

The 4th Amendment: Pre and Post 9/11

Abstract

This paper investigates the impact of the terrible terrorist acts of September 11, 2001, on the 4th Amendment of the United States Constitution. The 4th Amendment was in response to the dear needs of the early Americans who craved for privacy in the midst of an insecure world where even the authorities in charge of the state threatened with intrusion at the slightest excuse. Gradually the amendment had grown into a mature concept that had incorporated a number of checks and balances over the years so that, by the year 2001, it was an epitome of how a state could assure its citizens complete security of self. The paper finds that the terrorist acts of 9/11 somewhat changed this status and a number of the checks and balances that kept officials in line were taken away in the name of national security. The paper finds that this is much in excess of what was required. It finds that the 4th Amendment in itself, before 9/11, was a concept mature enough to serve the purpose of allowing officials to conduct their affairs fairly efficiently to promote national security. The elimination of some of the checks and balances after 9/11 is thus deemed unnecessary and the paper concludes that the 4th Amendment in itself as it was before being changed somewhat after 9/11 was sufficient enough to secure both individual privacy as well as national security. Tampering with its refined form was only an unnecessary and overzealous act of officialdom.

Introduction

The 4th Amendment of the United States Constitution is a part of the Bill of Rights and is a tool protecting the people of the United States against unfair searches and seizures. Initially it was a response to the controversial ‘writs of assistance, a major factor behind the American Revolution (Wikipedia, 2006, Roberts, Thomas H, and Associates, 2006). The exact phrasing of the amendment 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 and things to be seized.” (The Constitution of the United States of America, The 4th Amendment, 2006)

The amendment is in two parts primarily. The first part affords protection against unreasonable searches and seizures although, historically, there have been innumerable ways in which such procedures could be legally remedied. Modern jurisdiction, with stringent components guarding against any arbitrary injustice, encourages police officers to be cautious in their approaches to the amendment. (Wikipedia, 2006)

The second part affords guidelines as to how warrants can be judiciously issued. Issuance can be only on ‘probable cause’. Probable cause can be assured by using the ‘totality of circumstances’ test as defined in *Illinois v. Gates*, 462 U.S. 213, (1983). (Wikipedia, 2006)

The amendment guards against normal ‘expectation of privacy’ which is based on how society commonly perceives the term ‘privacy’. In *Katz v. United States*, 386 U.S. 954, (1967), the Supreme court ruled that there can be no search unless an individual has an ‘expectation of privacy’ which must, furthermore, be a reasonable one – one that society is willing to acknowledge. Thus, a police officer searching through garbage is not conducting a search under the amendment as there is no common expectation that the

garbage is private – California v. Greenwood, 486 U.S. 35, (1988). What is more germane to this paper is that officers monitoring phone numbers an individual dials constitute no search – Smith v. Maryland, 442 U.S. 735 (1979), although Congress has placed statutory restriction against such monitoring. (Wikipedia, 2006)

The Supreme Court has also ruled that searches such as those with drug-sniffing dogs that reveal illegal activities are not searches. (Wikipedia, 2006)

There are also certain notified circumstances under which no warrant is necessary for searches or seizures. For example, objects in ‘plain view’ can be searched or seized without warrant. This is if officers have probable cause that such objects are contraband. Also, ‘open fields’ – pastures, open water, woods and other such areas – can be searched without warrant since individuals conducting activities have no nominal expectation of privacy. This is the ‘open fields doctrine’ and it is intended to encompass all open areas just beyond a domicile. (Wikipedia, 2006)

There are also ‘exigent circumstances’ under which a warrant is not necessary. For example, if an officer is sure that a suspect will destroy evidence then the officer is due to seize such evidence without warrant. (Wikipedia, 2006) Vehicles do not constitute private space as much as residences and officers are allowed to search and seize objects within without warrant if they have probable cause for suspicion. (Wikipedia, 2006)

Arrests, which may be viewed as a form of seizure under the 4th Amendment, may be made if the officer catches the individual in the act of a misdemeanor. Also, the common law rule, which advocates that evidence, no matter how gathered, can be produced in court, does not apply so functionally to the amendment. An officer can make an arrest if he or she has probable cause. Evidence gathered after the arrest cannot be utilized to justify the arrest. (Wikipedia, 2006)

There are also many other facets to the amendment but these are eschewed for the purpose of the paper and the main constituents of the amendment have been dealt with instead.

The Exclusionary Rule: The ‘exclusionary rule’ partly preempts common law rules and acts as a deterrent to officers so that they are discouraged from making unlawful searches and seizures (Roberts, Thomas H, and Associates, 2006). In *Weeks v. United States*, 232 U.S. 383, (1914), the Supreme Court adopted the ‘exclusionary rule’ under which objects seized unlawfully cannot be produced in court. The rule was made applicable to the states in *Mapp v. Ohio*, 367 U.S. 643, (1961). (Wikipedia, 2006)

The Supreme Court has held that the rule does not apply in certain situations – probation or parole revocation hearings, tax hearings, deportation hearings, when government officials illegally seize evidence outside the United States, when a ‘private actor’ – not a state employee – illegally seized the evidence and when the illegally seized evidence is used to impeach the defendant’s testimony. (Wikipedia, 2006) Furthermore, a defendant has the right to appeal against illegally seized evidence only under his or her own 4th Amendment rights; he or she may not do so under third party rights. (Wikipedia, 2006)

Interestingly also, in the *United States v. Leon*, 468 U.S. 897, (1984) case, the Supreme Court applied the ‘good faith’ principle maintaining that seized by officers objectively and in ‘good faith’ relying on a warrant that was later found to be defective was still admissible in court. (Wikipedia, 2006) The entire implications of the ‘good faith’ principle are still unclear, especially in the context of evidence seized without warrants.

