Warrants Protect Privacy
Opposition Brief by Steven Errico



One of the hottest topics and most common applications for this year’s resolution is the idea of search warrants. Are they good? Are they bad? Whose side do they even support? They are common questions indeed. We will explore these questions and more in this brief.

In Stoa Lincoln-Douglas Release #11: “Public Safety” (AFF) (10/15/2018) by Drew Magness, he makes the argument:

Individual privacy says that criminals can keep anyone from going onto their property and prove their wrongdoing. Most civilized criminal justice systems have recognized this idea as a barrier to public safety and removed it for the sake of truth-seeking.

In America, we allow officers of the law to violate the privacy of suspected criminals upon obtaining probable cause of a crime. The very act of obtaining probable cause is an act of truth-seeking. When we allow search warrants, we’re saying that the right to privacy should be suspended in order to find the truth. We require probable cause because we’re ensuring that this action will actually help us seek the truth. And it works. Max Minzer, Assistant Professor at the Benjamin N. Cardozo School of Law wrote in the Texas Law Review,

“Searches pursuant to warrants issued on a probable cause standard recover evidence at very high rates, usually exceeding 80%. By contrast, warrantless searches, even when officers allege they have probable cause, succeed at far lower rates, recovering evidence as infrequently as 12% of the time.”

Without search warrants, law enforcement offers would be crippled in their ability to keep you safe. We’d be unable to stop criminals from viciously breaking the law again and again. Truth-seeking allows our police officers to stop the bad guys. Yet, privacy lets them walk free as we’ll see in contention 2.

Essentially, the argument being made is that search warrants are a violation of individual privacy, thus they are a perfect example of truth-seeking being valued above individual privacy. After all, they do allow the government to go into someone’s house and search their stuff. But is that really all they are? If it is, why do we even force police to go through the painstaking process of meeting all the requirements for getting one–if all we wanted to do was give them the ability to violate privacy whenever they wanted?

This brief will, for the most part, focus around one main idea: search warrants are, and have always been, a means by which privacy is protected, not violated. They still allow for police to do their jobs, but they have always been first and foremost a protection of privacy. We will explore the history of search warrants and examine some legal terms and court cases to determine what the purpose of search warrants actually is, and in doing so I hope to give you some proverbial ammunition against these Affirmative arguments.

Warrants Protect Privacy

History

Miller, Steven. “The History of the Search Warrant.” Legal Beagle, 21 Nov. 2017, <https://legalbeagle.com/6123799-history-search-warrant.html>.

The Fourth Amendment of the United States Constitution defines the right of people not to be unreasonably searched or seized and that no warrants can be issued except by probable cause. This summation of the Fourth Amendment and the historical basis of the search warrant law began during the Colonial era.

**British Warrants**

Warrant laws have an early history which started in Britain. Even though British citizens had the right to defend their homes, British agents had been given authority to enter and arrest or execute an individual within a home to enforce the King’s orders. Once England had established colonies in America search and seizure laws were enacted because of the smuggling of prohibited goods.

**Colonial Background**

Lifelong writs (authoritative court documents) were given to English agents within the colonies to search property for illegal contraband. These writs were not welcomed within the colonial communities and by 1760 opposition grew against these documents. James Otis, a Plymouth lawyer, influenced the Colonists to reject these writs because they infringed upon the liberties of the people.

**Words of Influence**

John Adams, a famous early American revolutionary, used James Otis’s influence to claim that the unjust writs were a cause for independence from England. Many did not agree with his ideas at first but this situation changed when more legal issues were being raised by the colonist and their rights. Before long the American colonies were fighting a war of independence from British rule.

**Bill of Rights**

After the Revolutionary War, America was an independent country in need of a government. The Constitution was established by Framers and some of them wanted to outline the rights of the people. Others did not think it was necessary. Recent memories of war and the causes which led to it influenced the American people to form a Bill of Rights.

**Fourth Amendment**

The Fourth Amendment is a natural liberty contained within the Bill of Rights. This particular right was a part of the Constitution which guaranteed the early Americans that agents no longer would be able to unjustly search their homes without the proper authority (warrant) and proper cause. Adopted into the Constitution in 1791, the Bill of Rights became the law of the land.

