Search and Seizure - The Fourth Amendment: Origins, Text, And History, The Current Structure Of Search And Seizure Law

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In any free society, the police must be constrained. The constraint can come from a variety of sources—politics, bureaucratic culture, administrative sanctions, and so forth. It need not necessarily come from the law. And in most Western democracies, it does not come from the law; outside the United States, police seem to be regulated, where they are regulated, mostly through nonlegal means.

For much of its history—until 1961, to be precise—the same held true of the United States. Since that date, however, American law has played a very large role in regulating the police and reining in police misconduct. And the chief source of legal restraint is the law of search and seizure. That law has three key features. First, it is constitutional. The basic standards that limit police investigation of crime—the standards that define when police can search a home, or seize a suitcase believed to contain drugs, or arrest a suspect for some crime—derive from the Fourth Amendment to the federal constitution. Because judges are the prime interpreters of the constitution, this means search and seizure law is basically judge-made. Because constitutional law is binding on popularly elected legislatures and executives, it means search and seizure law cannot be altered by elected politicians, state or federal. In the United States, to a degree that probably has no parallel elsewhere, judges—especially Supreme Court Justices—decide what rules the police must follow. Congress, state legislatures, and the police themselves must live with the rules these judges and Justices create.

Second, its chief business is protecting privacy. The dominant focus of the law of search and seizure is to limit what police can see and hear, to limit their ability to invade spaces people prefer to keep private. That is not the only interest the law protects, but it clearly is the interest that the law protects most. Other concerns—the potential for police violence, the harm to individual liberty that comes from arrest or street detention, discriminatory treatment of black and white suspects—receive much less attention from judges and Justices in Fourth Amendment cases.
Third, it is police-focused. Government gathers information about people in a variety of ways, through a variety of agents. Grand juries

subpoena witnesses and documents; prosecutors interview suspects; administrative agencies inspect wetlands and workplaces. These things receive only slight legal regulation; with few exceptions Fourth Amendment law ignores them. That law's clear focus is on police searches and arrests. It is not too much to say that Fourth Amendment law is a kind of tort law for the police; it is the body of civil liability rules that limit day-to-day police activities. Police must therefore pay close attention to Fourth Amendment rules; other government officials can usually ignore them.

Origins. Like most of the rest of the Bill of Rights, the Fourth Amendment has its origins in seventeenth-and eighteenth-century English common law. Unlike the rest of the Bill of Rights, the Fourth Amendment's origins can be traced precisely—it arose out of a strong public reaction to three cases from the 1760s, two decided in England and one in the colonies.

The two English cases are usefully treated as a pair. Both *Wilkes v. Wood*, 19 Howell's State Trials 1153 (C.P. 1763), and *Entick v. Carrington*, 19 Howell's State Trials 1029 (C.P. 1765), involved pamphleteers charged with seditious libel for criticizing the king's ministers and, through them, the king himself. In both cases, agents of the king issued a warrant authorizing the ransacking of the pamphleteers' homes and the seizure of all their books and papers. (An aside is necessary at this point: Warrants are means of giving government officials permission to search or arrest someone whom they otherwise might not be allowed to search or arrest. In American practice, warrants are issued only by judges or magistrates after reviewing an application from a police officer. In eighteenth-century England, warrants were sometimes issued by agents of the Crown on their own initiative.) These searches were duly carried out. Wilkes and Entick sued for damages, claiming that the warrants were void and that the searches pursuant to them were therefore illegal. Both Wilkes and Entick won, with powerful opinions issued by Lord Camden, the judge in both cases. These decisions made Camden a hero in the colonies; a number of towns and cities were named after him because of his opinions in *Wilkes* and *Entick*.

The third case was the *Writs of Assistance Case* (see Dickerson, 1939). British customs inspectors seeking to stamp out smuggling in colonial Boston were given blanket search warrants, called writs of assistance,

