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March 19, 2016

OU professor: Fourth Amendment at heart of dispute between FBI, Apple

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POINT OF VIEW | APPLE VS. FBI

Fourth Amendment at heart of dispute

BY STEPHEN E. HENDERSON

The dispute between the FBI and Apple Inc. over the unlocking of the iPhone used by one of the San Bernardino shooters is important to all Americans. And so it's good that it is getting a wide airing. But when it comes to issues that have complicated tradeoffs, it can be important not just that we have the conversation, but that we use the right words. And here the debate deserves very mixed reviews.

Emblematic of those getting it wrong is Sen. Tom Cotton, R-Ark., who has accused Apple of protecting "a dead ISIS terrorist's privacy over the security of the American people." Cotton would do well to reread the text of the Fourth Amendment. Indeed, if one were to articulate what it means to be an American, one could do far worse than to reply something about having First and Fourth Amendment rights. The Fourth Amendment says, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

Legal historians debate the Framers' purpose in choosing these words, but in many respects their ambiguity has been their saving grace. The world has changed dramatically from that of the founding generation, from the rise of paramilitary police to ever-more-deadly guns to science fiction-like technologies. The Fourth Amendment's text has permitted courts, including the U.S. Supreme Court, to craft responsive rules that protect our persons, homes and things. Wielding the constitutional criterion of "reasonableness," much can be done, even if few are ever com-

pletely satisfied with those results. But one word seems especially well-chosen: the right to be secure. It's hard to have any meaningful security in one's home if criminals regularly violate it. This requires good locks and attentive law enforcement. The same goes for one's papers, which today tend to reside in one of the constitutionally protected "effects," a mobile phone.

By the same token, it's hard to have any meaningful security in one's home or phone if police regularly violate it, or if the government requires that we remove our good locks. Thus, the Department of Justice poorly chose its words when it disappointingly alleged in a recent court filing that this controversy concerns merely a "marketing decision," and that the government demand "raises no Fourth Amendment concerns." Nothing could be further from the truth. The dispute — and there are important arguments on both sides of it — goes to the heart of the Fourth Amendment.

The tradeoff is not, as Cotton framed it, one of privacy vs. security. Instead, the sometimes difficult tradeoff is between privacy and safety. A meaningful measure of security requires both. Achieving that ideal balance is difficult, and we will not all agree on where to draw the lines. Indeed, we will not all agree in this case, with Apple urging privacy and the Department of Justice and its FBI urging safety.

But we can all agree on one thing: As Americans, we should all treasure security in our persons, houses, papers and effects. That debate was settled in 1791.



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