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Fourth Amendment's reasonableness standard a work in progress?

One of the last cases decided by the U.S. Supreme Court in June concerned the role of warrants in traffic stops where police want to use either blood or breath tests to determine the alcohol level of an arrestee. *Birchfield v. North Dakota*, No. 14-1468 (decided June 23).

The result?

In the words of Laurie Levenson, a professor at Loyola Law School Los Angeles, "The court split the baby."

On the one hand, the majority opinion written by Justice Samuel A. Alito Jr. held that no warrant was necessary to administer a breath test to an arrestee. Relying on the "search incident to arrest" doctrine, it held that an arrest per se would justify use of a breath test.

The court held that the impact of breath tests on privacy is slight, while the need for such evidence is important for public safety.

On the other hand, the court held that a warrant was required to conduct a blood test on an arrestee. This is because blood tests are significantly more intrusive on a person's privacy and thus merit more protection under the Fourth Amendment.

Yet, not all the justices agreed with this seemingly Solomonic decision.

Justice Clarence Thomas, writing only for himself, would have found that warrants were unnecessary for either breath or blood tests. He asserted that the natural metabolization of the alcohol in the body was itself an exigent circumstance that should excuse the police from ever having to obtain a warrant for either test.

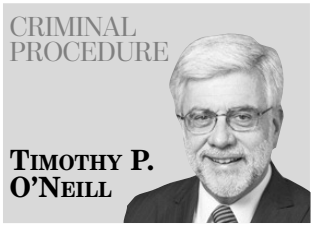
But Justice Sonia M. Sotomayor, in an opinion joined by Justice Ruth Bader Ginsburg, disagreed. She wrote that warrants should be required for both breath and blood tests. She saw no reason to diverge from what she characterized as the default rule that warrants are needed for all searches. Only in fact-specific situations of exigent circumstances should the requirement of a warrant be excused.

Birchfield is obviously significant for the effect it will have on traffic stops triggered by suspicion of drunken driving. But it raises a broader constitutional issue as well: Just what is the role of the warrant in the Fourth Amendment? It is an issue that has never been completely resolved.

Start with the language of the Fourth Amendment:

"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."

The amendment can be divided into two clauses. The first clause describes the right it guarantees: reasonable searches and seizures by the government. Let's call this the "Reasonableness Clause."



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You could view the Fourth Amendment as expressing two separate ideas. First, it mandates that all searches and seizures must be reasonable. Second, it also lays out the procedures for obtaining a warrant.

The second clause begins with the words "and no Warrants" and describes in detail the requirements necessary to obtain one. Let's call this the "Warrant Clause."

The question is what is the relation between these two clauses?

One way of viewing them would be to say that the Warrant Clause establishes the only way the government can make searches and seizures reasonable. Seen in this light, the Fourth Amendment expresses one unified idea: The only way to conduct a reasonable search and seizure is pursuant to a properly obtained warrant.

You could say that the "and" between the "Reasonableness Clause" and the "Warrant Clause" is actually an equal sign: reasonableness equals a warrant. Thus, the Fourth Amendment is actually one idea: the default rule is that searches and seizures must be obtained through a warrant in order to be reasonable.

But there is another way to interpret it. You could view the Fourth Amendment as expressing two separate ideas. First, it mandates that all searches and seizures must be reasonable. Second, it also lays out the procedures for obtaining a warrant.

But nothing in the Fourth Amendment says that only searches and seizures with warrants are reasonable. Some searches and seizures may very well be unreasonable unless conducted with a warrant. But other searches and seizures are obviously reasonable without a warrant, e.g., the warrantless arrest of a fleeing felon.

According to this view, while searches and seizures always have to be reasonable, there is no reason why some of them cannot ordinarily be reasonable without a warrant.

The strongest proponent of this view was the late justice Antonin G. Scalia. The most concise summary of this position can be found in his concurring opinion in *California v. Acevedo*, 500 U.S. 565, 581-584 (1991).

The Warren Court followed the view that obtaining a warrant is the default position. But Scalia notes that the so-called "warrant requirement" had become so riddled with exceptions that it [is] basically unrecognizable."

He stresses that the "first principle" of the Fourth Amendment is simply "reasonableness." There should be no presumption that a warrant is ever necessary.

Whether it is required will always depend on the facts of the individual situation.

So where is *Birchfield* in this? Sotomayor's opinion follows the Warren Court's view. She states that "securing a warrant before a search is the rule of reasonableness." She supports this with a citation to a Warren Court case from 1967. But what is striking is that her authority for this "warrant presumption" theory pretty much ends there in the '60s.

Contrast this with Alito's majority opinion. It cites a 2011 Roberts Court case that challenges the Warren Court's view of the necessity of warrants: "The text of the Fourth Amendment does not specify when a search warrant must be obtained." *Kentucky v. King*, 563 U.S. 452.

He then cites Scalia's concurrence in *Acevedo* for the proposition that the Fourth Amendment does not provide that a warrant is a hard-and-fast requirement for a reasonable search.

While Alito concedes that the court has inferred that a warrant must usually be secured, he then cites another Roberts Court case for the proposition that the need for a warrant is generally decided by weighing the intrusion of privacy against the government's need for the evidence. *California v. Riley*, 573 U.S. (2014).

In *Birchfield* only Sotomayor and Ginsburg used the traditional Warren Court approach of viewing a warrant as the default Fourth Amendment rule. The majority appears more attuned to Scalia's view that "reasonableness" is the only inflexible requirement of the Fourth Amendment.

It may be an issue on which Scalia will leave a lasting imprint in the Supreme Court.