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The Fourth Amendment: History and Development of the Reasonable Search

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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 searches, and the persons or things to be seized.

--Fourth Amendment to the United States Constitution

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HISTORICAL BACKGROUND OF SEARCH AND SEIZURE

The existence of the search and seizure restrictions encoded in the Fourth Amendment to the United States Constitution is the result of a two part historical development that took place simultaneously in England and the American colonies. Severe legislative restrictions on the press were largely responsible for the developments in England, while in the colonies it was British tax and trade regulations that spawned the changes. On both sides of the Atlantic, however, the primary catalyst was the government's use of general searches in the enforcement of those laws. It was the continued abuse of general searches despite the public's growing opposition to them that would ultimately prove responsible for the expression of reasonable search and seizure guidelines in the Bill of Rights.

The history of search and seizure in England is largely the product of a series of conflicts between the British government and the press. In order to control seditious libel, the printing of material that is critical of or unflattering to the established government, or that may instigate rebellion against it, the English government placed major legislative restrictions on the printing industry. Dating back to the mid-1500s officials were given broad authority to search nearly anything they wanted in conjunction with a suspected violation of seditious libel

laws. During the 1600s numerous regulations were passed that authorized even more strict censorship and broader search powers for their enforcement.

In 1643 the excise tax was created, granting officials the authority to search private homes. Having previously been an issue that concerned only members of the press, adoption of the excise tax brought the controversy surrounding general searches to every home in England. That initiated a period of increasing awareness of the concept of individual rights, and general searches came to be widely regarded as arbitrary and violative of those rights. However, in the midst of this growing public sentiment, Parliament passed the Licensing Act, the toughest press restriction yet, making it illegal to publish anything without a license from the king. Although this act expired in 1679, many of its provisions had become so ingrained in the common law that they continued to be employed long after that. It was those provisions that eventually proved responsible for popularizing the fight against general warrants in England.[1]

Following the adoption of the Licensing Act cases for seditious libel became quite common in England, and the primary means used to enforce libel laws was the general warrant of search and arrest. These warrants, commonly issued by the secretary of state, simply stated that a violation of law had occurred, or was suspected to have

occurred, and authorized officials to conduct a search for offenders or evidence. Places to be searched were not specified in the warrant, nor was there any designation of who should be arrested or what things should be seized. These issues were left entirely to the discretion of the officers charged with executing the writ.[2]

The first famous case disputing the use of a general warrant in England arose in 1762. John Wilkes, a member of Parliament at the time, had been anonymously publishing a collection of tracts entitled the "North Briton" that were critical of various government actions. The release of the forty-fifth edition, however, so enraged officials that Lord Halifax, secretary of state, issued a general warrant directing the messengers:

> to make strict and diligent search for the authors, printers, and publishers of a seditious and treasonable paper, entitled, The North Briton, No. 45, . . . and them, or any of them, having found, to apprehend and seize, together with their papers.[3]

Based on that authority forty-nine arrests were made in three days. When the messengers arrived at Wilkes's door, however, he defied their authority and refused to obey the warrant. He was then imprisoned, his home was ransacked anyway, and his belongings were taken for use as evidence.[4]

Wilkes immediately filed suits for trespass against everyone connected with the warrant,[5] all the way up to Lord Halifax himself. The printers who had been subjected to similar searches also filed suit for false imprisonment.

The warrant was held illegal by Chief Justice Pratt who stated, "To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour."[6] In one of the later cases contesting this warrant Pratt went on to argue that if secretaries of state possessed the authority to issue general warrants, "it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject."[7]

The government appealed the decisions, but when of they reached the Court of the King's Bench, the lower court's decisions were upheld. In one of the appeals the judges of the Court of the King's Bench dismissed the history of executive discretion in issuing and executing warrants, stating that no amount of time could legitimize such practices. Chief Justice Mansfield summarized the feelings of the court by stating, "It is not fit that the judging of the information should be left to the officer. The magistrate should judge, and give certain directions to the officer."[8] So important was that principle to the court that when all was said and done, they had ordered the British government to pay the extraordinary sum of 100,000 pounds cumulatively in costs and judgements as a result of the Wilkes cases. The decisions met with widespread approval in England and the American colonies where "Wilkes

and Liberty" became a widely used slogan in support of American causes.[9]