that permitted them to search anyplace where they thought smuggled goods might be. (The writs also allowed the inspectors to compel private citizens to help them carry out the searches—hence the writs' name.) Some Boston merchants, represented by James Otis, sued, seeking a holding that the writs were invalid. The merchants lost, but Otis's argument, with its ringing defense of individual privacy, became famous and strengthened opposition to British rule. John Adams later said of Otis's argument that "then and there the child Independence was born." Historians generally agree that the Fourth Amendment was designed to affirm the results in *Wilkes* and *Entick*, and to overturn the result in the *Writs of Assistance Case*. Three principles seem to follow. First, the government should not be allowed to search without some substantial justification, some reason to believe the place being searched contains the evidence being sought. That was the problem with the writs of assistance—they authorized searches based on no more than the unsupported suspicion of the inspector. Second, searches, particularly of private homes, should not go beyond their justification. That was the problem with the searches in *Wilkes* and *Entick*–the authorities did not simply search for and seize illegal writings, but took all the books and papers in the suspects' houses. Third, the government should not use blanket warrants to evade the first two principles. That was a problem in all three cases. English common law held it a trespass to invade someone's home without some kind of authorization; the warrants in *Wilkes* and *Entick* and the writs of assistance looked like efforts to evade that common law right. This explains why, at the time of the Founding era, search warrants—now viewed as a protection against police overreaching—were seen as more of a danger than a safeguard. Notice that none of these three cases involved ordinary criminal law enforcement. None stemmed from the investigation of a murder, or a robbery, or a rape. Rather, each involved the investigation and prosecution of what might fairly be called dissidents—ordinary law-abiding citizens who disagreed strongly with the laws they were disobeying, and who enjoyed some substantial support among the citizenry. It is not at all clear from the Fourth Amendment's history that James Madison and his contemporaries wished to restrict the investigation of ordinary crimes; indeed, it is not clear that they even thought about the investigation of ordinary crimes.

Notice, too, that none of these cases involved searches by people whom we would recognize today as police officers. Police forces did not exist in the eighteenth century, either in England or in the colonies. It follows that the Framers could not possibly have thought about how best to

regulate them. The Fourth Amendment's central role—reining in the police—is a role that it assumed much later. This point counsels in favor of a certain modesty when seeking to extract contemporary lessons from the Fourth Amendment's historical context.

The Fourth Amendment's text. The Fourth Amendment, along with the other provisions of the Bill of Rights, was proposed by James Madison. The version that was ultimately ratified (Madison's original version was slightly different) reads as follows:

> 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 first clause—lawyers usually call it the "reasonableness clause"–contains a simple prohibition: unreasonable searches and seizures are forbidden. It leaves the key term, "unreasonable," undefined. The second clause, usually called the "warrant clause," places a set of limits on the issuance of search or arrest warrants. Three limits are listed: the warrants must be supported by probable cause, they must define where the search is to take place, and they must define what the object of the search is—who or what is to be seized. This text nowhere requires the government to get search or arrest warrants—the second clause limits the use of warrants, but never says when, if ever, the government must use them. So far as the text of the Fourth Amendment is concerned, the police apparently may search or seize without a warrant, as long as the search or seizure is reasonable. This is unsurprising given the Fourth Amendment's origins. Madison and his contemporaries were chiefly concerned with preventing a recurrence of searches like the ones in *Wilkes* and *Entick;* the safest way to do that was to severely limit the use of warrants. Requiring them was apparently not on the Framers' agenda.

Subsequent history to 1961. For a century and a half after it was ratified, the Fourth Amendment (like the rest of the Bill of Rights) applied only to the federal government; state and local police were not bound by it. During most of this period, federal criminal investigation and prosecution was rare—there was no F.B.I., and no army of federal prosecutors—so there was little opportunity for Fourth Amendment litigation. As a consequence, Fourth Amendment law basically lay

dormant until Prohibition in the 1920s, which for the first time produced a large and active federal enforcement bureaucracy. By that time, three important changes had taken place. First, the Supreme Court had adopted the exclusionary rule (in *Weeks v. United States*, 232 U.S. 314 (1914)), which held that illegally seized evidence ordinarily could not be used in criminal trials. The source and rationale of that rule are discussed in a separate entry. Second, during the course of the nineteenth century search warrants had come to be seen as a way of limiting police authority, not as means by which the government could evade legal restriction. This is a natural development: once the Fourth Amendment placed stringent limits on warrants, requiring warrants became a good way to ensure that police had good reasons for searching. Accordingly, one sees frequent discussion in Prohibition-era cases of the importance of requiring police to get advance permission from a magistrate, in the form of a warrant, before searching. Third, probable cause had become the generally applicable legal standard for searches. "Reasonable" searches meant searches supported by probable cause—which meant, roughly, a fair likelihood that the evidence searched for would be found in the place searched.

