The Fourth Amendment, Privacy, and Law Enforcement

Robert L. Farb

North Carolina appellate courts have upheld the constitutionality of checkpoints for driver's licenses.

GARY ALLEN / NEWS & OBSERVER

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation and particularly describing the place to be searched and the persons or things to be seized.

—U.S. Constitution, Amendment IV

Privacy . . . the right to be free from governmental interference . . . a law enforcement officer's authority to investigate crimes . . . the government's interest in investigating conduct that is not necessarily criminal—the Fourth Amendment affects all these issues.[1]

The Fourth Amendment protects people against unreasonable searches and seizures by government authorities. The U.S. Supreme Court, which must determine how the Fourth Amendment applies in a wide range of contexts, has sought to strike a balance between society's interest in investigating crime and individuals' interests in maintaining their privacy against government intrusion. The Fourth Amendment does not apply to activities by a private person, no matter how unjustified, unless the private person acts as an agent of government officials or acts with their participation or knowledge.

One U.S. Supreme Court case, *Katz v. United States*, has had a particularly important impact on the relationship between privacy and government authority under the Fourth Amendment, establishing the basic test for determining whether a person's interest in privacy is sufficient to warrant Fourth Amendment protection.[2] This and later cases decided by the Court—as well as federal and state legislation that expands on the basic protections afforded by the Fourth Amendment—are the focus of this article.[3]

Reasonable Expectation of Privacy under the Fourth Amendment

Charles Katz's occupation was illegal gambling. In February 1965 he was using several telephones in a bank of public telephone booths on Sunset Boulevard in Los Angeles to conduct his gambling business. The Federal Bureau of Investigation (FBI) learned of his activities and placed microphones and a tape recorder on the tops of the telephone booths and recorded his conversations—without obtaining a search warrant. He was convicted of gambling violations.

The appeal of his conviction eventually reached the U.S. Supreme Court. The government argued that no search occurred because the FBI had not physically penetrated the telephone booth to listen to Katz's conversations.[4] The Court's opinion, written by Justice Potter Stewart, rejected the government's argument. It said that the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his or her own home or office, is not protected by the Fourth Amendment. But what a person seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. The Court concluded that the government's activities in

The author is an Institute of Government faculty member who specializes in criminal law and procedure. Contact him at farb@iogmail.iog.unc.edu.

electronically listening to and recording Katz's conversations violated the privacy on which he justifiably relied while using the telephone booth, and thus violated the Fourth Amendment.

At least as significant as Justice Stewart's opinion was Justice John Harlan's concurring opinion, which used the term "reasonable expectation of privacy" and explained its meaning. Justice Harlan noted that the Court had ruled that an enclosed telephone booth is an area, like a home, where a person has a constitutionally protected reasonable expectation of privacy. He said that there is a two-fold requirement when determining if there is Fourth Amendment protection: (1) a person must have demonstrated an actual (subjective) expectation of privacy; and (2) the expectation must be one that society is prepared to recognize as reasonable. A person who enters a telephone booth, shuts the door, and places a call, Justice Harlan continued, is entitled to assume that his or her conversation is not being intercepted—per the first test just stated. And although an enclosed telephone booth is accessible to the public at times, its occupant's expectation of freedom from intrusion when inside the booth is one that society recognizes as reasonable—per the second test. Later Supreme Court cases have adopted the reasonable-expectation-of-privacy analysis for determining whether people's activities are protected from governmental intrusion under the Fourth Amendment.[5]

Government Actions Subject to the Fourth Amendment

The *Katz* test provides a starting point for determining the extent of the Fourth Amendment's protections: the amendment applies when a person has a reasonable expectation of privacy. Other court decisions have developed rules detailing how the Fourth Amendment regulates government conduct in specific situations. Those rules are the subject of this section.