That was not the end of the matter, however; the victories of the Wilkesites were to have more serious and far reaching repercussions. Other victims of similar warrants were inspired by the success of the Wilkes cases and filed suits of their own. It was in the resulting flood of litigation Entick v. Carrington (1765), widely acclaimed as a hallmark of English liberty, came to trial.[10] John Entick was the author of another allegedly subversive publication entitled "Monitor" or "British Freeholder." A warrant was issued for his arrest which, unlike the warrant in the Wilkes cases, named him specifically as the suspect to be arrested. However, the seizure of papers and other evidence was still left to the discretion of the messengers who served the warrant. Entick therefore sued for trespass regarding the seizure of his papers based on the open warrant.[11]

Pratt, at this time Lord Camden, heard this case and issued its now famous decision. Camden wrote that a decision in favor of the government would force open even the peoples' most secret cabinets to government inspection on mere suspicion that a person is involved in the publication or dissemination of seditious libel. He therefore asserted that general warrants for search or arrest could no longer be issued by the executive branch,

and that evidence seized in the execution of such a warrant could not be used in court because that would amount to self incrimination, which he argued, "would be 'cruel and unjust' to the innocent and guilty alike."[12]

At the same time as all of that upheaval in England, the debate over the validity of general searches was also raging in the colonies. In 1696 Parliament had authorized the use of writs of assistance by customs officials to aid the enforcement of strict British tax and trade regulations in the colonies. So named because they authorized officials to command all officials and subjects of the crown to aid in their execution,[13] writs of assistance became the focus of the controversy surrounding the use of general warrants in America because of the unbridled discretionary power they granted to the officers. Although the general warrants commonly used in England left it to the officers' discretion who to arrest and what papers to seize, their application was at least somewhat limited in the sense that they were confined to one particular case. Writs of assistance not only left those issues open, but had the additional malady of permanence because they did not expire after execution and were not limited to one particular case. Once granted, the writ remained valid for the lifetime of the reigning sovereign. Moreover, the writs also authorized officers to knock down doors and break open trunks if necessary to overcome resistance, giving officials unfettered discretion

to search anything they wished whenever they suspected a customs violation.[14]

By the 1750s, however, many colonists were growing sensitive to the dangers of relying on the use of those general warrants for law enforcement. Massive opposition arose in 1754 with the passage of that year's excise act which granted tax collectors the authority to interrogate anyone they wished regarding the amount of liquor they had consumed in the past year and tax it by the gallon. As a result of this uproar, in 1756 Massachusetts became the first province to enact legislation requiring some elements of particularity before a warrant could be granted. The new law required a sworn oath by the informant that they knew an infraction of law occurred in a specified place. Even so, judges were not allowed to make any inquiry or determination of their own as to the reliability of the information given, but were required to supply the warrant once that provision was met.[15]

During the 1760s the controversy over the legality of writs of assistance in the American colonies reached its culmination. On October 25, 1760, George II died and, according to the law, all writs of assistance expired within six months of his death. In February of 1761 sixty-three Boston merchants petitioned for a hearing on the issue of granting new writs. James Otis, Jr. resigned his position as advocate general in order to avoid defending the writs

and represented the merchants who opposed them.[16] Otis presented evidence drawn from every possible source, from the rhetorical ideal of a man's home as his castle up to provisions of the British constitution itself, to show that any warrant that was not specific could not be granted. He denounced writs of assistance as villainous instruments of arbitrary power because of their perpetual and universal nature which allowed officials to conduct searches in violation of fundamental principles of English liberty and the Magna Carta. He concluded that the act of Parliament creating writs of assistance was void because it violated the British constitution, and therefore courts could not issue them.[17] Despite his efforts, Otis lost the case and in December of 1761 the first new writ was issued to Charles Paxton, Surveyor of the Port of Boston.[18]

However, it was not the actual ruling that was the important thing about Paxton's case, but the impact that James Otis's arguments were to have in the future. John Adams, in his mid-twenties at the time, was present in the gallery, and the influence that Otis's arguments had on him was profound. "Mr. Otis's oration against the Writs of Assistance," Adams would say many years later, "breathed into this nation the breath of life. . . . Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child of Independence was born."[19] The inspirational affect that Otis had upon Adams

is of great consequence because of the direct progression that can be seen from Otis's argument in 1761 to Article XIV of the Massachusetts Declaration of Rights framed by Adams in 1780 to the Fourth Amendment as it appears today.[20]

The decision in Paxton's case was not very popular, and the ability of officials to secure new writs of assistance did little in the way of controlling the smuggling that the writs were created to remedy. For many years bribery of customs officials was a commonly used method of evading tariffs, but an order from England for tougher enforcement of those laws and the passage of the Stamp Act became more than the colonists would bare. Riots broke out in 1765, and when property was seized for customs violations it was often liberated by merchants and others who opposed writs of assistance.[21]