Under the ‘fruit of a poisonous tree’ evidence seized subsequent to and as a result of an illegal search cannot be introduced in court by the government. (Wikipedia, 2006)

The Post 9/11 Scenario

So far the paper has been studying the pre 9/11 scenario. Now it is time to estimate what impact that terrible act of terrorism, an act of war against the United States committed by hostile individuals conducting their inimical activities from within the borders of the besieged nation. A judicious review of literature on the reactions of various national components reveals a certain syndrome. Those in charge of surveillance activities both within and outside the country were quick to blame the liberties of average citizens that they held hampered their work. In effect, they were seriously implicating the liberties afforded by the 4th Amendment to U.S. citizens. Libertarians, on the other hand, rose up in arms over what they viewed as strong authoritarian tendencies within the establishment. Some of them dramatically upheld that the 4th Amendment was dead and fascism had firmly set into the United States of America. (MacDonald, Heather, 2003)

Eschewing both these extreme views the paper seeks refuge in a more moderate one which advocates that it is necessary to act especially in the context of the national threat but this can be done quite adequately and efficiently under the purview of the amendment which affords enough room to government officials so that they can exercise their powers without being crippled by excessive undue concern for individuals' privacies.

After 9/11 initiations of the Patriot Act and Executive Branch actions have seriously 'eroded' values incorporated within the amendment. This is as noted by James X. Dempsey, Executive Director, Center for Democracy and Technology. The paper adopts a unique style in presenting the changes initiated by the government in response to 9/11. It does not posit the changes separately. Instead it posits the changes together with pointing out how such changes were not necessary as the checks and balances already existent within the amendment prior to 9/11 were in themselves adequate measures against any security concerns, however intense they may be. These are now being set down hereafter.

- Before 9/11 the government officials had the right to authority to go anywhere and collect information to prevent a terrorist act. They only needed some minimal basis to suspect that some criminal act was being planned or there was some minimal connection with an outside terrorist group. After 9/11 the FBI was authorized by the Attorney General to collect information on any individual without the necessity of having a minimal basis for suspecting them of any wrong-doing. This is in excess of requirements and unnecessarily curtails individual rights whereas the previous rules were adequate and balanced both on the side of the authorities and private individuals. Dempsey regards as baseless the official stance that the safeguards to individual privacy before 9/11 were seriously curtailing their efficient functioning. Instead he posits that officials had simply been incompetent and not fully utilized the opportunities presented to them by the amendment prior to 9/11. (Dempsey, James X, 2003)
- Dempsey also points out that religious places such as mosques and political gatherings were never off-limits to investigating officials provided they had minimal reasons for suspicion. After 9/11, he points out, the FBI was given the right to enter such places and events at will as if on a whim. This, he points out, is seriously lacking of safeguards against misuse by officials. In this instance also he feels that the existing checks and balances already incorporated within the amendment prior to 9/11 should have sufficed for the extra caution necessary after 9/11. (Dempsey, James X, 2003)
- Before 9/11 the FBI could certainly access commercial databases, also on the principle of minimal basis for suspicion. The Patriot Act and other laws formulated after 9/11 enable the investigating agencies to scoop up entire databases regardless of whose private information is being accessed. This does not protect the privacy of deemed innocent persons who cannot be connected to any criminal activities. Dempsey posits that this also in excess of requirements and favors inappropriate action by officials working under insufficient guidance. (Dempsey, James X, 2003)

Dempsey goes on to posit certain misdemeanors he had detected in official action stemming from the post 9/11 changes that were in no way connected to the Patriot Act.

- Secret arrests have been made of almost a 1000 people.
- Many of these have been detained for days, weeks or even longer without charges even though Congress had stipulated such detention limits to 7 days without charges even of foreign nationals arrested on suspected terrorist activities.
- Abuse had been made of material witness stature to hold people without charges.
- There has been blanket closing of deportation hearings.
- There has been indefinite detention of two American citizens in military prisons without criminal charges.
- There has been selective targeting of immigrants for enforcement based on their religion. (Dempsey, James X, 2003)

Dempsey believes that these misdemeanors would have been avoided if there had been adequate checks and balances set in as guidelines to operating officials.

Conclusion

The point that James Dempsey and others like him are trying to make in a rather moderate fashion is that the existent checks and balances incorporated within the 4th Amendment prior to 9/11 were sufficiently regulatory for both private individuals and government officials engaged in enforcing the law. They assured private individuals of privacy and officials of tools with which they could with sufficient judiciousness conduct their duties of preventing and apprehending misdemeanors. After 9/11 the changes that were incorporated doing away with much of the previously existing balancing procedures meant that domestic law enforcement and investigating authorities had fewer standards to guide them judiciously in their work. This afforded erosion of civil liberties and

‘unfocused investigative activities’ that may seriously affect security instead of enhancing it. (Dempsey, James X, 2003)

The 4th Amendment drew upon the English experience – “Every man’s house is his castle” (The Constitution of the United States of America, The 4th Amendment, 2006). To jeopardize this almost atavistic desire in American citizens would be a mistake that the future would never forgive. What America’s founding fathers wrought with such care should not only be preserved but should also be furthered upon better experience. The terrible incident of 9/11 affords just such an experience and to shy away from the finesses of the 4th Amendment and undo part of what it constitutes is a foolishness and weakness that should have been avoided. Instead, the 4th Amendment should have been utilized more competently to serve the United States of America in one of its most crucial moments of existence. The paper hopes that this will become so upon better foresight in the future. Much still remains of the principle of good faith that the amendment stands for and there is yet hope that much can be retrieved.

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