Why They Were Created: The 4th Amendment

“Probable Cause.” Findlaw, <https://criminal.findlaw.com/criminal-rights/probable-cause.html>.

"Probable cause" generally refers to the requirement in criminal law that police have adequate reason to arrest someone, conduct a search, or seize property relating to an alleged crime. The probable cause requirement comes from the Fourth Amendment of the U.S. Constitution, which states that: "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 searched." As seen in those words, in order for a court to issue a warrant -- for someone's arrest, or to search or seize property -- there must be "probable cause."

The Exclusionary Rule: Keeping Officers in Check

“Search Warrant Requirements.” Findlaw, <https://criminal.findlaw.com/criminal-rights/search-warrant-requirements.html>.

If a government actor conducts an illegal search (one that violates the Fourth Amendment), the government cannot present any evidence discovered during that search at trial. Known as the "[exclusionary rule](https://criminal.findlaw.com/criminal-rights/the-fourth-amendment-and-the-exclusionary-rule.html)," this rule aims to deter police officers from conducting unreasonable searches.

Fruit of the Poisonous Tree: Strict Deterrence from Illegal Searches

“Search Warrant Requirements.” Findlaw, <https://criminal.findlaw.com/criminal-rights/search-warrant-requirements.html>.

In addition, evidence obtained through illegal searches cannot lead police to the discovery of other evidence. This legal rule, known as the "fruit of the poisonous tree," is also designed to prevent government actors from invading people's privacy by conducting unreasonable searches. If police know, so the theory goes, that any evidence they obtain based on what they discover in an illegal search will be thrown out, they won't conduct illegal searches in the first place.

Lots of Restrictions: Katz v. United States

"Katz v. United States." Oyez, 22 Dec. 2018, [www.oyez.org/cases/1967/35](http://www.oyez.org/cases/1967/35).

Acting on a suspicion that Katz was transmitting gambling information over the phone to clients in other states, Federal agents attached an eavesdropping device to the outside of a public phone booth used by Katz. Based on recordings of his end of the conversations, Katz was convicted under an eight-count indictment for the illegal transmission of wagering information from Los Angeles to Boston and Miami. On appeal, Katz challenged his conviction arguing that the recordings could not be used as evidence against him. The Court of Appeals rejected this point, noting the absence of a physical intrusion into the phone booth itself. The Court granted certiorari. Does the Fourth Amendment protection against unreasonable searches and seizures require the police to obtain a search warrant in order to wiretap a public pay phone? Yes. The Court ruled that Katz was entitled to Fourth Amendment protection for his conversations and that a physical intrusion into the area he occupied was unnecessary to bring the Amendment into play. "The Fourth Amendment protects people, not places," wrote Justice Potter Stewart for the Court. A concurring opinion by John Marshall Harlan introduced the idea of a 'reasonable' expectation of Fourth Amendment protection.

Restricts Cellphone Tracking

Totenberg, Nina. “In Major Privacy Win, Supreme Court Rules Police Need Warrant To Track Your Cellphone.” NPR, 22 June 2018, [www.npr.org/2018/06/22/605007387/supreme-court-rules-police-need-warrant-to-get-location-information-from-cell-to](http://www.npr.org/2018/06/22/605007387/supreme-court-rules-police-need-warrant-to-get-location-information-from-cell-to).

In a landmark decision, the U.S. Supreme Court ruled Friday that police must obtain a search warrant to access an individual's cellphone location information. The 5-4 decision imposes new limits on law enforcement's ability to get at the increasing amount of data that private companies amass in the modern technological age. Cellphone providers routinely keep location information for customers to help improve service. And until now, the prevailing legal theory was that if an individual voluntarily shares his information with a third party — for instance, by signing up for cellphone service — police can get that information without a search warrant. On Friday, the Supreme Court blew a hole in that theory. Writing for the court majority, Chief Justice John Roberts said that cellphone location information is a "near perfect" tool for government surveillance, analogous to an electronic monitoring ankle bracelet. The writers of the Constitution, he said, would certainly have understood that an individual has a privacy interest in the day-to-day, hour-to-hour and even minute-to-minute records of his whereabouts — a privacy interest that requires the government to get a search warrant before gaining access to that information.

