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Search and Seizure

A study guide written by:
Geoffrey R. Stone, University of Chicago

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Moderator: James Q. Wilson, Professor of Government, Harvard University

Guests: Michael Farrell, Assistant U.S. Attorney, Washington, D.C.
James H. McComas, Public Defender Service, Washington, D.C.
Edward J. Spurlock, Washington Metropolitan Police Department

Your discussion will be assisted by background information concerning some of the issues raised by the fourth amendment and how the courts' interpretations of the fourth amendment attempted to balance individual rights and public safety.

The Fourth Amendment

The fourth amendment to the United States Constitution provides:

> "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 fourth amendment is an expression of a philosophy that grew out of offensive British practices prior to the American Revolution. It was written into the fundamental law of the land by the framers of the Constitution, who hoped to assure that our government would respect the sanctity, dignity, and privacy of its citizens.

The language of the fourth amendment leaves several critical questions unanswered. Perhaps most important, the amendment does not tell us when a search or seizure is "unreasonable." Can a search or seizure be "reasonable" if it is not authorized by a warrant? Can a search or seizure be "reasonable" if it is not based on "probable cause"? These and similar questions have plagued the Supreme Court in its efforts to construe the fourth amendment and to strike an appropriate balance between society's legitimate interest in effective law enforcement and its often competing interest in preserving the privacy, integrity, and dignity of its citizens.

The Need for a Warrant

The question of whether the police need a warrant as a precondition to a "reasonable" search or seizure has played a central role in the Court's interpretation of the fourth amendment. Over time, the Justices have taken two very distinct positions on the question. Some Justices have concluded that the ultimate issue under the fourth amendment is the "reasonableness" of the police conduct. These Justices emphasize that the critical considerations in the "reasonableness" determination—whether the police had probable cause to search and whether the search was conducted in a reasonable manner—can be resolved after the search or seizure takes place. Thus, for these Justices, the presence or absence of a warrant is merely one of several factors to be considered in each case in deciding whether the particular search or seizure was "reasonable."

Other Justices have concluded that failure to obtain a warrant is presumptively "unreasonable" except in extraordinary circumstances. These Justices emphasize that the fourth amendment is designed not merely to remedy "unreasonable" searches and seizures after the fact, but to prevent them from occurring at all. Requiring a warrant in nearly all cases, they argue, promotes this goal in three ways. First, it breaks the excitement of the "chase" and requires the police officer to make a more reflective determination of "reasonableness" before he acts. Second, it preserves a record of exactly what the officer knew at the time of the search and seizure, thus providing a better basis for a judge to decide later whether the officer's action was "unreasonable." Third, and most important, it requires that decisions about probable cause and the scope of the search be made, not by police officers "engaged in the often competitive enterprise of ferreting out of crime," but by "neutral and detached magistrates" who are more likely to balance the competing considerations in a fair and objective manner. Thus, for these Justices, a warrantless search or seizure is "reasonable" only if the officer can demonstrate that the failure to obtain a warrant was justified by "exigent" circumstances.

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Each of these views has been supported by majorities of the Supreme Court Justices at different times in history. Interestingly, at present, each view can claim a partial victory. Since 1948, the Court has held that, in the absence of exigent circumstances, *searches* are presumptively unconstitutional if they are not authorized by a search warrant. See *Johnson v. United States*, 333 U.S. 10 (1948). Since 1975, however, the Court has held that there is no warrant requirement for *arrests* or other seizures of the person. See *United States v. Watson*, 423 U.S. 411 (1975). The Court has explained this seeming anomaly on two grounds: first, generally requiring use of arrest warrants would more seriously undermine effective law enforcement and, second, although there is a long tradition that supports the use of search warrants, there is no similar historical support for an arrest warrant requirement.

Searches Without a Warrant in Exigent Circumstances

Although arrests can be made without a warrant, the Court has consistently held since 1948 that searches must be authorized by a warrant in the absence of exigent circumstances. What, though, is an "exigent" circumstance? Perhaps the two most common illustrations involve searches of automobiles and searches incident to arrests.

In *Carroll v. United States*, 267 U.S. 132 (1925), Federal prohibition agents spotted a car traveling on a highway. The agents had probable cause to believe that the car contained bootleg liquor, but if they went to get a warrant, the car would be long gone. They therefore stopped the car and searched it on the spot. The Supreme Court held that the search of the car was "reasonable" because an automobile is movable and the automobile in this case could have left the jurisdiction by the time the officers obtained a warrant.

