Law and Democracy in the Empire of Force
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Privacy's End

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How adequate is the word "privacy" as a way to capture the essential meaning of the Fourth Amendment? Ever since Katz v. United States (concerned with the bugging of a telephone booth), the Supreme Court and commentators alike have conceived of the protections of the Fourth Amendment largely in privacy terms. This move was driven initially by the desire to escape from the limitations of an approach that spoke in property terms—ownership, possession, license to be present, and so on. This movement fit with the general culture as well.

As Jed Rubenfeld reminds us in this essay, the word "privacy" does not appear in the Fourth Amendment's text. Moreover, however helpful privacy may be in thinking about searches, it is almost useless in thinking about arrest or detainment—about "seizure" of the person. This is an intrusion that does much more than violate privacy in the usual sense: it is an interference with liberty and autonomy.

In place of privacy, Rubenfeld proposes another mode of analysis that promises to give the Fourth Amendment new legal and political life.

How fragile a thing, law. Constitutional principles that took root over centuries can wither and die in a few short years. Freedoms long prized—freedoms long distinguishing the United States from much of the rest of the world—can disappear in the blink of a firebomb.

Not long ago, the notion that police could seize Americans off the streets and throw them in prison without probable cause might have seemed laughable. "We allow our police to make arrests only on 'probable cause,'" we used to be told. "Arresting a person on suspicion, like arresting a person for investigation, is foreign to our system."[1] To call a particular confinement "nothing more or less than unadorned preventive detention"[2] was to condemn it, because unadorned preventive detention—once upon a

time—did not exist in this country. The power to imprison on mere suspicion or "dangerousness" or executive say-so belonged to dictatorships. But the previous president of the United States had claimed the power to imprison any individual he declares an "enemy combatant"—including a U.S. citizen seized inside the United States—without probable cause, without criminal charge, with limited or no judicial review, and with preventive detention the explicit justification.[3]

Not long ago, it was possible to believe that the Fourth Amendment prohibited the government from tapping Americans' telephone calls except with probable cause and, absent exigent circumstances, judicial authorization. As late as 2004, the president declared:

> Now, by the way, any time you hear the United States Government talking about wiretap, it requires—a wiretap requires a court order. Nothing has changed, by the way. When we're talking about chasing down terrorists, we're talking about getting a court order before we do so. It's important for our fellow citizens to understand, when you think Patriot Act, constitutional guarantees are in place when it comes to doing what is necessary to protect our homeland, because we value the Constitution.[4]

These statements, it turned out, were not accurate. The president would later admit that, in 2002, he had personally but secretly authorized (and then repeatedly reauthorized) the National Security Agency to intercept hundreds, perhaps thousands, perhaps tens of thousands, of telephone calls and e-mail messages, without probable cause and without a court order.[5]

One cannot expect too much from judges in wartime. After all, the Constitution has been stretched before in times of war, real or perceived, hot or cold. But the weakness in Fourth Amendment law today—notice its strange and almost complete silence in the dispute over unlawful combatant detentions, despite the fact that arrests on less than probable cause were among the paradigmatic abuses that the Fourth Amendment was enacted to forbid—cannot be attributed solely to the winds of war.

To meet today's challenges,[6] Fourth Amendment law would need the strongest of anchors—the clearest understanding of what it stands for and against. But at the core of modern Fourth Amendment law, there is instead a kind of doctrinal black hole, known as the "reasonable expectation of

privacy."[7] This concept, the supposed "touchstone of Fourth Amendment analysis,"[8] has never been able to do the work required of it.

Tempting as it is to employ the language of privacy in arguing against unwanted surveillance, I suggest here that it is time to bring an end to privacy's reign as the touchstone of Fourth Amendment law. Under expectations of privacy thinking, the Fourth Amendment has lost hold of its text, its paradigm cases, and its ability to stand firm against patently unconstitutional searches and seizures. I suggest that *personal life* is instead the Fourth Amendment's end.

I. The Rise of Privacy in Fourth Amendment Law

The term *privacy* cannot be found in the U.S. Constitution. This absence has been much remarked on,[9] but typically in connection with a different right of privacy, the one announced in *Roe v. Wade*.[10] It is as true of the Fourth Amendment as of the Fourteenth, however, that the text makes no mention of privacy—or reasonable expectations thereof. Instead, the Fourth Amendment guarantees a right of security. The first words of the Fourth Amendment set forth a right not to be private but "to be secure": "The right of the people to be *secure* in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated."[11]

The term *secure* barely figures in modern doctrine. Current search and seizure thinking proceeds as if the first words of the Fourth Amendment were not there at all—as if the amendment simply read, "There shall be no unreasonable searches or seizures."[12] Perversely, when security is discussed in modern Fourth Amendment analysis, it is almost invariably pitted against Fourth Amendment rights: the nation's security, we are told, is what must be balanced against individuals' Fourth Amendment freedoms.[13]

This balancing idea completes the basic structure of modern Fourth Amendment law. In essence, in the great run of cases, current law has two elements. First, courts are asked to decide whether a challenged search or seizure violates the claimant's reasonable expectation of privacy; if so, courts are expected to balance this intrusion against the state interests served by the search or seizure. The idea of the claimant having a right to be secure in anything is simply absent.