Restricts Government Power: Carpenter v. United States

Totenberg, Nina. “In Major Privacy Win, Supreme Court Rules Police Need Warrant To Track Your Cellphone.” NPR, 22 June 2018, [www.npr.org/2018/06/22/605007387/supreme-court-rules-police-need-warrant-to-get-location-information-from-cell-to](http://www.npr.org/2018/06/22/605007387/supreme-court-rules-police-need-warrant-to-get-location-information-from-cell-to).

The Supreme Court agreed on Friday, declaring that the routine court order that police obtained in Carpenter's case required only a showing that police were seeking relevant information. A search warrant requires that police meet a far higher standard. "Big Brother is coming and we need to stop it. That seems to be the big takeaway from the opinion," said Orin Kerr, Fourth Amendment scholar at the University of Southern California. "It almost reflects an anxiety about technology thwarting privacy. If we don't stop the government here, what will they be able to do?" "This is a landmark privacy case," said Jameel Jaffer, director of the Knight First Amendment Institute at Columbia University. "It's also a very significant case for First Amendment freedoms — that is, for the freedoms of speech and the press and association. A government that can track your every movement without a warrant is a government that can freely monitor activist political associations, or monitor government employees' contacts with the press."

Restricts Government Access: Collins v. Virginia

Savage, David G. “Supreme Court Extends Privacy Protection to Cars in a Driveway.” Los Angeles Times, 29 May 2018, [www.latimes.com/politics/la-na-pol-supreme-court-privacy-20180529-story.html](http://www.latimes.com/politics/la-na-pol-supreme-court-privacy-20180529-story.html).

The Supreme Court on Tuesday extended the Constitution's privacy protection to include vehicles that are parked on a home's driveway or carport, ruling that police need a search warrant before they may inspect them.

In general, police may look closely at cars that are parked along public roads, without the need for a search warrant.

But in Tuesday's 8-1 ruling, the justices said a vehicle parked in a carport or on private property adjacent to a home deserves the privacy protection of the 4th Amendment.

"When a law enforcement officer physically intrudes" on private property and walks up to a house to look for evidence, "a search within the meaning of the 4th Amendment has occurred," wrote Justice Sonia Sotomayor in Collins vs. Virginia. "Such conduct thus is presumptively unreasonable without a warrant."

Tuesday's ruling closely tracks a decision in 2013 when the court ruled that police may not bring a drug-sniffing dog to the front porch of a home without a search warrant. In both instances, the justices said the 4th Amendment gives its greatest protection for homes and the private property surrounding them.

The court ruled in favor of Ryan Collins, a Virginia man who was convicted of stealing a motorcycle. Two officers in Albemarle County were in search of a distinctive orange-and-black-colored cycle they had seen speeding. After doing some research on Facebook, they saw Collins had posted a photograph of the cycle.

One officer stopped at the house where Collins was living and saw from the street what looked to be a motorcycle under a tarp. It was next to the house. The officer walked up the driveway, lifted the tarp and took several photos of the cycle. Collins was arrested and convicted.

The Virginia courts rejected his claim that the search was unconstitutional, citing the automobile exception to the 4th Amendment. In defending the conviction, the state's lawyers agreed an officer may not enter a closed garage, but they argued there was no such bar on checking a vehicle in plain sight on the property.

The Supreme Court disagreed with both the state's courts, and the state's fallback legal position about plain sight.

"We conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein," Sotomayor said.

Restricts Government Resources

Wolf, Richard. “Supreme Court Rules Police Need Warrant to Search Vehicle on Private Property.” USA Today, Gannett Satellite Information Network, 29 May 2018, [www.usatoday.com/story/news/politics/2018/05/29/supreme-court-upholds-privacy-rights-stolen-motorcycle/650958002/](http://www.usatoday.com/story/news/politics/2018/05/29/supreme-court-upholds-privacy-rights-stolen-motorcycle/650958002/).