What are the limits of this doctrine? In *Chambers v. Maroney*, 399 U.S. 42 (1970), the police had probable cause to believe a particular car contained evidence of a crime. They seized the car on the highway, brought it to the stationhouse, and then searched it without first obtaining a warrant. The defendant later argued that once the police have immobilized a car, they should be required to obtain a warrant before they search it. That would enable a "neutral and detached magistrate" to decide whether there was probable cause to search it. The Court rejected this argument, explaining that for the police to continue to "seize" the car while they sought a warrant would impinge on fourth amendment rights as much as an immediate search itself. Thus, the police could "reasonably" choose in each case whether to conduct an immediate search or impound the car and seek a search warrant.

If the police may search an automobile without a warrant, given that there is probable cause to believe it contains contraband or evidence, can they also search other property—such as a home or a suitcase—if there is probable cause and a potential destruction of evidence? Interestingly, the Court has said "no." In *Vale v. Louisiana*, 399 U.S. 30 (1970), the Court held that the police ordinarily cannot search a person's home without a warrant merely because they believe that someone in the house might destroy evidence, and in *United States v. Chadwick*, 433 U.S. 1 (1976), the Court held that the police cannot search a footlocker without a warrant merely because a footlocker—like a car—can be moved out of the jurisdiction. The Court explained that the individual has a "lesser expectation of privacy" in his car than in his home or other possessions, and that a car is therefore entitled to less protection under the fourth amendment.

Searches Incident to an Arrest

The second commonly invoked exception to the search warrant requirement involves searches "incident to arrest." Under this doctrine, when an individual is lawfully arrested, the police may automatically—and without obtaining either a search or arrest warrant—search the individual for weapons and evidence of crime. The Court has justified this doctrine on a number of grounds: the need to protect the arresting officers; the need to prevent the arrestee from destroying evidence in his possession; the intrusiveness of the lawful arrest is already so great that the incidental search is of only minor consequence; and, because the individual could in any event be subjected to an inventory search at the stationhouse, it is not "unreasonable" to search him at the time of arrest itself.

What are the limits of the search incident to arrest? Suppose, for example, an individual is arrested for a mere traffic offense, for which there is unlikely to be any evidence, and it is unlikely that the arrestee will be armed and dangerous. In *United States v. Robinson*, 414 U.S. 218 (1973), the Court held that the police may automatically search any person subjected to a custodial arrest, regardless of the nature or severity of the crime. The Court justified this conclusion largely in terms of the need for "bright-line rules"—that is, the need to avoid endlessly fine distinctions requiring the police to make on-the-spot judgments about the unique facts of each individual case in frequently recurring situations involving "relatively minor" intrusions into privacy.

There are limits, however. Suppose, for example, an individual is arrested in his home. May the police search the entire home "incident to arrest?" Although at one time the Court allowed this, more recently it has limited these searches to the area within the arrestee's "immediate control"—the area from which he might gain possession of a weapon or destructible evidence. See *Chimel v. California*, 395 U.S. 752 (1969). Another common variation on search incident to arrest concerns the arrest of an occupant of an automobile. Of course, if the police have probable cause to search the automobile, they may do so without a warrant under the automobile exception to the warrant requirement. But suppose they don't have probable cause. May they nonetheless search the automobile "incident to arrest"? In *New York v. Belton*, 453 U.S. 454 (1981), the Court again emphasized the need for bright-line rules in this context and held that the police may automatically search the passenger compartment of an automobile—including the glove compartment—incident to the arrest of an occupant of the car. The Court indicated, however, that such a search may not extend to the locked trunk of the car, for a locked trunk would not ordinarily be within the arrestee's "immediate control."

Searches in the Absence of Probable Cause To Make an Arrest

It should be noted that the doctrine of search incident to arrest involves an exception not only to the warrant requirement but also to the probable cause requirement. Although a police officer must have probable cause to make a lawful arrest, there is no independent requirement that he have probable cause to believe that the person or place searched incident to the arrest has any weapons or evidence of crime. This doctrine thus raises the question of when a search or seizure can be "reasonable" even in the absence of probable cause.

The most common case in which this issue arises, other than search incident to arrest—where there is at least probable cause to arrest—involves police contacts with citizens that stop short of arrest. Suppose, for example, a police officer approaches an individual on the street to question him about a crime. Does this constitute a "seizure" within the meaning of the fourth amendment? If so, is it permissible only if the officer has "probable cause"?

The Court has recognized that a police officer, like any other citizen, may approach an individual on the street and engage him in conversation, as long as the individual reasonably understands that he is under no restraint and is free simply to walk away. In such circumstances, there is no "seizure." But if the officer indicates in any way that the individual is under restraint—by displaying a weapon, physically touching the individual, or by using language or a tone of voice suggesting that the individual must comply with the officer's request—the fourth amendment comes into play. See *Florida v. Royer*, 460 U.S. 491 (1983).

