

Date: 04/27/2001 02:15 pm -0400 (Friday)  
From: Orin Kerr  
To: CyberProf  
Subject: Net-wide search?

I keep running into a cyberlaw hypothetical that has me baffled: the so-called "net-wide search."

It's a hypo first posed in a student note, see Michael Adler, "Cyberspace, General Searches, and Digital Contraband: the Fourth Amendment and the Net-wide Search," 105 Yale L.J. 1093 (1996), and later picked up by Larry Lessig in an article and in his Code book. The hypothetical considers the Fourth Amendment implications of government use of an imagined software tool that could invade private networks and search for contraband and report back to the government whenever contraband is found. The tool would execute a "perfect search" without collateral harm.

Here's the problem. On the basis of the student author's belief that current Fourth Amendment law is basically a cost-to-privacy vs. benefit-to-law-enforcement balancing test, the Note reasons that a warrantless net-wide search might be okay under the Fourth Amendment because the software could allow a "perfect search" that would survive the balancing test. According to the student author, current law might allow the government to use this tool to search everyone's computer remotely without a warrant. Lessig trumpets this hypo in Code as one of his "Four Puzzles of Cyberspace," as a way in which he thinks that technological change might have shifted our constitutional privacy rights. (p.17-19). The implication is that current Fourth Amendment law just isn't built to withstand changes that technology will bring, and we need to rethink the law to restore the values and interests that the old law was designed to protect.

The problem with all of this is that it is built entirely on an major doctrinal error. The Adler student note failed to recognize that the Supreme Court's Fourth Amendment cases that have followed a balancing test have done so only in a particular context: when a government actor conducting a search does so for non-law-enforcement reasons, and the non-law-enforcement government interest outweighs the privacy intrusion. For example, in *Camara v. Municipal Court*, 387 U.S. 523 (1967) the Court held that government housing inspectors could enter homes in a limited capacity to inspect homes for safety violations. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court held that a cop could briefly frisk a suspect for weapons to protect the officer's safety. In these so-called "special needs" cases, the government is allowed a more relaxed standard so long as the non-law-enforcement need (e.g., safety) outweighs the privacy intrusion.

In contrast, when government actors conduct a search for evidence of crime for law enforcement reasons, the government cannot rely on a balancing test and has to get a warrant if the search violates a reasonable expectation of privacy. See *Nat'l Federation of Fed. Empl. v. Weinberger*, 818 F.2d 935, 943 n.12 (D.C. Cir. 1987) ("The government may not take advantage of any arguably relaxed . . . standard for warrantless searches . . . when its true purpose is to obtain evidence of criminal activity."). Because the hypothetical netwide search would be conducted solely for the law enforcement purpose of identifying and prosecuting possessors of contraband, current Fourth Amendment law would not allow a balancing test, and of course the net-wide search would lose the balance if it did.

In short, the net-wide search is plainly unconstitutional under current law. (This shouldn't surprise us: notice how the Fourth Amendment doesn't let police officers who are good at finding evidence of crime execute more warrantless searches than those who are bad at it? Why would we expect a different result when a computer executes the search?)

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