cause is to embrace an opposite principle: That no one is presumed innocent until they have been proven so.

It is no coincidence that 'evolving' (that is to say, lawless) standards, and the reliance on arguments which attempt to lift themselves by their own bootstraps, have become the preferred devices of the state in recent decades. The adoption of-- or rather, dependency upon-- these devices parallels the expansion of the general concept of 'Crimes Against the State', a class of offense characterized most essentially by the lack of a victim.

That this is so can be made clear by simply considering the way in which a warrant is commonly obtained in a by-the-book fashion: As a consequence of a victim's sworn complaint and accusation; or by the examination of a crime scene and the generation of a list of suspects based upon physical and/or testimonial evidence found thereby-- either of which amounts to independent evidence to be presented to a judge. It's not tricky or difficult...

On the other hand, when the nature of the 'offense' is disobedience to some state directive, and thus involves no complainant, these precursor elements by which warrants are legitimately justified are typically not available. In such cases the natural inclination of related law enforcement efforts is toward proactive scrutiny of the citizenry in search of indications of guilt. Such police attention is, of course, inherently arbitrary and capricious-- necessarily taking place *before* the existence of any probable cause, and being largely indiscriminate in its application. But it is often only by such practices that victimless behavior can be detected and punished. (The testimony of unsolicited informants can provide for exceptions to this rule, of course, but could hardly be relied upon to suffice for broad and meaningful enforcement of a directive targeting the general population; furthermore, when such testimony is available, a warrant will be, too.)

The simple fact is that regardless of what pretexts might be deployed in an effort at its justification, the assault on the Fourth Amendment is not in service to any necessity of crisis, or even merely an attempt to compromise between the rights of Americans and some interest in 'law and order'. It is, rather, an assault on behalf of the exercise of arbitrary dictatorial authority by the state, to which the Fourth, when properly understood, stands as a formidable obstacle.

*****

It is the foolish vanity of those who believe that their interests are being served by today's erosion of liberty to think that they will not pay the price tomorrow. Power is a hungry beast, and as it grows, so does its appetite. Bourne observed that *"War is the health of the state"* meaning that by capitalizing on a condition or sense of crisis the State expands its power with the approval of the anxious and frightened people. Today, the 'War On Drugs' and the 'War on Terror' are the crises of the hour, and the treatments (no cures appear to be available) are proving predictably worse than the diseases. Tomorrow, another necessity will demand another mandate, and while the state will thus seek more new powers, those ceded in this present 'crisis' will not be relinquished.

For that matter, one would think that even those in government who advocate a doctrine of exceptions to the supremacy and clarity of the Constitution in times of crisis would fear that such a doctrine would rob them of their power and authority, both entirely dependent upon that supreme charter for legitimacy. But, of course, this is mere sarcasm. Those occupying positions of power mean to wield power regardless, without much concern about legitimacy, and so have no trepidations. That being so, a little concern on the part of the rest of us might not be unreasonable.

*****

P.S. The Supreme Court ruled in the Kyllo case at the end of 2001:

> *Held: Where, as here, the Government uses a device that is not in general public use, to explore details of a private home that would previously have been unknowable without physical intrusion, the surveillance is a Fourth Amendment "search," and is presumptively unreasonable without a warrant.*