In such circumstances, one must ask whether the "seizure" is "reasonable" even in the absence of probable cause. Of course, if the seizure constitutes a full custodial arrest, probable cause is required. But what if the "seizure" falls short of an arrest? The Court has held that seizures short of an arrest may be "reasonable" even in the absence of probable cause. Specifically, the Court has held that a police officer may briefly stop a person for questioning if the officer has "reasonable grounds" to believe that the individual has committed or is about to commit a criminal act. The Court has emphasized, however, that an investigative stop must "last no longer than is necessary to effectuate the purpose of the stop" and that "the investigative methods employed should be the least intrusive means reasonable available to verify or dispel the officer's suspicion in a short period of time." *Florida v. Royer*, 460 U.S. 491 (1983).

Another problem that frequently arises is whether the officer may search an individual incident to an investigative stop. In *Terry v. Ohio*, 392 U.S. 1 (1968), the Court rejected the proposition that a police officer may automatically search

incident to a lawful stop, holding instead that the officer may conduct only a limited "pat-down" for weapons if the officer has "reasonable grounds to believe" that the individual is "armed and presently dangerous." Thus, the Court has insisted that the search be limited to a relatively unintrusive frisk and that it be undertaken only when there are solid grounds to believe that the individual is in fact dangerous.

Searches and Seizures by Consent

Another common situation involving searches or seizures without either probable cause or a warrant involves the doctrine of consent. Just as an individual may waive other constitutional rights, such as the right to jury trial or the right to counsel, he may also waive the right to be "secure…against unreasonable searches and seizures." Thus, valid consent will legitimate a search and seizure that otherwise would be constitutionally prohibited.

There are three elements to the consent doctrine. First, to be valid, the consent must be "voluntary"—it must not be the product of duress, coercion, or "show of authority" by the police. On the other hand, the Court has held that the police are under no obligation to warn an individual of his right to withhold consent and, moreover, that consent is valid even if the individual did not know that he had a right to withhold consent. See *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). The Court explained that it "would be thoroughly impractical to impose on the normal consent search the detailed requirements of an effective warning," and that a requirement that the government prove that the consenting person was aware of this right would "create serious doubt whether consent searches could continue to be conducted" in light of the difficulty in proving such awareness. The Court thus concluded that the "voluntariness" standard represented an appropriate accommodation of the competing interests.

The second element of the consent doctrine involves the problem of third-party consent. Suppose two persons share an apartment. Can one consent to a search of the common area? Of the other's bedroom? In *United States v. Matlock*, 415 U.S. 164 (1974), the Court held that an individual who shared a bedroom with the defendant could validly consent to a search of the room. The Court explained that "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

The third element of the consent doctrine involves the question of mistake. Suppose a police officer reasonably believes the person giving consent is entitled to do so, but in fact he or she isn't. The Supreme Court has never addressed this issue. The lower courts are divided. Some focus on the reasonable belief of the officers and uphold the search; others focus on the rights of the individual and conclude that if he hasn't empowered the other person to give consent, he hasn't "assumed the risk" that the other will do so and he therefore hasn't waived his rights.

These are only a few of the many issues arising under the fourth amendment. They do not address such important questions as remedies for violations of the amendment or invasions of privacy by means that do not constitute tional searches or seizures, such as wiretapping o of undercover agents. But they do offer some glim the central fourth amendment inquiry—how does a democratic society preserve the privacy, dignity, and rity of its citizens while at the same time assuring effic and effective enforcement of its criminal laws? Alth the doctrines and principles announced by the Court often seem like "hair-splitting," this is because the iss are difficult and the concept of "reasonableness" is inhe ently vague. But it is through this process of balancing, accommodating, and line drawing that we ultimately define ourselves as a free society.

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Discussion Questions

1. Should the police be required to obtain a warrant before searching the home of a suspected drug dealer?

2. Current interpretations of the fourth amendment permit warrantless searches of automobiles in circumstances where a warrant would be required before an apartment or a suitcase could be searched. Do distinctions like these seem to you justified? Why or why not?

3. Many people regard search and seizure laws as technicalities that are irrelevant to the innocent and that sometimes let the guilty go free. Others view dismissals of charges against guilty people as an unfortunate but necessary price to be paid if liberty is to be maintained for all of us. With which view do you agree, and why?

4. One premise of search and seizure law is that individual liberty will be better protected if an independent magistrate decides whether a search or seizure is warranted than if that decision is made by police officers in the excitement of an active investigation. Do you agree?

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