The Faltering Fourth Amendment

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Courts Threaten Our Defense Against Government Tyranny

By Donald E. Wilkes, Jr.

[Fourth Amendment rights] are not mere second-class rights but belong in the catalog of indispensable freedoms. Among deprivations of rights, none is so effective in cowing the population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government.–U.S. Supreme Court Justice Robert Jackson (1949)
The Fourth Amendment is central to our Constitution. It is important, not for the criminal but for the individual, as it is the individual's only [constitutional] protection from unwarranted intrusions into his or her privacy.—U.S. Circuit Judge Myron Bright (1988)

On March 26, the U.S. Supreme Court decided Florida v. Jardines, an amazing landmark case involving the Fourth Amendment, the part of the Bill of Rights which prohibits unreasonable searches and seizures, and also requires arrest warrants and search warrants to be issued only by judicial officials and only upon a showing under oath of probable cause for the warrant's issuance.

The facts giving rise to Florida v. Jardines:

Down in Miami, Florida, an unknown individual called the crime hotline and provided an unverified tip that Joelis Jardines, a local resident, was growing marijuana inside his home. Acting on the anonymous tip, and without a search warrant, a team of federal and local narcotics police officers descended on Jardines' neighborhood and placed his house under surveillance for a while. Two of the local officers stationed themselves around the residence, while the federal officers served as backup. Two other local officers then walked up to Jardines' front door, stood on the porch, and knocked but got no response. One of the officers on the front porch had brought with him a trained drug detection dog on a six-foot leash. Under the supervision of the officer, the dog sniffed the base of the front door and "alerted" to the smell of live marijuana emanating from inside the residence. After about two minutes on the porch, the officers and the dog left the premises.

This warrantless police investigation of Jardines' residence presents intriguing legal questions, including: Did the use of the drug-sniffing dog amount to a search within the meaning of the Fourth Amendment? And if it was a search, was it unreasonable under the Fourth Amendment?

These questions are no-brainers. Of course the use of the dog was a search. Drug detection dogs exist to search for illegal drugs; that is what they are trained to do; that is what they do day by day; and that is what the dog did here. The whole purpose of the police visit to the home and their use of the dog was to search for possible drugs inside the home. And of course the search was unreasonable. How can it possibly be reasonable—or, indeed, anything other than Orwellian—for police, without a warrant, to come onto your front porch and use a dog to sniff under your front door to find out what is going on inside your home?

Setting forth in an affidavit the information the officers had learned from their warrantless investigation of Jardines' home, one of the officers applied for and obtained a search warrant from a judge. Officers then entered Jardines' residence pursuant to the warrant and found a marijuana-growing operation. Jardines was arrested and charged with trafficking in cannabis.

Prior to his trial in a Florida state circuit court, Jardines filed in that court a motion to suppress—that is, he applied to the court for an order preventing the state from introducing into evidence at the trial the incriminating items seized when the search warrant was executed at his residence. Traditionally, under what is known as the Fourth Amendment exclusionary rule, which came into existence no later than 1914, if a search is conducted under a search warrant issued in violation of the Fourth Amendment, or if
the search otherwise violates the Amendment, the evidence seized during the illegal search is excluded from evidence. The exclusionary rule applies only to illegally obtained evidence and does not bar the admission of any evidence that has been obtained in compliance with the Fourth Amendment. As long as police operate within the law, the exclusionary rule is no problem for law enforcement. The rule hampers effective law enforcement only to the extent that police violate Fourth Amendment rights, and only on the assumption that effective law enforcement requires police violations of the Fourth Amendment.

The Trial

The trial court conducted a hearing on the motion. Both the dog handler and the officer who went with him onto Jardines' front porch testified at the hearing. The state contended that the dog drug sniff was not a search and that if it was a search it was reasonable under the Fourth Amendment. The trial court ruled, however, that the use of the drug-sniffing dog was a search, and that the search was illegal under the Fourth Amendment. Since the search warrant had been issued on the basis of information acquired by the illegal search, the court found, the warrant was invalid and consequently the search pursuant to that warrant was illegal. The trial court granted the suppression motion.