Due to concerns about their legality, many colonial courts refused to even grant these controversial writs. Under the laws at that time the only court vested with the authority to issue writs of assistance was the Court of Exchequer. It was therefore argued that since Massachusetts was the only province that had expanded the jurisdiction of its high court to include the jurisdiction of the Court of Exchequer, that was the only place that could issue the writ. In order to remedy that legal technicality, in March of 1767, Charles Townshend, Chancellor of the Court of Exchequer, reported a bill to the House of Commons that

became the Townshend Act, which granted the supreme court in each province the power to issue the writ. By this time, however, the idea of "constitutionality" was gaining popularity in American legal thought, and even the Townshend Act did not solve the problem. Courts still refused to grant the writs, arguing that they violated Magna Carta because of the discretion they left to the officers charged with their enforcement.[22]

CONSTITUTIONAL MILESTONES

By 1776 American resolve for independence was fixed. In that year the Declaration of Independence was written, codifying American ideals of limited government and underscoring the importance with which they regarded personal liberties. That same year also saw the emergence of the first state constitutions. The various search and seizure provisions contained in those documents were the first to elevate the concept of reasonable search and seizure to a constitutional plane. Through them those concepts were molded and refined into the Fourth Amendment to the United States Constitution.

The first state to draft a constitutional search and seizure provision was Virginia. Article 10 of its Declaration of Rights stated:

> That general warrants, whereby any officer or messenger may be commanded to search suspected

> places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.[23]

Although George Mason was the author of most of Virginia's Declaration of Rights, he did not write Article 10. That provision was added by the convention that adopted Virginia's Declaration of Rights. However, the fact that the rest of Madison's proposals were adopted with very few other changes shows the importance with which the issues surrounding search and seizure principles were widely held.[24] Although Virginia's was a somewhat weak provision, because it was only directed against general warrants and merely said that they "ought" not be granted without specifically prohibiting them, it did provide a foundation for later state constitutions to build upon.

Pennsylvania adopted its constitution only a few months later and made some important advances in its search and seizure provision. The form of Section 10 of Pennsylvania's Declaration of Rights bares a strong resemblance to the forthcoming Fourth Amendment to the Federal Constitution in many respects. First of all, instead of merely focusing on protection from general warrants, the Pennsylvania provision recognized the right to be free from unreasonable search and seizure in the more broad sense. Its guidelines requiring specificication of things to be seized, and affirmations of actual knowledge of criminal conduct were also novel

advancements that were to become significant aspects of the Fourth Amendment. Delaware picked up on the idea of specificity, and its Declaration of Rights became the first to clearly state that warrants that were not specific were illegal.[25]

The relatively belated adoption of the search and seizure provision in the Massachusetts constitution of 1780, also had a major impact on the Fourth Amendment. Written by John Adams, who had been so impressed with James Otis's speech denouncing general warrants in Paxton's Case some twenty years earlier, the language of Article 14 was remarkably detailed. It is in that article that we see the first use of the actual phrase "unreasonable search, and seizure" that would later appear in the Fourth Amendment. Having recognized the right of the individual to be secure from such searches, it went on to describe the restrictions on them with a degree of particularity that was not given to any other provision in that constitution.[26]

In the spring of 1787 the Constitutional Convention convened in Philadelphia. Although their original purpose was to repair the failing Articles of Confederation, they ended up scrapping the articles altogether, and writing a new Constitution that created a supreme federal government with enormous powers.[27] When the delegates had completed their work and prepared to submit the new constitution to the states for ratification, a great clamor arose calling

for the addition of a Bill of Rights to protect the peoples' civil liberties from encroachment by this new and powerful government. Having fueled the drive for independence, the issues of search and seizure were especially important to the framers' generation, and they figured prominently throughout the debates surrounding the inclusion and creation of a Bill of Rights in the coming years.

