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Fourth Amendment builds some muscle

The comeback story of the last decade in criminal law continues to be the resurgence of the warrant. This past term, the U.S. Supreme Court held that a warrant was required both to enter curtilage to search a car and to access cell site location information. A concept that in the 1990s seemed to be losing ground now seems on the way to at least a partial recovery.

First, some background.

The text of the Fourth Amendment states: "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."

What is the most important word in the Fourth Amendment? Oddly enough, you could make a case that it is the word "and."

That's because the Fourth Amendment is essentially composed of two clauses. The first clause can be described as the "Reasonableness Clause" which states that the general command of the amendment is that searches and seizures cannot be unreasonable.

The second clause is the "Warrant Clause" that includes both the details of what a warrant must include and the amount of evidence necessary to obtain it.

It is the "and" between these two clauses that is problematic. This is because it is debatable whether the two clauses express one idea or two separate ideas.

The "One Idea" view sees the default rule of the Fourth Amendment as providing that no search or seizure can be reasonable without a warrant. Under this reading, the "and" between the two clauses functions as something like an equal sign in mathematics, i.e., a warrant is both necessary and sufficient to make a search or seizure reasonable.

On the other hand, the "Two Ideas" view insists that the two clauses express discrete ideas. The first clause provides that all searches and seizures must be reasonable. The second clause defines what a warrant requires. Yet the "Two Ideas" view insists that there is no absolute connection between the two clauses.

Some reasonable searches require warrants; in that case, the second clause provides the detail. Yet there are also searches and seizures that can be accomplished reasonably without a warrant. The "Two Ideas" view sees the "and" between the clauses as literally conjoining two discrete concepts.

The role of the warrant became particularly important once the Warren Court extended the Fourth Amendment exclusionary rule to the states in 1961 in *Mapp v. Ohio*, 367 U.S. 643. Starting then, a defense attorney in either a state or federal court could exclude incriminating evidence against her client if she could show that the evidence was obtained through a warrantless search performed in a situation where a warrant was constitutionally required.

But the defense-friendly Warren Court of the 1960s soon gave way to the prosecution-friendly Burger Court of the 1970s and the Rehnquist Court of the '80s and '90s. They realized that one way to make it easier for the prosecution to admit evidence at a criminal trial was to find that a particular type of search did not require a warrant.

For example, back in the 1920s the Supreme Court had held that the search of an automobile can be performed without a warrant as long as there is probable cause. *Carroll v. U.S.*, 267 U.S. 132 (1925). By 1991, Justice Antonin G. Scalia cataloged nearly 20 such "warrant exceptions." In addition to the "automobile exception," he noted, for example, searches incident to arrest, border searches, administrative searches, exigent circumstances, welfare searches, inventory searches, airport searches and school searches.

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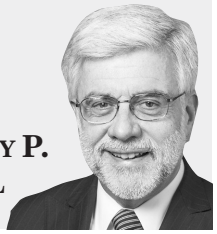

TIMOTHY P. O'NEILL

Timothy P. O'Neill is the Edward T. and Noble W. Lee Chair in Constitutional Law for 2014-15 at The John Marshall Law School in Chicago. Readers are invited to visit his Web log and archives at jmls.edu/oneill.

Another way to avoid the warrant requirement was to hold that the police activity simply was not a search and thus fell outside the Fourth Amendment.

For example, the Burger and Rehnquist Courts held that it was not a search for the police to search garbage outside a house (*California v. Greenwood*, 486 U.S. 35 (1988)); not a search to do a flyover of real property (*California v. Ciraolo*, 476 U.S. 207 (1986); and not a search for police to look for evidence on "open fields" owned by a person (*Oliver v. U.S.*, 466 U.S. 170 (1984)).

Yet the Supreme Court in the 21st century has shown a renewed interest in the warrant requirement. What makes this trend so intriguing is that is seems to be the result of the convergence of two separate views: a traditional pro-defense tack combined with a strong libertarian streak.

For example, back in 2001 the Supreme Court found that the government's use of a thermal imager on a private residence constituted a search requiring a warrant. They held this despite the fact that the police never entered the owner's property and the device only measured the heat escaping the house. (The police considered excessive heat as an indication that the owner was growing marijuana inside.)

In a 5-4 decision, the court rejected the dissent's view that discovering the amount of heat in the house was a de minimis intrusion not covered by the Fourth Amendment. Instead, the majority held that "in the home ... all details are intimate details, because the entire area is held safe from prying government eyes." The author of this opinion was Scalia. *Kyllo v. U.S.*, 533 U.S. 27.

Since then, there has been a steady stream of opinions characterizing various police activities as searches requiring warrants. The court has held that installing a GPS device on a car in a public place is a search requiring a warrant (*Jones v. U.S.*, 132 S.Ct. 945 (2012)); that performing a blood-draw on a drunken driving suspect is a search that generally requires a warrant (*Missouri v. McNeely*, 569 U.S. 141 (2013)); that a warrant is needed to search a cellphone's contents during an arrest (*Riley v. California*, 573 U.S. (2014)); that a warrant is needed to use a drug-sniffing dog on the curtilage of a home (*Florida v. Jardines*, 133 S.Ct. 1409 (2013)).

The court added to this list during its 2017 term. First, it held that police are not allowed to enter a home's curtilage without a warrant even when they are there to perform a warrantless search of the car under the "automobile exception."

The court basically held that the heightened privacy in a home trumps the lesser privacy interest in a car. *Collins v. Virginia*, No. 16-1027 (May 29, 2018). And in a bitterly contested 5-4 decision, it held that a warrant was necessary to obtain cell site location information that would provide a map of a person's movements over a period of time. *Carpenter v. U.S.*, No. 16-402 (June 22).

As for the future, consider Justice Anthony M. Kennedy's voting record on these cases. Kennedy was in the majority in *Jones, McNeely, Riley* and *Collins*. But he dissented in *Kyllo, Jardines and Carpenter*. If confirmed, Brett M. Kavanaugh will have an important say in the future of the Warrant Clause.