The state, at all times represented by able prosecutors and government attorneys, then took a pretrial appeal of the trial court order to a state intermediate appellate court, the Third District Court of Appeal of Florida. It reversed the trial court, holding that there had been no search in violation of Jardines' Fourth Amendment rights. What the police had done did not even constitute a search. The court's holding was based in large part on prior U.S. Supreme Court decisions, particularly U.S. v. Place (1983), containing language which appears to suggest that drug dog sniffs are not searches under the Fourth Amendment.

Jardines then appealed to the Florida Supreme Court which, by a vote of 5-2, reversed the appellate court and upheld the trial court's order suppressing the evidence taken from Jardines' home. The Florida Supreme Court majority agreed with the trial court that the dog sniff test at Jardines' front door was a search, that this search violated the Fourth Amendment, and that, because the request for the search warrant was based on information obtained by the prior unlawful search, there was no lawful basis for issuing the search warrant which led to the discovery of the evidence incriminating Jardines. And the warrant being invalid, the search pursuant to it violated the Fourth Amendment.

In the course of assessing Jardines' Fourth Amendment claims, the majority opinion of the Florida Supreme Court addressed two important matters regarding warrantless drug sniff searches of private residences.

First, the Court noted, "[c]ontrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and a dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected. Quite the contrary. In the present case, for instance, members of the Miami-Dade Police Department, Narcotics Bureau, and agents of the Drug Enforcement Administration, United States Department of Justice, conducted a surveillance of Jardines' home. As Detectives Pedraja and Bartlett and the drug detection dog
approached the residence, Sergeant Ramiez and Detective Donnelly of the Miami-Dade Police Department established perimeter positions around the residence and federal DEA agents assumed stand-by positions as backup units... The 'sniff test' conducted by the dog handler and his dog was a vigorous and intensive procedure."

Second, the warrantless search procedures utilized against Jardines, when used against him or any citizen, guilty or innocent, are calculated to destroy the reputation of a homeowner or resident in his own neighborhood. "Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment for the resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. Further, if government agents can conduct a dog 'sniff test' at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. Such an open-ended policy invites overbearing and harassing conduct."

It is true that the public humiliation of a resident resulting from a police drug dog search under a search warrant is, as a general rule, an acceptable consequence of the proper enforcement of the law. (One exception, of course, would be a situation where, as here, the search warrant should never have issued in the first place because it was based on an earlier, illegal warrantless drug dog search.) But the police who went to Jardines' front door the first time did not have a search warrant. True, it turned out that Jardines was guilty. But that is irrelevant for Fourth Amendment purposes. A search that violates the Fourth Amendment is not rendered lawful by the fact that it turns up incriminating evidence.

If police are permitted to conduct warrantless drug dog searches of residences, they will, in their alacrity to enforce drug laws, inevitably make mistakes and end up conducting these embarrassing searches against who knows how many innocent homeowners. The only way to stop this in its tracks is to positively deny police the warrantless search powers they used against Jardines, and to require instead that drug dog sniffs of homes be conducted only under a warrant issued by a judge who has found probable cause for the search.

The two dissenting Florida Supreme Court justices, agreeing with the intermediate appellate court decision, were of the view that the police investigation on the porch did not constitute a search for purposes of the Fourth Amendment.

The Court

After the Florida Supreme Court decision, the state appealed to the U.S. Supreme Court, which agreed to hear the case, but limited its review solely to "the question of whether the officers' behavior was a search within the meaning of the Fourth Amendment."

Various amici curiae then filed briefs in support of either the state of Florida or Jardines. President Obama's Justice Department filed a brief in support of the state, as did the attorneys general of 27 states. Also filing briefs in support of Florida were The National Police Canine Association, and Police K-9
Magazine. Amicus briefs in favor of Jardine were filed by the Cato Institute, the Rutherford Institute, the National Association of Criminal Defense Lawyers, and a group of Fourth Amendment scholars.