Street Encounters

Little did Detective Martin McFadden know when he was patrolling downtown Cleveland, Ohio, on the afternoon of October 31, 1963, that his encounter with John Terry would lead to the U.S. Supreme Court's most significant ruling expanding a law enforcement officer's authority to investigate criminal activity.

Detective McFadden, a police officer for thirty-nine years and a detective for thirty-five years, had been patrolling downtown Cleveland for shoplifters and pickpockets for thirty years. His attention was drawn to two men, Richard Chilton and John Terry, standing at an intersection. He later testified that "they didn't look right to me at the time."[6] McFadden decided to observe them from a distance of 300 to 400 feet. The two men took turns walking past store windows and looking into a particular one. Then they conferred briefly. They repeated this ritual five or six times apiece—in all, making about a dozen trips. A third man approached them, engaged them briefly in conversation, then walked away. Chilton and Terry resumed their measured pacing, peering, and conferring. After about ten minutes, they walked off together in the same direction as the third man.

McFadden now had become suspicious that they were casing a store to commit a robbery. He feared that they might have a gun. He followed the two men and saw them stop in front of the store to talk to the same man with whom they had conferred earlier. McFadden approached them, identified himself as a police officer (he was in plain clothes), and asked for their names. When the men mumbled something in response to his inquiries, McFadden grabbed Terry—spun him around so that he and McFadden were facing the other two—and patted down the outside of his clothing. He felt a pistol in the left breast pocket of Terry's overcoat, which he removed after securing all three men. Terry was convicted of carrying a concealed weapon. The appeal of his conviction eventually reached the U.S. Supreme Court.

Chief Justice Earl Warren wrote the Court's opinion in *Terry v. Ohio*, which decided several significant issues:[7]

- Stopping and frisking are subject to the Fourth Amendment even though those actions may not be as intrusive as an arrest or a full search of a person. The Court found that in forcibly stopping Terry by grabbing him, Detective McFadden seized him, and that in patting down the outer surfaces of Terry's clothing, McFadden searched him. The Court recognized that both the seizure (the forcible stop) and the search (the frisk) were actions regulated by the Fourth Amendment.
- The Court noted that if this case involved law enforcement conduct subject to the Warrant Clause ("no Warrants shall issue but upon probable cause . . .") of the Fourth Amendment, then the Court would have to determine whether probable cause existed to justify McFadden's search and seizure of Terry. To determine whether probable cause was the appropriate standard, the court used a balancing test: evaluating the officer's need to search or seize against the invasion of privacy that the search or seizure entailed.[8] The Court decided that officer safety outweighed the intrusion on a person's freedom when frisked for weapons, and a standard less than probable cause was reasonable under the Fourth Amendment's general proscription of unreasonable searches and seizures. This standard became known in later cases as "reasonable suspicion."[9]
- The Court determined that, in light of McFadden's experience as a law enforcement officer, the information he possessed supported his frisk of Terry for weapons. Also, the Court ruled, the scope of the frisk—patting Terry's outer clothing—was properly confined to what was necessary to learn whether he was armed. That is, McFadden did not conduct an impermissible general exploratory search for evidence of criminal activity.

As he had done in *Katz v. United States*, Justice Harlan wrote a significant concurring opinion. The Court's opinion did not specifically address whether the forcible stop of McFadden was lawful. Justice Harlan made clear his view, however, that an officer may forcibly stop a person before frisking him or her for weapons, and the standard for that stop also is less than probable cause.

When officers have lawfully stopped a vehicle, they may order both the driver and passengers out of it. To frisk an occupant, they need at least reasonable suspicion that the person is armed and presents a danger.

The Court in later cases recognized that an officer may make a forcible stop of a person or a vehicle on the basis of reasonable suspicion of criminal activity.[10]

The Home and Its Curtilage

The U.S. Supreme Court has stated that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed" and that "searches and seizures inside a home without a warrant are presumptively unreasonable."[11] Thus a law enforcement officer may not enter a home without a warrant unless (1) the officer has consent to enter or (2) exigent circumstances (a need for immediate action) justify entering without consent or a warrant.

