Attachment B

Carroll: Protecting Coloradans' privacy through a ballot amendment

By Vincent Carroll The Denver Post The Denver Post
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It was surprising to hear Colorado Deputy Attorney General Matthew Durkin, as well as Tom Raynes of the District Attorneys' Council, advise state senators at a recent hearing to trust the courts to protect our privacy against unreasonable searches and seizures.

To be sure, Durkin ticked off a notable list of court decisions that are supposed to keep government from spying on our conversations or movements, or rummaging through our personal property. As a result, he argued, it was unnecessary for the legislature to add the phrase "electronic and other data" to the state constitution's equivalent of the Fourth Amendment.

The courts already include electronic data among the "persons, houses, papers, and effects" that the Fourth Amendment protects from warrantless searches, he said. We've trusted the courts to get it right for 220 years, he added, and "it's worked out very well."

Well, in the context of our entire history maybe the courts have done a decent job of protecting liberty, but along the way they've often been terribly ineffective or unwilling to do the job.

Lest we forget, the high court was perfectly willing once upon a time to proclaim, in the Dred Scott case, that blacks "had no rights which the white man was bound to respect." A few decades later it had no trouble upholding "separate" but "equal" facilities in Plessy vs. Ferguson.

In the 1920s, the court sanctioned a state law authorizing forced sterilizations with the unforgettable quip that "three generations of imbeciles are enough." And justices would also give their blessing to the herding of Japanese-Americans into internment camps in World War II — just to note a few of its many regrettable blunders.

Nor did such judicial insults to liberty and constitutional rights end in the modern era. In 1990, the Supreme Court basically wrote the First Amendment's free-exercise clause out of the Constitution in a case involving certain Indians' use of peyote, prompting Congress to step in and pass — nearly unanimously — the Religious Freedom Restoration Act of 1993.

And let's not forget the court's appalling decision in 2005 justifying the condemnation of a New London, Conn., neighborhood in the name of private economic development.

The point is, the courts *don't* always get it right when it comes to protecting freedom. And if the General Assembly wants to ask Colorado voters to add "electronic and other data" to our state's list of property protected from warrantless searches — purely as a matter of emphasis — by all means why not do it?

It's not as if we know exactly how our right to privacy is going to shake out. The U.S. Supreme Court heard arguments just this week on whether police should be able to search data on a cellphone of someone they arrest. News reports suggest justices were skeptical, thankfully, of police having unfettered access to phone data without a warrant, as if the material were no

different from papers you might stuff in your pocket. Yet that issue and others remain in flux.

Many of us keep valuable personal documents in cyberspace, but those have less Fourth Amendment protection than physical documents stored in space rented from a third party. Why? Because of an outdated legal theory from the 1970s.

Colorado voters can't direct the federal courts, of course. And even if voters agreed to the proposed amendment, state judges would still have to determine which electronic data are personal and private. Yet those judges would at least understand, presumably, that Coloradans place a high priority on electronic privacy.

The state Senate, to its credit, passed the proposed amendment without dissent. Let's hope the House musters a similar degree of solidarity on the subject.

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