The Constitution's initial lack of a Bill of Rights was a conscious and deliberate act by the framers. Having completed the writing of the Constitution, it was sent to the Committee of Style in order to have copies made for its introduction to the Congress. It was then that George Mason, the Virginia delegate, commented that he thought it ought to have a Bill of Rights in order to assure the people that the awesome powers of the new government would not be used in violation of individual rights. When a formal motion was made to include a Bill of Rights, however, it was unanimously defeated. Refusing to leave things at that, Mason used the back of a final copy of the Constitution to list his "Objections to this Constitution of Government," with the absence of a Bill of Rights appearing at the head of the list. When Mason's objections found their way to a printer's office the battle lines were drawn and the debate over the ratification of the Constitution became centered on this issue.[28]

The Anti-Federalists opposed ratification because they

feared the awesome powers that the newly written Constitution granted to the federal government and wanted a Bill of Rights added to guarantee the protection of individual liberties.[29] They particularly feared the list of Congressional powers which, in addition to the powers of taxation and regulation of trade, included the power "to make all laws that shall be necessary and proper for carrying into execution the foregoing powers."[30] Since the new constitution would become the supreme law of the land once ratified, the necessary and proper clause seemed particularly foreboding to Anti-Federalists who viewed it as an unrestrained grant of power that would authorize laws that would be damaging to state interests and personal rights.[31]

The Federalists, on the other hand, supported the Constitution as it was written and argued that it would not be necessary to include a Bill of Rights for two primary reasons. First of all, the rights of the people were protected by the various state bills of rights that already existed, and the new constitution would not alter those.[32] Secondly, American political thinking was based largely on the social compact theory which, roughly stated, holds that government exists only by the consent of the people, and is created by a written compact that is superior to it and limits it. The Federalists therefore argued that since the new national government could only exercise the powers that

the Constitution expressly granted it, the government could not abridge the peoples' civil rights because the Constitution did not grant such a power.[33]

As the Constitution made its way to the various state ratifying conventions, the debate over the inclusion of a bill of rights went with it. The position of the Anti-Federalists was gaining support and ratification did not seem likely. Numerous recommendations for amendments were offered by many states, and four states even requested a second Congressional Convention to address some of the Constitution's shortcomings. The possibility of a second convention scarred many Federalists who thought that it would destroy many of the provisions that were necessary for the new government to succeed.[34]

Although Thomas Jefferson was in Paris at this time, he deserves much of the credit for the adoption of the Bill of Rights. Upon occasion to read the Constitution, Jefferson wrote his friend James Madison, a leading Federalist, that although he general approved of it, he opposed the exclusion of a bill of rights securing the personal liberties that were so important to Americans.[35] The power that a bill of rights would give to the independent judicial branch in the protection of personal liberties against possible majority oppression was of special importance to Jefferson.[36]

Madison, eager to avoid the dangers of a second convention, was finally convinced. He appealed to the

states to ratify the Constitution as it stood and promised to make the consideration of civil liberties protections the first order of business for the First Congress.[37] In the end Madison and the Federalists won, and the Constitution received the necessary votes for ratification.[38] The Virginia convention was the first to ratify with recommendations for amendments, including a search and seizure provision. Later states copied that practice, many even including their own search and seizure recommendations.[39]

During the spring of 1789, Madison went to work on keeping his promise. In the course of a few short weeks he drew together the state ratifying conventions' suggestions and compiled a list of proposed amendments to protect the civil liberties of the colonists.[40] Madison made some very significant advancements in his work on the issues of search and seizure. The initial draft of his Sixth Article was the strongest search and seizure provision yet, and appeared nearly the same as the Fourth Amendment does today. In addition to its affirmative recognition of the right of citizens to be free from "unreasonable searches and seizures," a direct copy of the language from Adams's provision in the Massachusetts constitution, Article Six required probable cause, not merely suspicion, before a warrant could be issued. Article Six was also the first to use the stronger words "shall not be violated" instead of

the weaker "ought not" that plagued earlier provisions.[41]

On June 8, 1789, Madison read his proposals in the House of Representatives.[42] No longer concerned with amending the Constitution, the representatives had turned their attention to more immediate issues, such as raising money to run the new government, and Madison's proposals were not discussed. After six weeks passed Madison requested that his amendments be taken under consideration again. Many of the representatives complained that Madison's proposals would be a waste of their time, sidetracking them from more important issues, and the amendments were assigned to a special committee instructed to pick out the best proposals for consideration by the rest of the House.[43] When the committee reported back one week later its report was tabled and the House did not actually begin debating the amendments until August 13.[44]

Having once led the forces of opposition to the amendments, Madison became their sponsor and had to defend them against some of the very arguments he himself had raised. In response to the argument that a bill of rights was not necessary because state constitutions already provided for the protection of personal liberties Madison replied that some states did not have a bill of rights, and others were very weak and often violated by state governments.[45] Responding to the core Federalist contention that the Bill of Rights was unnecessary because

of the social compact theory of limited powers, Madison said that although the new government's powers were indeed limited, they still allowed for a degree of discretion in their execution that could be abused. In one debate on the subject Madison said:

> I will state an instance, which I think in point, and proves that this might be the case. The General Government has a right to pass all laws which shall be necessary to collect its revenue; the means for enforcing the collection are within the discretion of the Legislature; may not general warrants be considered necessary for this purpose . . . ?[46]

Protection from the evils of general warrants was particularly important to Madison. That issue was partly responsible for his coming to regard a Bill of Rights as necessary, and was something he made repeated reference to as an illustration of its necessity in his speeches promoting the Bill of Rights.[47]

While in the special committee, the search and seizure provision proposed by Madison had been altered so that in their report it read:

> The right of the people to be secured in their persons, houses, papers, and effects, shall not be violated by warrants issuing without probable cause, supported by oath of affirmation, and not particularly describing the place to be searched, and the persons or things to be seized.[48]

In the debates in the House, however, Representative Eldbridge Gerry assumed that the "unreasonable searches and seizures" phrase had been omitted by mistake and moved that it be returned. Representative Benson then had the words

"by warrants issuing" replaced with "and no warrant shall issue."[49] Finally a semi-colon was inserted in the middle of the provision, dividing it into two parts; the first half established the right of the people and prohibited unreasonable searches and seizures, the second half laid down the requirements necessary to secure specific warrants.[50] No further changes were made in this provision except its number before it was sent with the other 17 amendments for approval by the Senate.

In the Senate debates, which were kept secret, those proposals were altered, combined, and cut down to 12. The House refused to accept the Senate's revised list, and a conference committee comprised of members of both the House and Senate was created to reach a compromise. On September 24, 1789, the committee's report was approved by both houses, and the final 12 amendments were ready to be sent for state ratification.[51] Records of the activities at the state ratifying conventions are scant, and therefore little is known about them beyond the count of votes. We do know, however, that the first two amendments (addressing representation in Congress and congressional salaries) failed to receive the necessary votes.

On December 15, 1791, the surviving 10 amendments completed the ratification process, altering the United States Constitution for the first time.[52] Labelled as the Fourth Amendment, the search and seizure provisions

contained in the Bill of Rights comprised the broadest and most liberal restrictions yet known. It was then up to the courts to give substance to the language of that amendment and perform the function that Jefferson and Madison had advocated as the protector of the peoples' rights.

SEARCH AND SEIZURE IN THE SUPREME COURT

Interpretation of the Fourth Amendment by the United States Supreme Court has recognized that its protection of citizens is in the three primary requirements that the warrant clause places on constitutional searches.[53] First, warrants must issue from "neutral and detached" magistrates, not police officers or other government agents.[54] Second warrants can only issue upon a showing of probable cause so that only searches with merit will proceed.[55] Lastly, that the warrant specifically describe the place and object of the search so the searcher will not exceed the limit of their authority.[56]

However, the language and structure of the amendment suggest that not all searches need to be supported by a warrant to be constitutional, they need only be reasonable. Accordingly, the Supreme Court has recognized various situations in which it is permissible for officials to conduct searches without first obtaining a warrant, but has held that such searches are subject to post hoc judicial

review where their reasonableness is to be measured against the dictates of the warrant clause. During the past two decades, however, Supreme Court decisions dealing with the reasonableness of warrantless searches have been over-permissive. The number of cases where the Court is willing to waive the warrant requirement has grown, probable cause standards for warrantless searches have been eased, and their permissible scope greatly expanded, resulting in the general destruction of the liberty protection that the Fourth Amendment was created to provide.

When considering whether it is reasonable to forego the Fourth Amendment's warrant requirement the Supreme Court must weigh the interests at stake against each other. It is a long established and deeply ingrained cannon of Fourth Amendment jurisprudence that the interest of the citizen is that of privacy. In recognition of that principle in 1886, writing for the majority in Boyd v. United States, Justice Bradley noted that the experience of the framers suggested that the Fourth Amendment was meant to:

> apply to all invasions on the part of the government and its employees of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property . . . .[57]

The government interest, it shall be shown, fluctuates somewhat according to the circumstances presented in each given case. Placing the respective interests at opposite

ends of the scale, the reasonableness of a warrantless search is then determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."[58]

In the past, recognition of the importance of Fourth Amendment liberties typically weighed the scale in favor of the individual, and the prior judicial authorization of a search warrant was nearly always required. In 1972, for example, the Supreme Court decided a case where without the support of a warrant the United States Attorney General had ordered the use of a wiretap to gain information on three defendants accused of conspiracy to destroy government property. When the issue reached the Supreme Court, the Attorney General argued that the wiretap was defensible because it was necessary to protect domestic security, but the Court held that even the government's concededly significant interest in domestic security was not enough to justify the warrantless invasion of Fourth Amendment freedoms that the wiretap entailed.[59]