Entering a residence to arrest. Without consent or exigent circumstances, an officer needs an arrest warrant to enter the residence of a person to be arrested. Without consent or exigent circumstances, an officer who wants to enter the home of a third party to arrest a person who does not live there must have a search warrant. An arrest warrant is insufficient to enter a third party's home because it does not adequately protect the third party's Fourth Amendment privacy interests.[12]

Entering the curtilage. People have a reasonable expectation of privacy not only in their home but also in its curtilage.[13] The "curtilage" is the area immediately surrounding the home, so intimately tied to the home itself that it deserves Fourth Amendment protection—for example, the area that includes buildings like an unattached garage, a storage shed, and similar structures, if they are relatively close to the dwelling and serve the homeowner's daily needs.

Officers who enter the curtilage without a warrant, consent, or exigent circumstances conduct an impermissible search under the Fourth Amendment except when they go to a house by using the common entranceway (for example, a driveway or a sidewalk leading to a door) for a legitimate purpose, such as to question a suspect in a criminal investigation. A person ordinarily expects a variety of people to enter private property for any number of reasons. Therefore a person does not have a reasonable expectation of privacy in the areas of private property commonly used by those who come there.[14]

Entering areas outside the curtilage. When officers are on private property *outside* the curtilage—for example, when they are walking through fields or woods—they are not conducting a search under the Fourth Amendment because the U.S. Supreme Court has ruled that a person has no reasonable expectation of privacy in the area outside the curtilage.[15] The Fourth Amendment does not protect that area even if officers are committing a criminal trespass or even if the area is surrounded by a fence with no-trespassing signs.[16] However, a person may have a reasonable expectation of privacy in an enclosed building located there.[17]

Using devices to detect activity within a home. Officers suspected that marijuana was being grown in Danny Kyllo's home. Growing marijuana indoors typically requires high-intensity lamps. Officers parked their car on the street near his home and—without obtaining a search warrant—used a thermal imager to determine whether the amount of heat emanating from the home was consistent with the use of such lamps. The imager showed that the roof over the garage and a side wall of the home were relatively hot compared with the rest of the home and substantially warmer than neighboring homes. On the basis of this and other information, the officers obtained a search warrant. In *Kyllo v. United States*, the U.S. Supreme Court ruled that using sense-enhancing technology to obtain any information concerning the interior of a home (in this case, the relative heat of various rooms) that could not have been obtained without physical intrusion into a constitutionally protected area is a search under the Fourth Amendment—at least when the technology is not in general public use.[18] Thus the officers in

this case violated Kyllo's Fourth Amendment rights by using a thermal imager without first having obtained a search warrant.[19]

The *Kyllo* ruling makes clear that the Court will likely consider to be a search the use of other technological instruments as intrusive as a thermal imager to reveal private matters within a home. It remains unclear whether the Court will rule differently if and when certain technological instruments become widely used by the general public.[20]

Flying over a home and its curtilage. Generally, aircraft surveillance is permissible to help officers make observations and does not constitute a search under the Fourth Amendment. For example, officers do not conduct a search when they fly in lawful navigable airspace over a home and its curtilage and see with their unaided eyes marijuana plants in a fenced-in yard. The U.S. Supreme Court has ruled that a person does not have a reasonable expectation of privacy from observations from an aircraft in public airspace at an altitude at which the public travels with sufficient regularity—because any person flying in such airspace who looks down can see what officers can see.[21] However, officers' actions may constitute a search, requiring appropriate justification—usually a search warrant—if they also use sophisticated cameras and the like to see intimate activities within a home or its curtilage that they could not see unaided.

Officers may fly aircraft at any altitude over open fields because, as with areas outside the curtilage of his or her home, a person does not have a reasonable expectation of privacy there.