Thus, by the end of the 1920s, Fourth Amendment law had assumed the following structure. Probable cause was required for all searches or arrests. A warrant, obtained in advance, was required at least for searches of homes, and possibly for many other searches as well. (Curiously, arrests for serious crimes were not thought to require warrants, a rule that still holds today.) And these rules were enforced primarily by an exclusionary rule, so that when the police violated the rules, any evidence they found would be inadmissible in a subsequent criminal trial.

These rules still applied only to the federal government. That state of affairs changed when, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Supreme Court held that the Fourth Amendment was part of the liberty protected by the Fourteenth Amendment's due process clause against infringement by state and local officials. Twelve years later, in *Mapp v. Ohio*, 367 U.S. 643 (1961), the Supreme Court gave teeth to *Wolf* by imposing the exclusionary rule on the states. Henceforth local police, who are the primary enforcers of American criminal law, would be subject to the same search and seizure rules as F.B.I. agents, and to the same penalty for violating those rules.

It is not too much to say this worked a revolution in the way American police are themselves policed. Before 1961, local police were subject to state constitutional limits and could be sued for common law trespass (just like the offending officials in *Entick* and *Wilkes*). But these limits were illusory: state constitutions went unenforced, and common law claims against police officers virtually were never brought.

Consequently, there was no working law of search and seizure, no body of rules that officers felt bound to obey, outside the federal system. Local police were restrained, if they were restrained at all, by local custom or politics. Law played no real part in their regulation.

This posed more of a danger to some suspects than to others. At the time *Mapp* was decided, it was widely (and surely correctly) believed that local police, especially in the South, treated black suspects much more harshly than white ones. And blacks could not protect their interests through the political process, because they were often either denied the right to vote or frozen out of governing coalitions. Although the opinions in *Mapp* do not make this point explicitly, it seems likely that one of the reasons—perhaps the primary reason—for the Supreme Court's assertion of regulatory control over local police was the desire to protect black suspects from unfair treatment at the hands of nearly all-white police forces. In this way, Fourth Amendment law, which began as a tool for protecting upperclass pamphleteers and smugglers, had become a means of protecting a poor minority against oppression by police forces dominated by a middle-class (white) majority.

After 1961. The law *Mapp* imposed on local police forces was basically the same law that had been imposed on federal agents enforcing Prohibition in the 1920s: probable cause for searches and arrests, with warrants required for searches unless the police had a good excuse for not getting one. Perhaps because of a coincidence in timing—at about the time *Mapp* was decided, crime rates began skyrocketing, with the number of serious felonies trebling in the course of the next decade—these rules came to seem too burdensome for increasingly busy local police. (Rising crime also meant rising public hostility to the Supreme Court's efforts to regulate the criminal process, which was seen as "handcuffing" police and prosecutors.) Beginning in 1968, the Supreme Court moved to relax these rules in two key ways. First, in *Terry v. Ohio*, 392 U.S. 1 (1968), the Court permitted police to "stop and frisk" suspects on the street based on reasonable suspicion of criminal activity, a lesser standard than probable cause. *Terry* involved suspicion of an about-to-

be-committed robbery, but the Court soon applied its reasonable suspicion standard to past crimes and, most importantly, to drug crime. With these extensions, *Terry* meant that officers could briefly detain people, but not arrest them, based on fairly low-level suspicion of crime—the sort of suspicion that might come from spending time in the company of "known" drug dealers at places where drug trafficking is believed to be common.

The second change involved the warrant requirement. In a series of decisions stretching from the early 1970s to the early 1990s, the Court created or expanded various exceptions to the warrant requirement. For example, searches of cars were exempt, as were searches incident to arrest, as were inventory searches (these involved the inspection and cataloging of a suspect's belongings when he is taken into custody). These various exceptions, taken together, meant that the warrant requirement applied to searches of houses and apartments, but almost never applied to anything else. For searches and seizures outside private homes, police were still bound by the probable cause or reasonable suspicion standards, but no advance permission to search was required. The creation and expansion of "stop and frisk" doctrine and the contraction of the warrant requirement were both contentious; Fourth Amendment decisions in the 1970s and 1980s gave rise to some of the most heated arguments the Supreme Court has ever seen. Defenders of Fourth Amendment law's classical structure, primarily Justices William Brennan and Thurgood Marshall, argued passionately that it was important to preserve probable cause, not the softer reasonable suspicion standard, as the primary standard for searches and seizures; they also argued for a broad warrant requirement to provide an extra check on police overreaching. But these arguments generally lost, and the structure that had emerged by the early 1990s is now fairly stable. The key characteristics of that structure are the subject of the next part.