More recently, however, the Court has been increasing the weight allotted to government interests. At first the change was relatively small, but it steadily grew. In Terry v. Ohio, for example, recognizing that police officers often find themselves in dangerous situations when investigating crime, the Court said that in the interest of self protection an officer may conduct a cursory "frisk" of a

suspect's outer clothing for weapons without having to first obtain a warrant.[60] But within four years of the Terry decision efficient law enforcement was said to be a weighty enough interest to justify a warrantless search. Upholding the power of a Federal Treasury agent to conduct a warrantless search of the storeroom of a pawn shop for weapons violations, the Court stated that, "if the law is to be properly enforced an inspection made effective, inspections without warrant must be deemed reasonable official conduct under the Fourth Amendment."[61]

Furthermore, the increased weight given to the interests of government seems to have come directly away from that of the Fourth Amendment interests of citizens. Searches conducted by administrative agencies to enforce civil codes are particularly illustrative of that principle. In 1967 the Court required inspectors to secure a warrant before conducting fire and health code inspections despite their acknowledgement those searches were minimally intrusive of individuals' privacy interests.[62] Five years later, however, the Court upheld the power of Federal Treasury agents to conduct warrantless searches of businesses.[63] Then in 1981 the government's interest in health and safety issues was claimed to uphold warrantless mine inspections because the privacy interest that owners have in commercial property was said to be less than that of a private residence.[64]

Automobile searches are another telling example of the slippage in this area. The Supreme Court has stated that for Fourth Amendment purposes there is a difference between one's car and one's home, ascribing a lesser privacy interest to the former. The justifications offered for that determination have included: the inherent mobility of automobiles makes them easy to move before a warrant can be obtained;[65] automobile use is highly regulated;[66] cars are used for transportation on public streets where they are readily visible.[67] As the perceived weight of individuals' privacy expectation in automobiles has dropped, the government has been given greater latitude to conduct warrantless searches of vehicles. Safety of officers in the streets was once deemed a significant enough interest to uphold such a search when an officer believed themselves to be in danger.[68] In view of the diminished privacy rights in automobiles, however, officers have been able to defend a warrantless vehicle search even after the suspect had been taken into police custody.[69]

In accordance with their recognition that the reasonableness of a search is derived from its adherence to the guidelines of the warrant requirement,[70] the Supreme Court has held that even with the most serious of government interests at stake a warrantless search will be considered unconstitutional absent a showing of probable cause. In Berger v. New York the Court defined probable cause and

stated the purpose behind its requirement:

> Probable cause under the Fourth Amendment exists where the facts and circumstances within the affiant's knowledge, and of which he has reasonably trustworthy information, are sufficient unto themselves to warrant a man of reasonable caution to believe that an offense has been or is being committed. . . . The purpose of the probable-cause requirement of the Fourth Amendment, to keep the state out of constitutionally protected areas until it has reason to believe that a specific crime has been or is being committed . . . .[71]

However, along with the Court's approval of warrantless searches in a growing number of cases came a shift in the definition of the probable cause standard needed to justify them. Recall the case of Terry v. Ohio, mentioned above. In that case a police officer had observed behavior of three individuals that seemed suspicious, so he decided to investigate. Upon approaching the suspects, the officer patted down the outer clothing of one of them and found a gun. Although the Court recognized that the officer did not have actual knowledge of any facts that would indicate that the suspects had committed or were committing a crime, it held that given the possibility of harm to himself or others, the officer merely needed to "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion."[72] Terry's articulable suspicion standard, also known as the reasonable suspicion test, is still used by the Court today when judging probable cause for investigative stops, even after having stated:

> Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.[73]

Perhaps, given the exigencies confronting officers when investigating suspicious and possibly dangerous incidents, the reasonable suspicion standard can be justified. As time progressed, however, the Court even did away with that in arrest situations. In 1973 the Court held that when an officer makes a lawful arrest, no additional justification need be offered to conduct a full search of the arrestee.[74] Adding to that rule in New York v. Belton the Court stated that an officer need not make any special showing of probable cause, or even reasonable suspicion, in order to search someone they have arrested because "the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have."[75] In 1989 that principle was taken to the extreme when a federal employees' union challenged the constitutionality of a United States Customs Service program requiring employees desiring promotion to submit to a drug test. Rejecting the employees' claim that the tests failed the Fourth Amendment's probable cause requirement because they were not based on any suspected drug use within the Customs Service, the Court ruled that "neither a warrant nor probable cause, nor, indeed, any

measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[76]

