

FOREWORD

Symposium: The Effect of Technology on Fourth Amendment Analysis and Individual Rights

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The National Center for Justice and the Rule of Law,¹ founded at the University of Mississippi School of Law, focuses on issues relating to the criminal justice system. Its purpose is to promote the two concepts comprising the title of the Center. The concept of “justice” appeals to basic notions of equality, equity, and fairness, often with an emotive component. In contrast, the phrase “rule of law” refers to the requirement that certain procedures and issues must be followed in each case to reach a proper result. Neither concept is sufficient; rather, both must be utilized to ensure that the criminal justice system fulfills its function in society. The Center implements its mission through projects, conferences, educational programs and publications that examine important criminal law and procedural issues.

In furtherance of that mission, the Center has created a “Fourth Amendment Initiative.” Perhaps no other Amendment has such broad applicability to everyday life. The Fourth Amendment is a very complicated area of jurisprudence. Prosecutors, defense attorneys, and judges often have limited knowledge of the law and many law enforcement officers are undertrained. The legal landscape is constantly changing as a result of new technology and court decisions. Yet, there is little or no continuing search and seizure training for professionals in the criminal justice system.

The purpose of the Center’s initiative is to promote awareness of Fourth Amendment principles. This initiative includes

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hosting conferences and lectures and supporting selected publications. The Center takes no point of view as to the direction that Fourth Amendment analysis should take, but it seeks to facilitate awareness of the issues and encourage discussion of search and seizure principles.

On April 12, 2002, the Center hosted its initial conference, entitled *The Effect of Technology on Fourth Amendment Analysis and Individual Rights*. The Center believes that that conference—and the insightful articles published in this edition of the *Mississippi Law Journal* that stemmed from the presentations at the conference—significantly further the Center's mission and, more importantly, make significant contributions to resolving the question of how to reconcile the impact of technological change with Fourth Amendment principles. The Center, and I personally, wish to thank the leading legal scholars who participated in the symposium: Professor John Burkoff of the University of Pittsburgh School of Law; Professor A. Morgan Cloud of Emory University School of Law; Professor Tracey Maclin of Boston University School of Law; Professor David Sklansky of the University of California at Los Angeles School of Law; Professor Christopher Slobogin of the University of Florida Fredric G. Levin College of Law; Professor James Tomkovicz of the University of Iowa College of Law; and Professor Kathryn Urbonya of the College of William & Mary Marshall-Wythe School of Law.²

The United States Supreme Court has long struggled with reconciling Fourth Amendment protections with the challenges posed by modern technology. At the beginning of the Twentieth Century, the Court in *Olmstead v. United States*³ was confronted with the question of whether the Amendment afforded protection against the wiretapping of telephone conversations by federal authorities. Throughout the Twentieth Century, new technology produced new challenges and new attempts to reconcile Fourth Amendment principles with indi-

² Professors Burkoff and Sklansky acted as commentators at the conference, providing insightful comments and questions based on the presentations made by the other participants.

³ 277 U.S. 438 (1928).

vidual protections. These cases have included such seminal cases as *Carroll v. United States*⁴ (motor vehicles); *Katz v. United States*⁵ (listening device); *Smith v. Maryland*⁶ (pen registers); *United States v. Karo*⁷ (electronic monitoring devices); *United States v. Jacobsen*⁸ (chemical testing of substance); *Dow Chemical Co. v. United States*⁹ (surveillance from airplanes); and *Skinner v. Railway Labor Executives' Assoc.*¹⁰ (drug testing of employees). None of these attempts has produced a consensus that the Court has found the correct analytical structure or the proper balance of governmental and individual interests.

The Court recently issued its opinion in *Kyllo v. United States*,¹¹ which concerned the use of a thermal imaging device directed at a house. Is this a major decision? What impact does that decision have on the government's ability to use technology to gather information? Even more recently, terrorist acts have utilized sophisticated technology (airplanes and germ warfare), placing new emphasis on the question of the effect of technology on Fourth Amendment analysis and individual rights. What is the Fourth Amendment's role in regulating the government's attempts to use technology to find those responsible and to prevent such attacks in the future?

Still more challenges are posed by current technology and technological devices that are on the horizon, which give the government new powers to intrude. For example, these devices include very intrusive scanning machines, which leave nothing to the imagination when depicting the human body; handheld devices the police can use to measure the presence of alcohol on one's breath and guns and drugs on the person's body; facial recognition systems used in public places; and very sophisticated systems to search e-mail and computer files.

⁴ 267 U.S. 132 (1925).

⁵ 389 U.S. 347 (1967).

⁶ 442 U.S. 735 (1979).

⁷ 468 U.S. 705 (1984).

⁸ 466 U.S. 109 (1984).

⁹ 476 U.S. 227 (1986).

¹⁰ 489 U.S. 602 (1989).

¹¹ 533 U.S. 27 (2001).

Parents are now voluntarily having computer chips implanted into their children to permit satellite tracking in the event the child is lost or kidnapped. Such systems are also useful to track Alzheimer patients and others suffering infirmities. Satellite tracking is now employed by some jurisdictions to track probationers, parolees, and those on pretrial release. The benefit of such tracking is substantial and immediate: the police can determine with certainty where the person is. Think of its potential usefulness in tracking aliens who enter the United States. Think also of the potential usefulness of a universally mandated 24-7 tracking system, whereby all persons have embedded computer chips (or some other device that permits tracking to occur) that are monitored, with the results recorded for future use. Law enforcement would be able to readily solve hosts of crimes. If a burglary occurs, the police will be able to determine who was in the house at the time. If a child is kidnapped, the persons responsible could be quickly identified and the child recovered. Automobile theft is a huge problem. Should the government be able to mandate placing tracing devices in all cars to facilitate their recovery? Similar devices could be placed in virtually all newly manufactured goods, similarly reducing the ability of thieves to enjoy the fruits of their crimes and to successfully elude detection.

Technology is both a good and a danger to privacy and security. Do we have to abandon the traditional Fourth Amendment model, which protects individual rights over group rights? Do terrorists win when we destroy liberty to combat them? How much power should the police have? What are the standards by which the courts should regulate the use of advanced technological devices to search and seize? These are just a few of the difficult decisions that must be confronted as a result of technological change. How the Supreme Court—and society in general—address these challenges will have a great deal to say about how much liberty we have and how much the government can know and intrude.