OPINION

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4th Amendment in 21st century

Even many who cherish the "original meaning" of the Constitution recognize that provisions drafted in the 18th century must be interpreted in light of changing technology. That is especially true of the 4th Amendment's guarantee of the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

When the amendment was adopted, unreasonable searches involved physical trespass. But in 1967 the court ruled that the 4th Amendment was violated when federal agents affixed a wiretap to the outside of a telephone booth being used by a gambler. What mattered, wrote Justice John Marshall Harlan, was whether the suspect had a reasonable expectation of privacy.

Flash forward to 2001, when the court held that police violated the rights of a drug suspect when they aimed a thermal imaging device at his house to determine whether the heat inside was consistent with marijuana cultivation. Justice Antonin Scalia wrote: "Where, as here, the government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

The latest controversy over adapting the privacy protections of the 4th Amendment to new realities concerns global positioning system, or GPS, devices, until recently an exotic technology but now as ubiquitous as the cellphones of which they are a prized feature. Seven months after the Supreme Court sidestepped a major decision on the constitutionality of warrantless GPS tracking of criminal suspects, a federal appeals court in Cincinnati has issued a decision on the subject that seems as antiquated as a rotary phone.

Melvin "Big Foot" Skinner was a drug runner who was apprehended after Drug Enforcement Administration agents established his location through signals sent by his pay-as-you-go cellphone. The agents could have sought a warrant for the information by showing probable cause that Skinner was involved in drug trafficking, but instead they obtained an order by convincing a magistrate judge that the desired data were merely "relevant and material to an ongoing criminal investigation."

Writing for the court, Judge John M. Rogers dismissively observed: "When criminals use modern technological devices to carry out criminal acts and to reduce the possibility of detection, they can hardly complain when the police take advantage of the inherent characteristics of those very devices to catch them." Perhaps not, but the 4th Amendment and the requirement of probable cause are designed to protect innocents as well.

Rogers' decision reflects two legal principles that have been undermined by technological changes. The first is that although the contents of a phone conversation may be protected from casual police intrusion, phone records are not. In the era of land lines, the courts concluded that callers didn't anticipate that the exchanges they dialed to and from would be kept secret. In the cellphone era, however, those records can pinpoint not just who called whom but also the phone's variable location.

The decision also is consistent with a distinction the Supreme Court has drawn between papers in the sole possession of a citizen, and bank and phone records that are the legal property of a corporation. But that difference is also an anachronism.

Justice Sonia Sotomayor suggested as much earlier this year in a concurring opinion when the court held that the surreptitious attachment of a GPS device to a drug dealer's vehicle was a "search" under the 4th Amendment. It may be necessary, Sotomayor wrote, "to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."

BLOG | THE WINE PRESS

"2012 Grape Harvest is right around the corner, and in fact will start this week for some growers with early varieties going to large wineries. The Lake Erie region, which accounts for about 2/3rds of all New York vineyard acreage and tonnage [...] will unfortunately have a very small crop this year due to a late spring frost which killed the buds." For more on the harvest, go to **http://www.the-leader.com/community/blogs/thewinepress_blog**.

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COMMENTARY

A new New York approach

TOM O'MARA

The Business Council of New York State, in its recent review of this year's legislative session, identified a "commitment to a pro-growth, pro-jobs agenda" as the bottom line for judging the performance of the State Legislature in 2012 (you can read the full review on www.bcnys.org).

For the leading upstate New York advocacy group Unshackle Upstate, which released its own rundown (www.unshackleupstate.com), the bottom line is a commitment to fiscal responsibility, pro-taxpayer initiatives and private-sector economic growth.

I think that pretty well sums up how we're defining ourselves in New York State government nearly two years into the administration of Governor Andrew Cuomo. From the day he took office, this governor's mantra has been "jobs, jobs, jobs" as the overriding focus for turning around the fortunes and the future of New York. And believe me, it's been music to the ears of many state legislators, particularly upstate legislators, who spent so many of the pre-Cuomo years railing against a prevailing tax-and-spend mindset in Albany.