Sorting through garbage. The U.S. Supreme Court has ruled that people do not have a reasonable expectation of privacy in garbage that they have placed for collection on the curb in front of their house.[22] The Court reasoned that garbage left on or at the side of a public street is readily accessible to scavengers and other members of the public. Moreover, people are aware when placing their trash for pickup by a third party—for example, sanitation workers—that these workers may sort through the garbage or permit others, including law enforcement officers, to do so.[23] Garbage placed for collection in an area accessible to the public is not subject to an expectation of privacy that society recognizes as reasonable.

Motor Vehicles

Stopping motor vehicles on a highway or at a checkpoint. The U.S. Supreme Court has ruled that an officer may not stop a car traveling on a highway simply to check the operator's driver's license. To stop a vehicle, an officer generally needs reasonable suspicion that the driver has violated a law.[24] Using the Fourth Amendment's balancing test from *Terry v. Ohio*, discussed earlier, the Court concluded that the marginal contribution to highway safety resulting from this kind of license check cannot justify subjecting all vehicle drivers to being stopped at the unbridled discretion of law enforcement officers.

However, in the same opinion, the Court indicated that driver's license checkpoints would be constitutional.[25] A typical checkpoint is set up at a designated place on a highway, and all cars are stopped to check driver's licenses.[26] Reasonable suspicion of a driver's license violation, another traffic violation, or criminal activity is not required to stop a car at the checkpoint. Most state appellate courts, including North Carolina's, have upheld such checkpoints.[27]

The U.S. Supreme Court also has upheld the validity of checkpoints for impaired drivers.[28] Using the Fourth Amendment's balancing test, the Court concluded that the state's interest in combating impaired driving outweighs the intrusion on motorists of being briefly stopped at these checkpoints.

On the other hand, the Court has ruled unconstitutional a vehicle checkpoint whose primary purpose is to detect illegal drugs.[29] The Court noted that it had approved checkpoints to deal with highway safety or to police the nation's border.[30] But if it approved a checkpoint to detect illegal drugs, law enforcement officers could establish checkpoints for any conceivable law enforcement purpose.[31] The Court's application of the balancing test under the Fourth Amendment was resolved in favor of an individual's right to be free from governmental intrusion.

Ordering the driver and passengers out of a vehicle. According to the U.S. Supreme Court, when officers have lawfully stopped a vehicle, they may order the driver and passengers out of it without articulating any reason for doing so.[32] Using the Fourth Amendment's balancing test, the Court concluded that the strong governmental interest in an officer's protection from assault by weapons that may be in a car outweighs the minimum intrusion on drivers and passengers when required to exit a car.

Searching a vehicle with probable cause but no search warrant. When officers have probable cause to search a vehicle for evidence of a crime, and the vehicle is in a public place (that is, a place where a person does not have a reasonable expectation of privacy), they may seize the vehicle—whether it is moving or parked—without a search warrant. Also, they may search it where they seized it or take it to a law enforcement facility or another place and search it there.[33]

This legal principle is an exception to the general rule that officers may make a warrantless search with probable cause only when exigent circumstances justify a failure to obtain a search warrant—for example, when the evidence might disappear if they took the time to obtain a warrant. The U.S. Supreme Court and the North Carolina Supreme Court have justified this principle on the ground that people have a lesser expectation of privacy in their vehicles than in their homes because government pervasively regulates vehicles.[34]

Government Conduct Subject to Other Laws

Federal and state laws may go farther than the floor established by the Fourth Amendment, applying, for example, to private activities. The following sections highlight two areas covered by federal and state laws.

Wiretapping and Eavesdropping

Wiretapping and eavesdropping are pervasively regulated by federal and state laws. Therefore most of this discussion is based on these laws.[35] Although the Fourth Amendment is clearly implicated in many aspects of wire-

Garbage placed at the curb for collection is fair game for law enforcement officers to search.

tapping and eavesdropping, there have been relatively few Fourth Amendment rulings because federal and state laws are as restrictive as, and sometimes more restrictive than, the Fourth Amendment. These laws are quite complex, and this discussion will attempt to cover only some of the basic issues.[36]

An important point to be made at the outset about these laws is that they often apply to private people's activities as well as governmental activities, whereas the Fourth Amendment applies only to the latter. Thus anyone who violates these laws may be subject to criminal and civil penalties.

