Anthony Shawn Bandy

Engineering 350

Monday 2:00PM

Current Events Assignment

02/10/2013

Five years ago the Department of Homeland Security (DHS) began a program that allowed agents at the nation’s borders to inspect the contents of electronic devices without suspicion of any wrong doing. In 2009, the office of Civil Rights and Civil Liberties within the DHS promised to release their findings of the legal impacts of the new program within 120 days but instead released the executive summary just last week. The office of Civil Rights and Civil Liberties is the internal “watchdog” for the Department of Homeland Security[[1]](#footnote-1).

The Fourth Amendment to the Constitution of the United States protects its citizens from “unreasonable search and seizure.” Among other things, the 4th Amendment guards against general warrants, those which do not restrict law enforcement to specific people or places. The 4th Amendment also requires the approval of the judiciary before the warrant is executed. Taken together, the 4th Amendment helps to guarantee that United States citizens can be secure in their persons, at least in the sense that there are protections that limit the power of government agents from frivolous intrusions on privacy. Despite this guarantee, the language of the Constitution does not in itself guarantee a “right to privacy, per se,” according to Chief Justice John Roberts.[[2]](#footnote-2)

Our legal system is derived from English Common Law, and therefore the courts, in reaching a decision, can alter the means by which laws are applied or executed. Legal precedence applies to all laws including the amendments to the Constitution. In fact, each amendment has had numerous challenges to which the Supreme Court ruled including the 4th Amendment. *Carroll v United States* established that an automobile may be searched without warrant even if the driver of the vehicle is legally authorized to the use of the roads and highways, so long as the officer making the search has *probable cause* and cannot reasonably attain a warrant from the court. *Carroll v United States* was used as precedent for the ruling in *Almeida-Sanchez v United States* in 1973. In *Almeida-Sanchez*, the Supreme Court found that the needs of the federal government to secure its foreign borders tilted the balance from its citizens’ rights to privacy to those of the agencies to whom the task of security was delegated. In other words, the government has more leeway to search the persons and their effects near the border without securing a warrant than in the interior so long as the search assuming a balance is maintained between the invasiveness of the search and the degree of suspicion on the part of law enforcement agents conducting the search. This is known as the “border search exception” to the 4th Amendment according to Justice Rhenquist in *United States v Ramsey, et al.*

Following the terrorist attacks in 2001 and particularly during the administration of George W. Bush, the balance between of civil liberties and the needs of national security shifted in favor national security. The Bush administration created the Department of Homeland Security in November of 2002, in part by merging the Immigrations and Naturalization Service with the Customs Service. The terrorist attacks in 2001 were blamed partly on a failure of the federal government to secure the nation’s foreign borders and so the new DHS was tasked with correcting the issue through a number of executive initiatives. This expansion of federal authority includes the assertion that the DHS has authority to operate within 100 miles of the nation’s borders. That area fully includes all major cities on the east and west coasts and 33 new interior “checkpoints” where the DHS may search a person’s effects without warrant.[[3]](#footnote-3)

Within the framework of *United States v Ramsey*, then, DHS is asserting that it has the authority to randomly, or based purely on racial profiling, search the contents of any electronic device that crosses the border regardless of the citizenship status of that person. The courts have no had adequate time to settle on how invasive searching electronic devices truly is and this is important in determining whether the DHS will be able to continue this type of search and, if so, with what scope it may do so.

At least on the face of it, an electronic device may be comparable to an automobile in terms of personal intimacy. An automobile may contain very personal effects – perhaps even effects that we would not want to share with others – and it can also contain property that can detrimental to national security. Having an automobile searched is probably not as personal for most people as having one’s house search and certainly to so much as having our body’s searched.

On the other hand, an electronic device may be much more private than an automobile, and so should have a higher legal threshold for law enforcement to legally search. Electronic devices can easily contain all of our personal and professional contacts, our finances and tax information, professionally sensitive information, and possibly indiscretions that, while legal, could have significantly negative personal impact if they were disclosed. Removing the need seek judicial approval for a warrant or at least be able to demonstrate *probable cause* after the fact allows DHS agents access to all of this and the power to potentially handle it in a manner that benefits the agents personally and not national security.

I am personally uncomfortable with the idea of federal government expanding its powers to encroach on my 4th Amendment rights. Like many Americans, I enjoy the freedom to move about the states and to even leave and come home with the knowledge that I can do so without unwarranted invasion into my personal affairs. I also have a great deal of respect for the people that work to secure our country and want them, all things being equal, to have the best means to do so. In the end, I have a great deal of faith for us to come together and decide these issues and eventually establish it as legal precedent in the process.

The most disturbing part of this, to me, is that we are relying on an office internal to the DHS itself to oversee its obligations to our civil rights and liberties. We should really never rely on the watchers to watch themselves.

1. “DHS Watchdog OKs ‘Suspicionless’ Seizure of Electronic Devices Along Border.” Wired. 08 February, 2013. [↑](#footnote-ref-1)
2. “Memo Cited Abortion Tragedy.” *Washington Post*. Amy Goldstein and Jo Becker. Web 16 August, 2005. [↑](#footnote-ref-2)
3. “ACLU Assails 100-Mile Border Zone as ‘Constitution Free’.” Ryan Singel. *Wired Magazine.* [↑](#footnote-ref-3)