But enough said on that old divide. Because what's most important today – and moving forward into the 2013 legislative session – is staying focused on this newfound momentum to keep rebuilding our economy and restoring fiscal responsibility to our government.

The key point is this one: it's beginning to work. We're not just talking about a new approach to turning around key state industries; we're backing it up with actions.

Take just two examples from 2012.

Exhibit #1: New York's first-ever "Yogurt Summit" earlier this month brought together leaders from the burgeoning yogurt industry, farmers and other agricultural industry leaders and state officials to share ideas and suggestions for solidifying and strengthening the state's position as a national leader in this growing economic sector. To call it a "growing" industry is a bit of an understatement. The number of yogurt processing plants in New York has increased from 14 to 29 since 2000, while the plants' production doubled in the six years from 2005 to 2011. At the same time, the amount of milk used to make yogurt in New York increased dramatically from 158 million pounds to approximately 1.2 billion pounds due to the exploding popularity of Greek-style yogurt, which requires three times more milk to produce than traditional yogurt.

That's impressive enough in and of itself, but the key point is that we're focusing on the spin-off benefit, the so-called multiplier effect on other industries – especially the dairy industry, the backbone of New York's No. 1 agricultural industry.

The thrust of the recent Yogurt Summit, then, sought to capture the real prize: how New York can take every step to encourage and grow the yogurt industry, and in ways that will work in partnership to strengthen our dairy farmers and other manufacturers. The yogurt industry is growing by leaps and bounds and because of it, we have a once-in-a-lifetime opportunity to strengthen the backbone of New York's agricultural industry, dairy, and boost farming communities across upstate New York. The summit made it clear that we're not about to let this opportunity pass us by. That's a welcome change for New York government. It's a move and a direction that's going to be embraced by many small farmers locally and statewide.

As Governor Cuomo said, "As an entrepreneurial government, we brought all the stakeholders to the table to help the dairy industry and yogurt producers enhance their relationship so it is both beneficial to the companies and to the state. New York will do everything it can to facilitate a strong, prosperous partnership."

I like that phrase, entrepreneurial government. I like the idea of governing it holds. It signals a commitment to recognizing economic opportunities and then harnessing the cooperation, the energy and all of the available resources to seize the opportunity.

Sen. Tom O'Mara is a Republican from Big Flats.

ANOTHER VIEW

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Court ruling: Bad air and bad reasoning

Environmental regulation is a complicated business, but the Environmental Protection Agency's Cross-State Air Pollution Rule is, in principle, fairly simple. It aims to protect people who live in states that are downwind of the deadly pollutants emitted by power plants in adjacent states - so if coal smoke from Texas, say, is poisoning the air in Louisiana, the EPA can force Texas to be a better neighbor by cutting emissions. Yet differing court interpretations of the EPA's authority have turned what should be straightforward into a continuing legal nightmare, endangering tens of thousands of American lives in the process.

The latest twist came Tuesday when the appeals court for the District of Columbia overturned the Cross-State Air Pollution Rule. It was a confusing decision. Four years ago, the court declared that the EPA's rules, developed during the George W. Bush administration, were too weak to adequately protect the health of people in downwind states. But after the Obama EPA crafted a new rule designed to pass the court's scrutiny, two judges on the three-judge panel - both of them, notably, Bush appointees - said it had gone too far and was now usurping states' rights and overstepping its powers. This provoked a blistering dissent from the third judge - an appointee of President Clinton - saying the majority's decision was "based on the court's own notions of absurdity and logic that are unsupported by a factual record, and a trampling on this court's precedent."

Is there judicial activism at play here? That's not an unreasonable conclusion, though the definition of "activism" seems to be any decision that disagrees with the political opinions of the accuser. What is clear is that the majority wrote a highly defensive decision that seems to twist itself into knots to reinterpret the EPA's powers under the Clean Air Act in ways that aren't supported by precedent.

What's also clear is that the delay in implementing this pollution rule is costing human lives. Nitrogen oxide and sulfur dioxide from power plants contribute to smog and acid rain in Midwestern and Eastern states. The rule, which was supposed to go into effect in January, would prevent up to 34,000 premature deaths annually, according to the EPA.