Intercepting telephone conversations. Generally, it is unlawful to use a device to intercept a telephone conversation (as well as voice communications over pagers).[37] The law applies not only to regular telephones but also to cellular and cordless telephones—even though conversations on some of the latter may be intercepted by scanners and radios that many people own and use.

North Carolina law enforcement officers may intercept telephone conversations, but they must obtain a special court order from a designated court, and the requirements for obtaining the court order are significantly more stringent than those for obtaining a search warrant.[38]

However, neither federal nor North Carolina law makes it unlawful to tape-record a telephone conversation in which one party to the conversation has given prior consent to its being tape-recorded.[39] For example, law enforcement officers may tape-record (1) a telephone conversation between themselves and a criminal suspect or (2) a telephone conversation between a government informant with a criminal suspect when the informant has given prior consent. (However, a person's Sixth Amendment right to counsel may bar this activity under certain circumstances.)[40] Also, a private person may tape-record a telephone conversation between himself or herself and another party to the conversation.[41] However, a spouse may not install a device on a telephone to tape-record his or her spouse's telephone conversations with third parties unless the other spouse has given prior consent.[42]

Using a device to intercept oral communication. It is illegal under federal and state law to use a device to intercept an oral communication under circumstances in which a person has a reasonable expectation of privacy. This is the same standard as the Fourth Amendment standard adopted in *Katz v. United States*.[43] Thus a person who places an eavesdropping device in a bedroom to listen to or to record oral communications violates federal and state law—assuming, of course, that a party to the communications did not give prior consent to the use of the device there. On the other hand, a person who secretly records an open city council meeting does not violate federal or state law because council members and other speakers do not have a reasonable expectation of privacy that their statements will not be recorded by others.

As with telephone conversations, a law enforcement officer or a private person does not violate federal or state law when he or she surreptitiously tape-records a conversation with another person if one party to the conversation has given prior consent to the recording.[44] The U.S. Supreme Court and the North Carolina Supreme Court also have ruled that a law enforcement officer's conduct under these circumstances does not violate the Fourth Amendment because a person does not have a reasonable expectation of privacy in a conversation with another person who happens to be a law enforcement officer or an agent of the officer.[45] A person contemplating criminal activity takes the risk that the person with whom he or she is conversing is an officer or someone who may report the conversation to an officer.

Intercepting or reading electronic mail (e-mail). Officers may not intercept and read an e-mail message during its

transmission without a special court order, as described earlier for interception of telephone conversations.[46] However, an officer does not need a special court order once the message has been transmitted. If a message has been unopened for 180 days or less, only a search warrant is necessary to read it.[47] If a message has been opened, or if it remains unopened for more than 180 days, then an officer may read the message by obtaining a search warrant or, with notice to the recipient of the message, by obtaining a subpoena or a court order.[48] The law allows delayed notice to the recipient under certain circumstances.[49]

Neither federal nor North Carolina law makes it unlawful to tape-record a telephone conversation in which one party to the conversation has given prior consent to its being tape-recorded.

Additional provisions allow a law enforcement officer to obtain subscriber information.[50] Further, they sometimes permit service providers to disclose information to officers voluntarily.[51]

Conducting video surveillance. Nonaural video surveillance (surveillance that does not record oral communications) is not regulated by federal or state wiretapping or eavesdropping laws.[52] However, video surveillance directed at places where a person has a reasonable expectation of privacy is a search under the Fourth Amendment, and usually a search warrant is required to conduct the surveillance.[53] For example, officers need a search warrant to place a nonaural video camera on a utility pole to record all activities in a person's backyard, when the backyard is surrounded by a ten-foot-high fence.[54] On the other hand, a nonaural video camera directed at people on a public street or sidewalk to observe possible drug transactions does not implicate anyone's reasonable expectation of privacy and may be used without a search warrant or other legal authorization.