Fortunately, on the merits the Court resolved the issue before it correctly: it concluded that indeed there had been a search insofar as the Fourth Amendment is concerned. But it did so only by a 5-4 vote.

The first sentence of the opinion for the five-justice U.S. Supreme Court majority stressed the narrowness of the single issue before the Court: "We consider whether using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a 'search' within the meaning of the Fourth Amendment." The majority's conclusion, formally announced in the last sentence of its opinion, was: "The government's use of trained police dogs to investigate the home and its immediate surroundings is a 'search' within the meaning of the Fourth Amendment." The U.S. Supreme Court therefore affirmed the Florida Supreme Court's decision.

The majority opinion relied on two of the Court's recent Fourth Amendment decisions on what constitutes a search under the Amendment. Both decisions involved warrantless use by drug police of sense-enhancing technology. The first was Kyllo v. U.S., a 2001 case involving a thermal imager device used to find out what was going on inside a home. By a 5-4 vote, the Court held that as a general rule the surveillance of a home is a search if "the Government uses a device that is not in general public use to explore details of the home that would previously have been unknowable without physical intrusion." The Court held specifically that the use of a thermal imager to measure heat emanating from a home was a search.

The other decision relied on was U.S. v. Jones, a 2012 decision in which the Court without dissent held that physically attaching a Global Positioning System (GPS) tracking device to a criminal suspect's vehicle, and the subsequent use of that device to monitor the vehicle's movements on public streets, was a search.

Written in crisp and energetic prose, the majority opinion in Florida v. Jardines, authored by Justice Scalia and concurred in by Justices Thomas, Ginsburg, Sotomayor, and Kagan, reached its conclusion that a search had occurred based on the following persuasive, undeniable reasoning process:

1. Under long-established Fourth Amendment law, a search occurs when the government obtains information by physically intruding on the persons, houses, papers, and effects of individuals.

2. When it comes to Fourth Amendment protections, the home is first among equals and is at the Amendment's "very core."

3. Here the officers gathered information in an area—the front porch—belonging to Jardines and immediately surrounding his home. The area immediately surrounding and associated with a dwelling house is known as the "curtilage." The front porch of a home is part of the curtilage.

4. The curtilage has long been regarded as part of the home itself for Fourth Amendment purposes. The curtilage is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened."
5. The officers' warrantless investigation therefore took place, under the Fourth Amendment, in a constitutionally protected area.

6. The officers' physical intrusion was not licensed by Jardine, either explicitly or implicitly. While a police officer may without a warrant approach a home by the front path and knock on the door, his authority to do so is no more than any private citizen's; and introducing a trained police dog to explore the area around the house in hopes of discovering incriminating evidence is something entirely different. Here, the police behavior objectively reveals a purpose to conduct a search which is not what anyone would think he had license to do.

7. Although "forensic dogs have been used by police for centuries," "when the government uses a physical intrusion to explore details of the home (including its curtilage), the antiquity of the tools that they bring along is irrelevant."

The dissenters were Chief Justice Roberts and Justices Kennedy, Breyer, and Alito. They would have reversed the Florida Supreme Court. According to the dissenting opinion, written for the four justices by Justice Alito, the presence at the front door of the policeman with the sniffing drug dog did not amount to a trespass; furthermore, Jardines did not have a reasonable expectation that the odors in his home would not emanate from inside the residence and possibly be detected by a police dog outside on the front porch. "For these reasons," Alito wrote, "I would hold that no search within the meaning of the Fourth Amendment took place in this case."

Why is the U.S. Supreme Court's Florida v. Jardines decision important?

To begin, the Court—thankfully—eliminated previous doubts about whether drug dog searches are subject to the Fourth Amendment. They are.

