**What the Fourth Amendment Fundamentally Requires**



**by Barry Friedman**

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In the Supreme Court’s decisions interpreting the Fourth Amendment, there are a lot of cross-cutting arguments.

For example, sometimes the Justices say that there is a strong preference for government agents to obtain warrants, and that searches without warrants are presumptively invalid. At other times they say warrants are unnecessary, and the only requirement is that searches be “reasonable.” At times the Justices say probable cause is required to support a search; at others they say probable cause is not an “irreducible minimum.”

This is your Fourth Amendment. It describes “[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures.” It is important for each American to focus on some basics and decide—separate and apart from what the Justices say—what this vital amendment means.

People say that the Fourth Amendment protects privacy, but that trivializes it. In this world you give up a lot of privacy, whether you wish to or not. Internet cookies, or data stored in web browsers, are just one example. But the Internet companies are not going to come take you away. The government might. What the Fourth Amendment protects is the right of the people to be secure. The Fourth Amendment is the means of keeping the government out of our lives and our property unless it has good justification.

In evaluating how the Fourth Amendment should be interpreted, it is essential to bear in mind the vast changes in policing since the time it was ratified. Whereas policing once was reactive, tasked with identifying and catching criminals, today it has become proactive and is based in deterrence. Before, policing was mostly based on “suspicion,” it was aimed at people for whom there was cause to believe they had violated or were about to violate the law. Today, policing is aimed at all of us—from red light cameras to bulk data collection by intelligence agencies to airport security.

There are some basic principles that should govern searches and seizures.

First, no member of the Executive branch should be permitted to intervene in our lives without the say-so of at least one other branch. This is fundamental, and all the more important when that Executive actor engages in surveillance of the citizenry and can use force and coercion against them.

Second, a central purpose of the Fourth Amendment is preventing arbitrary or unjustified intrusions into the lives and property of citizens.

In light of these basic principles, certain interpretations of the Fourth Amendment follow:

No search or seizure is “reasonable” if it is not based on either legislative authorization or pursuant to rules that have some form of democratic say in their making. The police can write rules—all other agencies of executive government do—but absent a critical need for secrecy those rules should be public and responsive to public wishes.

Second, warrants are to be preferred. Policing agencies are mission-oriented. We want them to be—they have a vital role protecting public safety. But because they are mission-oriented, warrants should be obtained in advance of searching whenever possible so that a neutral judge can assess the need to intrude on people’s lives.

Third, we should distinguish between searches aimed at suspects and those aimed at society in general. When there is a particular suspect, the protections of a warrant and probable cause apply. But those protections make no sense when we are all the target of policing. In the latter instance the most important protection is that policing not discriminate among us. For example, at airport security all must be screened the same unless and until there is suspicion—“cause”— to single someone out.

Finally, often today’s policing singles out a particular group. Examples include profiling (based on race, religion, or something else) or subjecting only workers in some agencies to drug tests. When policing is group-based, the proper clause of the Constitution to govern is the Equal Protection Clause. When discriminatory searching or seizing occurs, the government should have to prove two things: that the group it is selecting for unfavorable treatment truly is more likely to contain people worthy of the government’s attention, and that the incidence of problematic behavior is sufficiently great in that group to justify burdening everyone. Otherwise, the government should go back to either searching individuals based on suspicion, or search us all.