Records in a Third Party's Possession

The U.S. Supreme Court has ruled that a person does not have a reasonable expectation of privacy in his or her bank records.[55] The Court reasoned that, in revealing his or her financial affairs to another, a bank customer takes the risk that the information will be conveyed by that person or institution to the government. However, the North Carolina General Assembly has enacted legislation that requires law enforcement officers to obtain appropriate legal process (a search warrant, a court order, or a subpoena) to obtain bank records.[56]

A U.S. Supreme Court case makes clear that a person does not have a reasonable expectation of privacy in his or her telephone records, including telephone numbers dialed from or to a telephone.[57] However, Congress has enacted legislation that requires law enforcement officers to obtain appropriate legal process to obtain telephone records.[58] Further, the North Carolina General Assembly has enacted legislation requiring a law enforcement officer to obtain a court order to use a device that records numbers dialed from or to a telephone.[59]

Many other records, such as personnel or school records, are subject to federal and state laws regulating disclosure. The protections for those records are discussed elsewhere in this issue of *Popular Government* (see pages 33 and 36).

Conclusion

This article has briefly surveyed some privacy and law enforcement issues involved with the Fourth Amendment and federal and state legislation. With constant technological advances, debate will become more intense about the proper balance between a person's right to privacy and the government's need to investigate crimes. These issues will be the subject of future court decisions and federal and state legislative activity that will continue to define the scope of individual privacy and law enforcement authority.

Notes

1. Examples of the government's interest in investigating conduct that is not necessarily criminal are workplace and school searches, discussed elsewhere in this issue of *Popular Government*; see pages 33 and 36.

2. Katz v. United States, 389 U.S. 347 (1967).

3. For a more detailed discussion of Fourth Amendment issues, *see* ROBERT L. FARB, ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (2d ed., Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1993) and ROBERT L. FARB, 1997 SUPPLEMENT TO ARREST, SEARCH, AND INVESTIGATION IN NORTH CAROLINA (Chapel Hill: Inst. of Gov't, The Univ. of N.C. at Chapel Hill, 1998). A new edition of ARREST, SEARCH, AND INVESTIGATION is expected in 2003.

4. The government's argument relied on Olmstead v. United States, 277 U.S. 438 (1928), and Goldman v. United States, 316 U.S. 129 (1942).

5. *See, e.g.,* Oliver v. United States, 466 U.S. 170 (1984).

6. Terry v. Ohio, 392 U.S. 1, 5 (1968).

7. *Terry*, 392 U.S. 1.

8. The Court adopted the balancing test from Camara v. Municipal Court, 387 U.S. 523 (1967), which ruled that conducting a routine building inspection without a warrant or consent violated the Fourth Amendment. As a result of that ruling, the North Carolina General Assembly enacted Section 15-27.2 of the NORTH CAROLINA GENERAL STATUTES (hereinafter G.S.), which requires an administrative inspection warrant to conduct such an inspection.

9. United States v. Brignoni-Ponce, 422 U.S. 873 (1975).

10. Adams v. Williams, 407 U.S. 143 (1972); United States v. Cortez, 449 U.S. 411 (1981).

11. Payton v. New York, 445 U.S. 573, 585–86 (1980).

12. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 48–52, and FARB, SUPPLEMENT, at 9.

13. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 86–87.

14. *See id.* at 87. Officers who are conducting a legitimate law enforcement function on private property are not violating North Carolina's criminal trespass laws. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 117 n.99.

15. Oliver v. United States, 466 U.S. 170 (1984).

16. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 87, 117 n.99.