Second, and amazingly, Justices Scalia and Thomas, who routinely reject Fourth Amendment claims, saved the day for the Fourth Amendment rights of a criminal defendant who had been illegally cultivating marijuana! This happened before, in the Kyllo case, where the votes of these two justices also were crucial to the five-justice majority (and where, as in Jardines, Justice Scalia wrote a vigorous opinion for the Court upholding Fourth Amendment rights!). For their willingness to protect the homes of Americans from snooping, prying government agents, Justices Scalia and Thomas deserve our praise and respect! It is stirring to observe Justice Scalia, contrary to his usual practices, using his brilliant intellect to advance rather than retard our Fourth Amendment liberties! Good job, Justice Scalia! Good job, Justice Thomas!

Third, and finally, the Court's holding in Florida v. Jardines must be regarded as striking a definitive blow in favor not only of the sanctity of private homes, but also, more broadly, of Fourth Amendment privacy rights.

Frequently overlooked in public discourse, the Fourth Amendment is of inestimable significance, and it is the source of some of the most important protections for individuals in the Bill of Rights. "Its great purpose," Justice Frank Murphy wrote in 1942, "was to protect the citizen against oppressive tactics
[and] its protecting arm extends to all alike, worthy and unworthy." The Fourth Amendment is the principal constitutional reason why American police are not supposed to be allowed to act like the Gestapo in enforcing criminal laws.

The Amendment

In recent years, however, the Fourth Amendment has been faltering. The rights secured by the Amendment have steadily narrowed as a result of U.S. Supreme Court decisions dating back to the 1980s. In cases in which a citizen claims the police violated his Fourth Amendment rights, the Court usually sides with the police. Most people have no idea how vastly the Court has broadened the power of police, without a warrant, to accost, detain, arrest, search, interrogate, eavesdrop upon or conduct surveillance of Americans. The Court has watered down the Fourth Amendment probable cause requirement. The Court has made it extremely difficult, both procedurally and substantively, for citizens to successfully sue police for violating the Fourth Amendment, The Court also has attenuated the exclusionary rule, thereby encouraging police to violate the Amendment, and vesting government with the illegitimate power to try and convict criminal defendants based on unconstitutional searches and seizures. The Court has made it impossible for a citizen to obtain post conviction habeas corpus relief in cases where, in violation of the exclusionary rule, evidence obtained in violation of Fourth Amendment was admitted at the citizen's criminal trial.

There is not enough space here to detail the other ways in which the Court has, insofar as Fourth Amendment issues are concerned, turned itself into a cheerleading section for police (and prosecutors). That the issue of whether a drug dog sniff is a search was even debatable until a few weeks ago, and that even now four members of the Court think that the dog sniff at Jardine's home was not a search, are indications of just how far the Court has veered in favor of the power of the police.

It is because of the Court's abdication of its function of upholding and defending the Fourth Amendment that we see American police today engaging in a plethora of alarming activities—the abusive or unnecessary SWAT raids, the violent no-knock entries into residences, the detonation of explosive devices (euphemistically called "flash-bangs"), and the painful, dangerous and sometimes fatal taserings of Americans who have committed minor offenses or who have done nothing more than fail to obey a policeman's verbal order. These sinister developments, manifestations of the nationwide militarization of our police forces and the transformation of police officers into warrior cops dressed like Darth Vader, would never have occurred if the Court had been guarding rather than gutting the Fourth Amendment. No wonder law review articles examining the Court's search and seizure decisions have such titles as The Incredibly Shrinking Fourth Amendment or The Court That Devoured the Fourth Amendment.

Jardines, like the Kyllo and Jones decisions, is therefore a welcome exception to the Court's pattern of relaxing Fourth Amendment restrictions on police conduct. For this reason alone it is an important decision. It will be even more important if it should initiate a series of pro-Fourth Amendment decisions by the Court, decisions that transform a failing, faltering Fourth Amendment into a flourishing one. But to expect that the current Court will cease curtailing Fourth Amendment protections and will begin siding more with the citizen than the police may be as unrealistic as Hollywood endings.
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