

Search and Seizure Scenarios

Directions: Answer the following questions to the best of your ability. In each case, explain the reasons for your answer.

1. An officer observes a suspect commit a criminal act inside his apartment while the officer is working surveillance. If the drapes were closed during the observation, but the officer was still able to view the act because of special optical aids, would the officer's observations be admissible?
2. Police listened to a drug transaction being consummated by putting their ears against a wall common to the adjoining apartment where the transaction occurred. Was there any violation of privacy?
3. A drug dealer was using a public telephone booth to make a drug transaction. The police used listening devices to hear the suspect's conversation. Would the officer's evidence be admissible in court?
4. The police used binoculars to observe a crime taking place 250 feet away. Would this be admissible in court?
5. Jail officials monitored and tape recorded conversations of an inmate. Are these recordings admissible in court?
6. Police overheard a suspect's conversation in the rear seat of the police car. Can this be used in court?

Fourth Amendment: Search and Seizure

Directions: Read the following selection. Be prepared for class discussion.

Search and Seizure:

A Guide to Rules, Requirements, Tests, Doctrines, and Exceptions

The young man knows the rules, but the old man knows the exceptions.

—Oliver Wendell Holmes

A search is by definition an invasion of *privacy*. Prior to *Katz v. U.S.* (1967), privacy was defined in terms of the trespass doctrine, but since then, a "*reasonable expectation of privacy*" doctrine has prevailed. Only what people themselves deem "private" and what society recognizes as private are protected. The Fourth Amendment does not protect against all invasions of privacy; it only forbids unreasonable searches and seizures.

Technically, the Fourth Amendment says that all searches are to be conducted under authority of a warrant (*the warrant rule*). Warrants can be issued to search premises (dwellings), vehicles, or persons. The Fourth Amendment also states that probable cause (*the probable cause requirement*) should form the basis of warrants, supported by oath or affirmation. . . . There are different definitions of probable cause, from what a person of reasonable caution or prudence would believe in connection with a crime or criminal offender to what would make a reasonable person to more probably than not believe a guilty rather than innocent interpretation of facts, hearsay, or a combination of the two. The trend is toward the "*more probable than not*" test. For example, in informant law, the *Aguilar test* (1964) was established approving anonymous informant tips if (a) it could be shown the informant was reliable, and (b) some underlying information could be provided to show how the informant reached the information in their tip. This *two-pronged test* was replaced by a "totality of circumstances" test in *Illinois v. Gates* (1983) in which a reviewing magistrate uses practical common sense, given all the circumstances set forth in the affidavit, to decide if there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Warrants must be executed promptly (within forty-eight hours in some states; at least within ten days in other states) and not usually at night or on Sundays unless otherwise stated. So-called "no-knock warrants" can be issued if the "exigent circumstances" test is met; i.e., evidence can be easily destroyed or flushed, a hostage situation exists, and the case involves explosives, emergencies, danger to officers, or unusual circumstances. All warrants, not just no-knock warrants, authorize the use of force to enter a dwelling if police are denied entrance or no one is there to admit them. The "demand and refusal" element of the "knock and announce" rule has been eliminated. A warrant must include a street address and description of the location; e.g., 110 S. Main, a two-story white house. A warrant for one side of a duplex does not authorize search of the other side, and the same is true of apartments. A warrant must describe as fully as possible all the things to be looked for in connection with a crime that has been committed or is about to be committed. The descriptions must be specific; e.g., one black 21" Panasonic TV, serial number 63412X. The described item(s) are usually provided in boilerplate fashion on the warrant form itself (with an indication to strike inapplicable paragraphs). Finally, a valid warrant must be signed by a judge. The most important thing about searches is that their scope must be narrow. General, exploratory searches are unconstitutional.

A seizure is by definition the deprivation of liberty, or the enjoyment in exercising dominion or control over a thing, be it property or person. . . . Police can temporarily seize private property for about fourteen days (this varies from jurisdiction to jurisdiction), and usually hold it indefinitely if it is material evidence in a criminal case. Temporary seizure or detention of a person is allowed for shorter periods of time, usually seventy-two hours. Asset forfeiture laws have been recently applied in criminal cases, to show that crime does not pay. While these are technically civil law procedures that exist on both federal and state levels, seized property can be auctioned off for money to fund the criminal justice system, or in some cases, used by the police departments themselves in operations; e.g., as an undercover vehicle. With asset forfeiture, the crime must fall under the RICO (Racketeer Influenced Corrupt Organization) Act, or be part of an ongoing criminal enterprise designed to be profitable, such as drug dealing. In most cases, a person who has had their assets seized under forfeiture laws must make a showing of good cause why the property should be returned in civil court within ninety days.

The exclusionary rule and common law time frames provide protection against unreasonable seizures. The purpose of the exclusionary rule (briefly, evidence illegally obtained cannot be legally admitted), first created by *Weeks v. U.S.* (1914) and made applicable to the states via *Mapp v. Ohio* (1961) is often misunderstood. It is not designed to protect the constitutional rights of suspects, but to penalize police and deter police misconduct. The exclusionary rule is a judicial mandate designed to help professionalize the police; it's a social experiment, not a guarantee of constitutional safeguards. It's a rather harsh rule, the reasoning being that it is better to let some of the guilty go free so that the majority of people would benefit from more thorough and professional police work. The Court appears to be waiting for social science to answer when this goal is reached, but it represents an under-researched topic in Justice Studies, if indeed, it is researchable at all. The exclusionary rule also subsumes the *fruit of the poisonous tree* doctrine, first established in *Silverthorne Lumber Co. v. U.S.* (1920). According to this doctrine, not only is evidence illegally seized inadmissible, but any evidence or testimony obtained later as a result of the illegally seized evidence is inadmissible. This has been somewhat weakened by the *good faith exception*, . . . but it basically means that any secondary, incriminating facts or leads discovered later in a case from an earlier, illegal seizure are inadmissible. If the "tree" is tainted, the "fruits" are also tainted. This usually results in not enough evidence to go to trial. One loophole is the *purged taint exception*, which applies if the defendant broke the chain of evidence himself, and came forward with new evidence, like a spontaneous confession, about a related crime. Another loophole is the *inevitable discovery doctrine*. . . .¹

¹Dr. Tom O'Connor, "Search and Seizure: A Guide to Rules, Requirements, Tests, Doctrines, and Exceptions," *North Carolina Wesleyan College*, 6 December 2004, <<http://faculty.ncwc.edu/toconnor/405/405lect04.htm>> (1 November 2005).