17. State v. Tarantino, 322 N.C. 386, 368 S.E.2d 588 (1988).

18. Kyllo v. United States, 533 U.S. 27 (2001).

19. If exigent circumstances exist, then a search warrant is not required. For example, if a person is holding hostages within a home in a life-threatening situation, officers may use sense-enhancing equipment if they believe it will be useful in locating people in the home.

20. Even if the Court ruled that the Fourth Amendment would not bar use of certain technological instruments, Congress or state legislatures could legislate otherwise. For example, in 1994, Congress made it unlawful to intercept, without a court order, the radio portion of a cordless telephone communication transmitted between the cordless telephone handset and its base unit. Act of Oct. 25, 1994, Pub. L. No. 103-414, § 202(a), 108 Stat. 4290 (1994). At the time some courts had held that a person did not have a reasonable expectation of privacy in such conversations, which were readily overheard by people with scanners or radio receivers. *See, e.g.,* Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989); Price v. Turner, 260 F.3d 1144 (9th Cir. 2001).

21. California v. Ciraolo, 476 U.S. 207 (1986); Florida v. Riley, 488 U.S. 445 (1989). Flying over business premises is analyzed differently. *See* Dow Chemical Co. v. United States, 476 U.S. 227 (1986).

22. California v. Greenwood, 486 U.S. 35 (1988).

23. Officers also may make arrangements with sanitation workers to collect trash at a person's residence and give it to the officers. State v. Hauser, 342 N.C. 382, 464 S.E.2d 443 (1995).

24. Delaware v. Prouse, 440 U.S. 648 (1979).

25. *Id.* at 663. More recently the Court noted the likely constitutionality of such checkpoints in City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

26. Typically all cars are stopped except when traffic congestion requires that some cars be waived through.

27. State v. Sanders, 112 N.C. App. 477, 435 S.E.2d 842 (1993); State v. Tarlton, 146 N.C. App. 417, 553 S.E.2d 50 (2001).

28. Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990). G.S. 20-16.3A authorizes checkpoints for impaired drivers.

29. *Edmond*, 531 U.S. at 32. The Court in *Edmond* specifically did not decide whether a checkpoint would be unconstitutional if the primary purpose was permissible—for example, to check for impaired drivers—and a secondary purpose was to check for illegal drugs.

30. *Sitz*, 496 U.S. 444 (checkpoints to deal with highway safety); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (checkpoints to police the nation's border).

31. The Court recognized, however, the constitutionality of roadblocks set up immediately after the commission of a crime, such as a bank robbery, to stop a fleeing suspect.

32. Pennsylvania v. Mimms, 434 U.S. 106 (1977) (driver); Maryland v. Wilson, 518 U.S. 408 (1997) (passengers).

33. State v. Isleib, 319 N.C. 634, 356 S.E.2d 573 (1987) (decided under both U.S. and North Carolina constitution); California v. Carney, 471 U.S. 386 (1985); United States v. Johns, 469 U.S. 478 (1985); Michigan v. Thomas, 458 U.S. 259 (1982); Texas v. White, 423 U.S. 67 (1975); Chambers v. Moroney, 399 U.S. 42 (1975).

34. California v. Carney, 471 U.S. 386 (1985); State v. Isleib, 319 N.C. 634, 356 S.E.2d 573 (1987). Although the Court also has stated that a vehicle's mobility is another reason to permit a warrantless search, that reason hardly has much force when the Court permits a warrantless search even after a vehicle and its contents have been immobilized.

35. *See generally* 18 U.S.C.A. §§ 2510–2522, 2701–2711, and G.S. 15A-286 through -298.

36. A useful publication is CLIFFORD S. FISHMAN & ANNE T. MCKENNA, WIRETAPPING AND EAVESDROPPING (2d ed., Deerfield, Ill.: Clark Boardman Callaghan, 1995). The most current supplement, published by West Group, was issued in August 2001.

37. "Intercept" is defined in both federal and state law as "the aural or other acquisition of the contents of any wire, oral, or electronic communication through the use of any electronic, mechanical, or other device." 18 U.S.C.A. § 2510(4); G.S. 15A-286(13).

