THE "NOT A SEARCH" GAME

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The privacy versus security discussion is not just about the Fourth Amendment—it involves policy considerations as well. The Fourth Amendment concerns frame the policy considerations, however, and they are worth thinking about on their own.

The text of the Fourth Amendment states that: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[1] One of the very first things the American people did when we became a nation was to establish a constitutional right against unreasonable searches and seizures.[2] In fact, we had a revolution against our parent country in part because we did not want the government to search or seize our persons or property without good cause.[3] The issuance of general warrants that gave the British government unfettered authority to search private areas was one of the American colonists' major complaints against the British.[4] The need to limit the government's authority to search and seize was considered important enough that the First Congress specifically included it in the Bill of Rights.[5]

It is worth noting that the concern for national security used to justify the federal government's current broad surveillance activities is not new. From the British perspective, the American colonists were a group of criminals who presented an existential threat to the British Empire. The need to balance security and privacy dates back to the very beginning of our nation, and it is not an easy balance to strike.

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1. U.S. CONST. amend. IV.

2. *See, e.g.*, M. Blane Michael, *Reading the Fourth Amendment: Guidance from the Mischief that Gave it Birth*, 85 N.Y.U. L. REV. 905, 911–12 (2010).

3. *See id.* at 911; *see also* Riley v. California, 134 S. Ct. 2473 (2014).

4. *See* Michael, *supra* note 2, at 912.

5. *See id.*

And yet there is something new about our current debate as well. As technology has advanced over time, the government has been able to obtain private information about individuals that previously would have required a physical intrusion into their persons, houses, papers, or effects. The question with which the Supreme Court has struggled throughout the 20th century and into the 21st century has been: "Is that a search or not?" When the government uses a microphone to listen in on your private conversations, for example, is this a search? If not, what is it? Does it fall within the Fourth Amendment at all?

In the famous case of *Katz v. United States*,[6] the Supreme Court said in essence that if the government uses a microphone to listen to your phone conversations, this is a search even though the government is not physically intruding into your property, and even though it is not seizing your belongings.[7] Therefore this non-physically instrusive activity is governed by the Fourth Amendment.[8] *Katz* was a landmark case in the protection of privacy rights, but there is also a sense in which *Katz* was problematic, for it got the Court into what we might call the "Not a Search" game. The Supreme Court has been playing this game ever since.

I have put together a brief list of some of the highlights of this game. When the government sends someone into your house wearing a wire, and that person broadcasts your private conversations to the government, is this a search or not? No, the Court has said, it is not a search because you knowingly exposed your house to this third party and you took the risk that they might betray you.[9] What if the government gets the phone company to put a pen register on your phone so that it can tell what numbers you are dialing? Is this a search or not? No, it is not a search. You took the risk that the phone company would betray you, and since you took that risk, it is not a search.[10] What if they obtain your bank records? Not a search, for the same reason. You took the risk that the bank would betray you.[11]

As we move on, the game gets more complicated: What if the government surreptitiously places a beeper on a canister of

6. 389 U.S. 347 (1967).
7. *See id.* at 352–53.
8. *See id.*
9. United States v. White, 401 U.S. 745, 752 (1971).
10. Smith v. Maryland, 442 U.S. 735, 744 (1979).
11. United States v. Miller, 425 U.S. 435, 443 (1976).

chemicals to track your location? Well, that all depends. If the government puts the beeper on the canister before you own it, and then tracks your movements after you take possession, this is not a search.[12] If it puts the beeper on the canister after you own it, and does precisely the same tracking, this is a search.[13] Is there a real constitutional difference between these situations? The Supreme Court says there is one, but it may not be so obvious to the rest of us.

What about dog sniffs? If a dog sniffs you or your possessions to determine whether you have drugs or explosives, is this a search? The Supreme Court has declared that if the dog sniffs your person or your effects, this is not a search.[14] If the dog comes up to your front door and sniffs, this is a search.[15] It is a very strange set of cases.

I love teaching, and as a teacher it is kind of fun to play the "Not a Search" game. As a matter of constitutional law, however, this game deflects us from the real question, which is not whether these things are searches. In reality they are probably all searches. The question is whether these searches are *reasonable*. This is the question that needs to be addressed, and by playing the "Not a Search" game, the court has been able to evade these questions.

This game has moved things like the NSA metadata program completely outside the purview of the Fourth Amendment. In the pen register case, the Court said that if you send out the phone numbers you dial to the phone company, you have assumed the risk that they will give those numbers to the government, and therefore the collection of such information is not a search.[16] Well, that is all the metadata program really is—the collection of data that individuals expose to service providers.[17] The Court approved such practices in the 1970s and moved them outside the scope of the Fourth Amendment by declaring them non-searches.[18] We are having debates about these practices

12. United States v. Knotts, 460 U.S. 276, 285 (1983).
13. United States v. Karo, 468 U.S. 705, 715–16 (1984).
14. United States v. Place, 462 U.S. 696, 706–07 (1983).
15. Florida v. Jardines, 133 S. Ct. 1409, 1417–18 (2013).
16. Smith v. Maryland, 442 U.S. 735, 744 (1979).
17. Klayman v. Obama, 957 F. Supp. 2d 1, 14 (D.D.C. 2013).
18. *Smith*, 442 U.S. at 744.

now, but from a Fourth Amendment perspective, the debate was closed off in the 1970s because of the "Not a Search" game.

This game is not sustainable over the long run, because technology keeps advancing. Remember, technology was the reason we got into this game in the first place. There are two problems relating to technology that the Court has not figured out how to manage, and that may necessitate leaving this game behind.

First, the government's ability to use technological surveillance to gather personal information is growing exponentially in at least two ways. Number one, technology is becoming much more intrusive. The government can get a lot more data about you than it used to be able to get back in the days of beepers and pen registers, which seem quaint by today's standards.[19] Number two, the government is able to aggregate this data much more comprehensively than it ever could before, so it can know nearly every single thing about your life simply by tracking data that the Supreme Court has already classified as public and thus not subject to the Fourth Amendment.[20] The Supreme Court needs to figure out how to deal with these developments, because governmental aggregation of vast amounts of personal information may pose a threat to life in a free society. A couple of years ago, in the *Jones* case,[21] which involved GPS tracking, many people thought the Supreme Court might attempt to deal with this problem. Unfortunately the Court punted, failing to answer any questions about what is reasonable and what is not reasonable.[22]

Technology also poses a completely different set of problems, which is part of what makes it difficult to figure out what sorts of governmental searches are reasonable. These problems arise because the technology of terrorist attacks has changed. We live in a world where terrorists can hijack an airplane and fly it into the World Trade Center, could acquire a nuclear weapon, or nerve gas. They are capable of causing destruction on a massive scale. What do we do about that? What do we do not only about the fact that the technology of surveillance is becoming much more intrusive, but also that the technology of

19. *Klayman*, 957 F. Supp. 2d at 32–36.
20. ACLU v. Clapper, 959 F. Supp. 2d 724, 750–52 (S.D.N.Y. 2013).
21. United States v. Jones, 132 S. Ct. 945, 947 (2012).
22. *Id.*

destruction is becoming much more severe? How do we balance that equation?

I do not know the answer to that question. It is very important to find some answers, however, and I think the first step is to give up this game of pretending that searches are not searches. We should recognize that the use of dog sniffs, beepers, and pen registers—not to mention GPS trackers and NSA metadata programs—are searches. Once we do this, we can try to develop some standards for determining when they are reasonable and when they are not.