The Supreme Court in recent years has been a firm defender of the Fourth Amendment protection against unreasonable searches and seizures. It has held that police cannot use GPS equipment to track vehicles or search cellphones without a warrant. Earlier this term in a pending case, the justices voiced concerns about government monitoring of suspects by tracking the location of their cellphones.

Warrant Loopholes are Seen as a Threat to Privacy

Ruiz, David. “A New Backdoor Around the Fourth Amendment: The CLOUD Act.” Electronic Frontier Foundation, 14 Mar. 2018, [www.eff.org/deeplinks/2018/03/new-backdoor-around-fourth-amendment-cloud-act](http://www.eff.org/deeplinks/2018/03/new-backdoor-around-fourth-amendment-cloud-act).

There’s a new, proposed backdoor to our data, which would bypass our Fourth Amendment protections to communications privacy. It is built into a dangerous bill called the CLOUD Act, which would allow police at home and abroad to seize cross-border data without following the privacy rules where the data is stored. This backdoor is an insidious method for accessing our emails, our chat logs, our online videos and photos, and our private moments shared online between one another. This backdoor would deny us meaningful judicial review and the privacy protections embedded in our Constitution. This new backdoor for cross-border data mirrors another backdoor under Section 702 of the FISA Amendments Act, an invasive NSA surveillance authority for foreign intelligence gathering. That law, recently reauthorized and expanded by Congress for another six years, gives U.S. intelligence agencies, including the NSA, FBI, and CIA, the ability to search, read, and share our private electronic messages without first obtaining a warrant. The new backdoor in the CLOUD Act operates much in the same way. U.S. police could obtain Americans’ data, and use it against them, without complying with the Fourth Amendment.

Sibilla, Nick. “Iowa Supreme Court Closes Warrant Loophole, Slams U.S. Supreme Court For Weakening Fourth Amendment.” Forbes, Forbes Magazine, 14 Aug. 2018, [www.forbes.com/sites/nicksibilla/2018/08/13/iowa-supreme-court-closes-warrant-loophole-slams-u-s-supreme-court-for-weakening-fourth-amendment/#32712a147d73](http://www.forbes.com/sites/nicksibilla/2018/08/13/iowa-supreme-court-closes-warrant-loophole-slams-u-s-supreme-court-for-weakening-fourth-amendment/#32712a147d73).

Thanks to a string of decisions by the U.S. Supreme Court, police can conduct inventory searches without a warrant, so long as those searches comply with a “reasonable” local policy. But those policies are created by the very agencies that perform the searches. Nor do those policies have to be written down; they can instead be set by “custom and practice.”

These precedents, when coupled with a “disturbing trend” in caselaw for traffic stops, have imbued law enforcement with “virtually unlimited discretion.” As the Iowa Supreme Court noted, police have the power:

“...to stop arbitrarily whomever they choose, arrest the driver for a minor offense that might not even be subject to jail penalties, and then obtain a broad inventory search of the vehicle—all without a warrant.”

Regulated from the Perspective of the Individual

Busby, John C. “Expectation of Privacy.” Legal Information Institute, 1 Oct. 2017, www.law.cornell.edu/wex/expectation\_of\_privacy.

The expectation of privacy test, originated from Katz v. United States is a key component of Fourth Amendment analysis. The Fourth Amendment protects people from warrantless searches of places or seizures of persons or objects, in which they have an subjective expectation of privacy that is deemed reasonable in public norms. The test determines whether an action by the government has violated an individual's reasonable expectation of privacy.

The Reasonable Expectation of Privacy Test

In *Katz*, Jutsice Harlan created the Reasonable Expectation of Privacy Test in his concurring opinion. Although it was not formulated by the majority, this test has been the main takeaway of the case. Justice Harlan created a two-part test:

1. an individual has exhibited an actual (subjective) expectation of privacy
2. the expectation is one that society is prepared to recognize as reasonable

If both of these requirements have been met, and the government has taken an action which violates this "expectation," then the government's action has violated the individual's Fourth Amendment rights.