38. *See* FARB, SUPPLEMENT, at 16–17.

39. 18 U.S.C.A. § 2511(c), (d); G.S. 15A-287(a). However, such tape-recording is illegal under federal law if a private person intercepts a communication to commit a crime or a tortuous act (a civil wrong). Some states allow the tape-recording of a conversation only under limited circumstances, or prohibit it unless all the parties to the conversation have consented. *See* FISHMAN & MCKENNA, WIRETAPPING AND EAVESDROPPING §§ 6:15 through 6:28; 6:38.

40. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 218–23. Generally, officers may not deliberately elicit statements from a defendant—whether in custody or not—after his or her Sixth Amendment right to counsel for a criminal charge becomes operative. This right begins for a felony charge after a defendant's first appearance in district court or a defendant's indictment, whichever occurs first. Thus, for example, law enforcement officers who by themselves or through an informant deliberately elicit statements in a telephone conversation (whether recorded or not) from a defendant after his or her indictment may violate the defendant's Sixth Amendment right to counsel.

41. See note 39.

42. State v. Rickenbacher, 290 N.C. 373, 226 S.E.2d 347 (1976); State v. Shaw, 103 N.C. App. 268, 404 S.E.2d 887 (1991).

43. 18 U.S.C.A. § 2510(2); G.S. 15A-286(17) (definition of "oral communication"). *See* United States v. Turner, 209 F.3d 1198 (10th Cir. 2000); *In re* John Doe Trader Number One, 894 F.2d 240 (7th Cir. 1990); Tyler v. Berodt, 877 F.2d 705 (8th Cir. 1989); United States v. Harrelson, 754 F.2d 1153 (5th Cir. 1985).

44. See note 39.

45. United States v. White, 401 U.S. 745 (1971); State v. Levan, 326 N.C. 155, 388 S.E.2d 429 (1990). There is no Fourth Amendment issue when a private person records the conversation because the amendment applies only to the government and its agents.

46. The discussion in this section concerns obtaining information from a public service provider, such as America Online or Microsoft. The laws are somewhat different for nonpublic service providers.

47. 18 U.S.C.A. § 2703(a).

48. 18 U.S.C.A. § 2703(b).

49. 18 U.S.C.A. § 2705.

50. 18 U.S.C.A. § 2703(c).

51. For example, a service provider may divulge the contents of a communication to a law enforcement agency if the provider inadvertently obtained the communication and it appeared to pertain to the commission of a crime. 18 U.S.C.A. § 2702(b)(6).

52. United States v. Falls, 34 F.3d 674 (3d Cir. 1997).

53. It would be extremely unusual if a person who was present during the entire video surveillance had given prior consent to it or if exigent circumstances existed to excuse the requirement of a search warrant.

54. United States v. Cuevas-Sanchez, 821 F.2d 248 (5th Cir. 1987). Some courts have imposed rigorous requirements for search warrants for video surveillance. *See, e.g.,* United States v. Koyomejian, 970 F.2d 536 (9th Cir. 1992).

55. United States v. Miller, 425 U.S. 435 (1976).

56. G.S. 53B-1 through -10. *See also* FARB, ARREST, SEARCH, AND INVESTIGATION, at 85.

57. Smith v. Maryland, 442 U.S. 735 (1979). Although the *Smith* Court ruled only that a person does not have a reasonable expectation of privacy in telephone numbers that a person dials on his or her telephone, the ruling clearly would also apply to telephone numbers dialed to that telephone and to telephone records maintained by the telephone company.

58. *See* FARB, ARREST, SEARCH, AND INVESTIGATION, at 86.

59. G.S. 15A-260 through -264. *See also* FARB, ARREST, SEARCH, AND INVESTIGATION, at 84–85. A "pen register" records numbers dialed from a telephone, and a "trap-and-trace device" records numbers dialed to a telephone.