The basic structure of search and seizure law seems fairly stable; large changes are unlikely, at least in the near future. In assessing that structure, it is helpful to focus on two issues. The first goes to the interests the law of search and seizure protects. The second goes to an interest that, for the most part, the law of search and seizure ignores.

Privacy. The dominant focus of the law of search and seizure is protecting privacy. "Privacy" here has a particular meaning—it is not some generalized right to be let alone; rather, it is the interest in being free from observation, the interest in not being seen or heard. That the

law protects privacy in this limited sense is shown by the cases that define "searches," which cover only police conduct that permits officers to see or hear things that ordinary citizens would not be able to see or hear.

Notice that the interest in liberty receives less protection. Searches of private homes require probable cause and a warrant. Probable cause, with no warrant, suffices for an arrest outside the home—even though an arrest can lead to detention in the police station. The interest in being free from police violence receives, if not less protection, less attention, which may amount to the same thing: The number of excessive force claims brought against police officers is but a small fraction of the number of suppression motions based on allegedly illegal car searches. The law's focus on privacy sits uncomfortably together with its focus on regulating the police. Administrative agencies like the Internal Revenue Service arguably invade people's privacy more than the police—think about the kinds of information people must supply on their tax forms. If one really wished to protect privacy, then, a natural way to do so would be to regulate with some care what questions the IRS can ask and how it can ask them. Yet Fourth Amendment law has almost nothing to say about those topics. At the same time, it has a great deal to say about questions like when the police can inspect the inside of a paper bag, or look inside the glove compartment of a car—trivial privacy invasions, one might think, compared with tax forms. In other words, search and seizure law protects privacy, but only when the police infringe it. That seems an odd way to protect privacy.

And protecting privacy may be an odd way to regulate the police. Police do two things that other government agents—grand juries, prosecutors, or administrative agencies—do not. Police arrest people, which means removing them from their homes and locking them up. And police beat, sometimes shoot, people as a means of obtaining and maintaining control over them. If one were to imagine a body of law whose goal was specially to regulate the police, one might expect that law to focus on those two things: on regulating police ability to deprive suspects of their liberty and, perhaps especially, on limiting police ability to injure or kill suspects. Fourth Amendment law does some of that. But it focuses more on privacy interests, on searches of homes and cars and paper bags, and less on other, perhaps more important goals.

Race discrimination. One of those goals might be to eliminate police discrimination on the basis of race. African Americans suffer a

disproportionate share of arrests and prison sentences. Much of that disproportion flows from differences in crime rates across population groups, but some of the disproportion may be a consequence of discriminatory targeting of suspects by the police. Perhaps surprisingly, Fourth Amendment law does little to stop that sort of discrimination. Given the breadth of criminal law, police have probable cause to arrest or reasonable suspicion to stop a large portion of the population—when it comes to vehicular traffic, a large majority of the population. Within this pool of potential suspects, police can target whom they wish; Fourth Amendment law basically says nothing about their exercise of enforcement discretion. So if police officers stop large numbers of black drivers, ostensibly for speeding but primarily to check for drugs, and stop few whites, the black drivers have no legal claim.

This is true notwithstanding the fact that a number of courts forbid the use of race as a factor in police "profiles." Such profiles are common in drug investigations; they basically list factors common to drug couriers in particular markets at particular times. Officially, race is a forbidden factor, but officers can easily take race into account without acknowledging that they do so, and for now, the law tolerates that. Another form of potential discrimination involves the targeting of some kinds of crimes, and some neighborhoods, more severely than others. In the late 1980s and early 1990s, urban crack markets received more police attention than suburban markets in cocaine powder. Most crack defendants were black; most cocaine powder defendants were white. One could argue that the strong tilt against crack was, on balance, a good thing; one could also argue that it was socially harmful, in part because of the racial composition of the two pools of defendants. Whichever answer is right, the current law of search and seizure leaves the question wholly to the police.

There may be no good alternative to that position. Courts are poorly positioned to direct the allocation of police resources across crimes and neighborhoods, and any serious effort to eliminate discriminatory policing would require precisely that. Still, it seems strange that Fourth Amendment law—the body of law most clearly devoted to regulating the police—has so little to do with what may be the most serious regulatory problem in the world of policing: stamping out race discrimination.