



Written by [Joe Wolverton, II, J.D.](#) on June 21, 2014

## Court Rules Feds Cannot Indefinitely Hold Seized Computer Files

In a decision handed down on June 17, the Second Circuit Court of Appeals reinforced the right to be free from unreasonable searches and seizures as protected by the Fourth Amendment.

Judge Denny Chin, writing for the court in the case of *United States v. Ganius*, ruled that it is a violation of the Fourth Amendment for the federal government to indefinitely maintain control of computer files that were originally seized pursuant to a valid warrant, when that data are not included in the scope of the warrant.



“Like 18th Century ‘papers,’ computer files may contain intimate details regarding an individual’s thoughts, beliefs, and lifestyle, and they should be similarly guarded against unwarranted Government intrusion. If anything, even greater protection is warranted,” the court held.

It further ruled:

If the 2003 warrant authorized the Government to retain all the data on Ganius’s computers on the off-chance the information would become relevant to a subsequent criminal investigation, it would be the equivalent of a general warrant. The Government’s retention of copies of Ganius’s personal computer records for two-and-a-half years deprived him of exclusive control over those files for an unreasonable amount of time. This combination of circumstances enabled the Government to possess indefinitely personal records of Ganius that were beyond the scope of the warrant while it looked for other evidence to give it probable cause to search the files. This was a meaningful interference with Ganius’s possessory rights in those files and constituted a seizure within the meaning of the Fourth Amendment.

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Although the *Ganius* decision does not set forth any specific timeline for the return of digital information seized in an investigation, it does reinforce the applicability of the overarching “reasonableness” standard, explaining that “the Government clearly violated Ganius’s Fourth Amendment rights by retaining the files for a prolonged period of time and then using them in a future criminal investigation.”

Of course, the action of the government in the *Ganius* case seems analogous to the surveillance of telephone and computer activities of millions of Americans and the storing of that data indefinitely in massive database farms such as that recently brought online in the suburbs of Salt Lake City, Utah.

A bit of background will provide the context necessary to understand the critical importance of the case. The *Washington Post* provided us with that recap:

In 2003, the government obtained a warrant to search Ganius’s accounting business for evidence of



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fraud. When executing the 2003 warrant, the agents did not seize any physical computers. Instead, they made images of several computers (that is, perfect copies of every file on the computers) and took away the images while leaving the original computers behind. The agents copied the images onto 19 DVDs. Investigators took their time in searching the DVDs, but by a year later they had searched the images for the files that were responsive to the warrant. The agents kept the DVDs, which they saw as government property. Later on, agents came to think that Ganius was involved in tax offenses, too. They realized that the evidence of tax crimes could be on the DVDs in their possession. The agents obtained an additional warrant to search the DVDs again, this time for evidence of tax offenses. The government ended up searching the DVDs under the second warrant in 2006, about two-and-a-half years after it had initially entered Ganius's business and copied his computer files pursuant to the 2003 warrant.

The June 17 decision prohibits such semi-permanent possession of data, describing such government overreach as analogous to the general warrants that were universally despised by our Founding Fathers. The court wrote, quoting an earlier decision: "The chief evil that prompted the framing and adoption of the Fourth Amendment was the 'indiscriminate searches and seizures' conducted by the British 'under the authority of general warrants.'"

Adding, by way of additional historical context, "The British Crown had long used these questionable instruments to enter a political opponent's home and seize all his books and papers, hoping to find among them evidence of criminal activity. The Framers abhorred this practice, believing that 'papers are often the dearest property a man can have' and that permitting the Government to 'sweep away all papers whatsoever,' without any legal justification, 'would destroy all the comforts of society.'"

In his restatement of Blackstone's *Commentaries*, Founding Era jurist St. George Tucker condemned the execution of general warrants:

The case of general warrants, under which term all warrants not comprehended within the description of the preceding article may be included, was warmly contested in England about thirty or thirty-five years ago, and after much altercation they were finally pronounced to be illegal by the common law. The constitutional sanction here given to the same doctrine, and the test which it affords for trying the legality of any warrant by which a man may be deprived of his liberty, or disturbed in the enjoyment of his property, can not be too highly valued by a free people.

In 1776, George Mason, the principal author of the Virginia Declaration of Rights — a document of profound influence on the construction of the federal Bill of Rights — upheld the right to be free from such searches, as well:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Orin Kerr, writing for the *Washington Post*, declares the decision to be "hugely important," because, "Whenever government agents copy files pursuant to a warrant, they are going to have to delete or return all the files that are non-responsive as a matter of Fourth Amendment reasonableness."

The rights guaranteed by the Fourth Amendment are under nearly constant assault by the forces of the federal government. From NSA surveillance to IRS use of tax records as a political tool, the papers, effects, and homes of all Americans are now de facto denied the protections our Founders held so dear.



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The undeniable truth is that not a single one of our Founding Fathers, not even the most ardent advocate of a powerful central government, would have remained even one day at the Philadelphia Convention if he had believed that the government they were creating would become the instrument of tyranny that it has become.

Taken together, the federal government's consolidation of control and cognizance reduces every American to the status of suspect.

More often than not, the courts, Congress, and the president have formed an unholy alliance bent on obliterating the Constitution and establishing a country where every citizen is a suspect and is perpetually under the never-blinking eye of the government.

The establishment will likely continue construction of the surveillance until the entire country is being watched around the clock and every monitored activity is recorded and made retrievable by agents who will have a dossier on every American.

The fight can yet be won, though. Americans can attack the sprawling surveillance state on several fronts. First, we must elect men and women to federal office who will honor their oaths of office to preserve, protect, and defend the Constitution. Then, once in office, each of them must be held immediately accountable for each and every violation of that oath.

Next, we must fill our state legislatures with men and women who will refuse to enforce any act of the federal government that exceeds the boundaries of its constitutionally granted powers and never accept even a degree of deviation from the blueprint drawn in Philadelphia in 1787.

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