One of the most suspect developments in the Court's treatment of probable cause during recent years is their abdication of responsibility for the matter. The Court has simply left probable cause determinations to other branches of government and deferred to their judgement, thereby effectively eliminating the security of even post search judicial review of reasonableness. In the case of administrative searches, for example, the Court recognized that even searches conducted to enforce civil codes implicate the privacy protected by the Fourth Amendment. However, the Court has distinguished between the probable cause necessary to justify criminal and civil investigations, holding that where the purpose of the search is not to uncover evidence of criminal wrong doing, legislative or administrative standards satisfy the probable cause requirement.[77] That general principle of deferring to legislative judgement in this area was re-emphasized in 1981 when the Court stated that the warrants may be bypassed when "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme . . . ."[78]

Police agencies have also been given the discretion to create their own standards of probable cause in some cases. In 1976, for example, the Supreme Court upheld a conviction

based on evidence seized during a warrantless inventory search of a car that had been impounded for numerous parking violations. Defining them as "routine practice" and noting that their primary objective is to protect police from claims of theft, the Court held that inventory searches were constitutionally valid. The Court has further stated that probable cause is only necessary in criminal investigations and therefore there need be no showing of it for searches that are not aimed at discovering evidence for criminal prosection.[79] Hence we read in a 1987 decision that:

> reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure.[80]

By requiring that warrant requests include information "particularly describing the place to be searched, and the persons or things to be seized" the Fourth Amendment requires judges to limit the search to its proper scope. Regrettably, the constitutionally permissible scope of a search is defined by the interests and probable cause justifying its initiation, and the Court's expansive reading of those issues has led to an expansion in the scope that a warrantless search is allowed. Drawing from the lessons of past cases, in Terry v. Ohio the Court established that when considering the legitimate scope of a warrantless search, courts should examine "whether it was reasonably related in scope to the circumstances which justified the interference

in the first place."[81] Application of the test created in that case led the Terry Court to the conclusion that, the only justification for initiating the search at issue there being to obviate the possibility of harm to the officer or others nearby, the permissible scope of that search had to be limited to only those actions necessary to detect weapons. Accordingly, the officer's cursory "frisk" of the suspect's outer clothing was upheld because it was no more intrusive than necessary.[82]

Although Terry dealt specifically with an investigatory stop where the threat of danger to the officer was yet unknown, Chimel v. California used the scope limitation principle that Terry established as a touchstone in its limitation of the proper scope of searches conducted in conjunction with a lawful arrest. Prior to Chimel when a person was arrested virtually all of their possessions could be searched in order to procure evidence of the crime.[83] In Chimel, however, using the need to protect officers' safety as the foundation of its decision, the Court held that the scope of such searches must be limited to the arrestee's person and the area within their immediate reach or control, from which they could grab a weapon. Although Chimel did restrict the physical area that could legally be searched, its shortcoming was in still allowing general searches for unspecified evidentiary items within that area that previous cases in that genre allowed.[84]

Subsequent decisions would also leave the possibility of evidentiary search open and distort even the physical limitation created in Chimel with expansive readings of what constituted "the area within the arrestee's control." In 1981, for example, a case came before the Court where, after smelling and seeing what he believed to be marijuana in a car he had pulled over for speeding, a New York State policeman arrested the occupants of the vehicle for possession of marijuana. While stating to apply the Terry and Chimel guidelines, the Court upheld the officer's subsequent search of a zipped jacket pocket in the passenger compartment of the vehicle that led to one of the suspect's conviction for possession of cocaine, as being a search of the area within the arrestee's immediate control.[85]

The very next year the Court was confronted with a case where police officers arrested a suspect and searched his vehicle pursuant to an anonymous tip that stated he was involved in drug trafficking. Having found the suspect and vehicle described by the anonymous caller, officers took him into custody and then entered the trunk of his car. After finding a bag in the trunk that contained what appeared to be narcotics, the car was taken to the police station where it was searched again and a large amount of cash was found. When the case reached the Supreme Court it was determined that the anonymous tip supplied the necessary degree of probable cause to initiate the search and defined its proper

scope. Moreover, the Court stated that given probable cause, the power of officers to search without a warrant is as broad as a warrant could authorize. Once the search has begun, wrote the Court:

> nice distinctions between closets, drawers, and containers, in the case of a home, or between glove compartments, upholstered seats, trunks, and wrapped packages, in the case of a vehicle, must give way to the interest in the prompt and efficient completion of the task at hand.[86]

That principle was echoed in Colorado v. Bertine where the Court upheld an inventory search of an automobile pursuant to an arrest for driving under the influence of alcohol in which the officer opened a closed backpack and found drugs and cash that were used to convict the owner on drug charges.[87]

These current trends in the Court's treatment of warrantless searches are in direct conflict with the spirit and purpose of the Fourth Amendment directives. Admittedly, the language of the Fourth Amendment conceives of warrantless searches, but given the history of the amendment it is obvious that the framers meant to seriously circumscribe them. The injustices of general searches conducted under the authority of writs of assistance were largely responsible for the move towards independence, and were uppermost in the minds of the men who drafted the restrictions on the powers of search and seizure the Fourth Amendment contains. Just more than two centuries after the adoption of those protections, however, the Supreme Court

has re-exposed citizens to many of the evils that the framers intended to eradicate.

The Court's weakening of Fourth Amendment liberties can be seen at all of the previously discussed levels of analysis. In the weight allotted to the various interests at stake when conducting their balancing test, the breakdown is apparent at two points. First, allowing law enforcement efficiency to be used as a calculable interest, as was done in United States v. Biswell for example, is clearly a retreat from the amendment's history. This becomes obvious recalling that the Fourth Amendment was created to eliminate the use of writs of assistance which were obviously very efficient law enforcement tools. Secondly, the Court's reading down of the importance of individuals' Fourth Amendment interests in different settings also belies the intent of the amendment. In the case of administrative searches, for example, the opinion of the court has been that warrantless inspections are okay because of the perceived decreased privacy interest owners have in commercial property. History shows, however, that it was merchants who were most troubled by writs of assistance in the colonies. Their having led the first major battle against them in Paxton's case, provides a compelling indication that the Fourth Amendment was meant to protect businesses. Furthermore, the Court's holdings that individuals enjoy a lesser privacy expectation in

automobiles fails to properly account for their pervasiveness in today's society. With as much time as Americans spend with their cars and the degree to which society depends on automotive transportation that is a difficult premise to accept.

The probable cause standard has also been the subject of the Court's abuse. In order to secure themselves from arbitrary government intrusions, the framers required that the government have actual knowledge indicating that a specified crime had been or would be committed before conducting a search. Here again the colonists' experience with writs of assistance was proof enough of the need to require that searches be based on knowledge of criminal activity, not just suspicion. However, through a series of decisions leading to the statement in Treasury Employees v. Von Raab that even individualized suspicion is not always necessary, the Supreme Court has all but removed the probable cause requirement from warrantless searches. Where the requirement has been left it has been the Court's policy to defer to the judgements of other government branches as to the proper standard to enforce. This has included letting police agencies define probable cause for routine matters, a practice dangerously reminiscent of the executive discretion in writs of assistance.

The framers sought to further insulate themselves from arbitrary exercises of government power by requiring those

who wished to search to specify the area and object of the search and confine its scope to those things indicated. Colonists had endured broad and extensive general searches, and meant to end that practice with the provisions of the Fourth Amendment. Unfortunately, application of those principles by the Supreme Court has nearly read those provisions out of existence. Although Chimel v. California limited searches conducted incident to arrests to the area within which a suspect could grab a weapon, that is a somewhat empty protection of liberty. Presumably such a search can only be executed after the suspect has already been taken into custody, but the Chimel doctrine would still allow an officer to search the immediate area of the arrest scene even after the suspect is no longer a threat. Chimel also allows officers to search for evidence in that general area, despite the similarity of such action to the evidentiary searches authorized by general warrants, like that of the Wilkes case cited above, that the Fourth Amendment was created to stop. Furthermore, the Court has held that the scope of warrantless searches may extend as far as a warrant could authorize, thereby placing more discretion in the hands of the searching officer, contrary to the framers' demands.

Taken by themselves each of these variations from required Fourth Amendment principles may seem insignificant, but on the whole, viewed in light of the history that

resulted in the creation of those principles, a general pattern of erosion of citizens' protected freedoms emerges which is unacceptable. As Justice Bradley wrote in 1886:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely: by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. . . . It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.[88]

It is true that the Fourth Amendment allows warrantless searches in some circumstances, but great care must be exercised in defining and limiting those situations in order to preserve the protections that the framers valued so highly. That standard of care is entirely lacking in the current trend of Supreme Court decisions.

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