

**The New York Times** Reprints

This copy is for your personal, noncommercial use only. You can order presentation-ready copies for distribution to your colleagues, clients or customers [here](#) or use the "Reprints" tool that appears next to any article. Visit [www.nytreprints.com](http://www.nytreprints.com) for samples and additional information. [Order a reprint of this article now.](#)



June 22, 2011

# Free to Search and Seize

By **DAVID K. SHIPLER**

Chevy Chase, Md.

THIS spring was a rough season for the Fourth Amendment. The Obama administration petitioned the Supreme Court to allow GPS tracking of vehicles without judicial permission. The Supreme Court ruled that the police could break into a house without a search warrant if, after knocking and announcing themselves, they heard what sounded like evidence being destroyed. Then it refused to see a Fourth Amendment violation where a citizen was jailed for 16 days on the false pretext that he was being held as a material witness to a crime.

In addition, Congress renewed Patriot Act provisions on enhanced surveillance powers until 2015, and the F.B.I. expanded agents' authority to comb databases, follow people and rummage through their trash even if they are not suspected of a crime.

None of these are landmark decisions. But together they further erode the privilege of privacy that was championed by Congress and the courts in the mid-to-late-20th century, when the Fourth Amendment's warrant requirement was applied to the states, unconstitutionally seized evidence was ruled inadmissible in state trials, and privacy laws were enacted following revelations in the 1970s of domestic spying on antiwar and civil rights groups.

For over a decade now, the government has tried to make us more secure by chipping away at the one provision of the Bill of Rights that pivots on the word "secure" — the Fourth Amendment's guarantee of "the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures."

The founding fathers, who sought security from government, would probably reject today's conventional wisdom that liberty and security are at odds, and that one must be sacrificed for the other. In their experience, the chief threat to individual security came from government itself, as in the house-to-house searches conducted by British customs officers under blanket "writs of assistance." After the Boston lawyer James Otis Jr. eloquently

challenged the writs in 1761, John Adams, who was present in the crowded courtroom, wrote of the audience's rage, "Then and there the child independence was born."

Independent America's answer to those searches was the Fourth Amendment, with its requirement that law enforcement have probable cause to believe that evidence of a crime can be found at a particular place and time before a judge issues a warrant.

The ingenious feature of this demand is that it makes criminal investigations more efficient and accurate, even as it preserves liberty. If that rule and others in the Bill of Rights are followed, the police waste less time chasing false leads, make fewer erroneous arrests and leave the community safer.

In other words, the framers handed down a system in which liberty and security were fused, one inseparable from the other. So it is hard to see how safety has been enhanced by the post-9/11 expansion of counterterrorism surveillance, which has uncovered hardly any known plots and instead burdens analysts with so much irrelevant noise that they have trouble hearing the ominous melodies.

A recent study by the Breakthrough Institute found only two cases that benefited from the secret warrants made easier by the Patriot Act. The rest, the report concluded, "were broken open due to the combination of well-deployed undercover agents, information from citizen or undercover informants and tips from foreign intelligence agencies." The two exceptions were the Portland Seven, Oregon Muslims who tried to travel to Afghanistan to fight with the Taliban in 2001, and Najibullah Zazi, a Colorado resident from Afghanistan who pleaded guilty last year to planning a suicide attack in the New York City subways.

Two successes in nearly a decade might be enough to satisfy a fearful public, but it is worth noting that both cases began with old-fashioned tips — the first from a landlord, the second from Pakistani intelligence linking Mr. Zazi to Al Qaeda — and could have been pursued with the law enforcement tools available before 9/11.

The false dichotomy of liberty versus security is accompanied by another myth: that someone else's rights are always the ones at risk, that I can give up their rights for my safety. It seems a comfortable bargain. The terrorist is covertly monitored, the drug dealer is searched and the upstanding citizen is protected.

But it does not always work that way. The constitutional system of case law and precedent applies rulings on rights universally. So, legally, if a black man in a poor neighborhood can be stopped and frisked with minimal reason, so can a white woman in a rich neighborhood

— even if the police tactics differ.

American history is replete with assaults on liberties that first target foreigners, minorities and those on the political margins, then spread toward the mainstream. The 1917 Espionage Act, for example, was used to prosecute American labor leaders and other critics of the government, and the 1798 Alien Enemies Act was revived after Pearl Harbor to intern American citizens of Japanese ancestry. A similar process is taking place now, as the F.B.I. has begun using counterterrorism tools to search, infiltrate and investigate groups of American peace activists and labor leaders in the Midwest.

The Fourth Amendment is weaker than it was 50 years ago, and this should worry everyone. “Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government,” Justice Robert H. Jackson, the former chief United States prosecutor at the [Nuremberg trials](#), wrote in 1949. “Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart.”

*David K. Shipler, a former Times correspondent, is the author of “The Rights of the People: How Our Search for Safety Invades Our Liberties.” He writes the blog [The Shipler Report](#).*