

Fourth Amendment, Privacy and Technology Class Notes

History and Scope of the Amendment

History --Few provisions of the Bill of Rights grew so directly out of the experience of the colonials as the Fourth Amendment, embodying as it did the protection against the utilization of the "writs of assistance." But while the insistence on freedom from unreasonable searches and seizures as a fundamental right gained expression in the Colonies late and as a result of experience, there was also a rich English experience to draw on. "Every man's house is his castle" was a maxim much celebrated in England, as was demonstrated in *Semayne's Case*, decided in 1603. A civil case of execution of process, *Semayne's Case* nonetheless recognized the right of the homeowner to defend his house against unlawful entry even by the King's agents, but at the same time recognized the authority of the appropriate officers to break and enter upon notice in order to arrest or to execute the King's process. Most famous of the English cases was *Entick v. Carrington*, one of a series of civil actions against state officers who, pursuant to general warrants, had raided many homes and other places in search of materials connected with John Wilkes' polemical pamphlets attacking not only governmental policies but the King himself.

Entick, an associate of Wilkes, sued because agents had forcibly broken into his house, broken into locked desks and boxes, and seized many printed charts, pamphlets and the like. In an opinion sweeping in terms, the court declared the warrant and the behavior it authorized subversive "of all the comforts of society," and the issuance of a warrant for the seizure of all of a person's papers rather than only those alleged to be criminal in nature "contrary to the genius of the law of England." Besides its general character, said the court, the warrant was bad because it was not issued on a showing of probable cause and no record was required to be made of what had been seized. *Entick v. Carrington*, the Supreme Court has said, is a "great judgment," "one of the landmarks of English liberty," "one of the permanent monuments of the British Constitution," and a guide to an understanding of what the Framers meant in writing the Fourth Amendment.

In the colonies, smuggling rather than seditious libel afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize "prohibited and uncustomed" goods, and commanding all subjects to assist in these endeavors. The writs once issued remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. Otis lost and the writs were issued and utilized, but his arguments were much cited in the colonies not only on the immediate subject but also with regard to judicial review.

Scope of the Amendment --The language of the provision which became the Fourth Amendment underwent some modest changes on its passage through the Congress, and it is possible that the changes reflected more than a modest significance in the interpretation of the relationship of the two clauses. Madison's introduced version provided "The rights to be secured in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched, or the persons or things to be seized." As reported from committee, with an inadvertent omission corrected on the floor, the section was almost identical to the introduced version, and the House defeated a motion to substitute "and no warrant shall issue" for "by warrants issuing" in the committee draft. In some fashion, the rejected amendment was inserted in the language before passage by the House and is the language of the ratified constitutional provision.

As noted above, the noteworthy disputes over search and seizure in England and the colonies revolved about the character of warrants. There were, however, lawful warrantless searches, primarily searches incident to arrest, and these apparently gave rise to no disputes. Thus, the question arises whether the Fourth Amendment's two clauses must be read together to mean that the only searches and seizures which are "reasonable" are those which meet the requirements of the second clause, that is, are pursuant to warrants issued under the prescribed safeguards, or whether the two clauses are independent, so that

searches under warrant must comply with the second clause but that there are "reasonable" searches under the first clause which need not comply with the second clause. This issue has divided the Court for some time, has seen several reversals of precedents, and is important for the resolution of many cases. It is a dispute which has run most consistently throughout the cases involving the scope of the right to search incident to arrest. While the right to search the person of the arrestee without a warrant is unquestioned, how far a field into areas within and without the control of the arrestee a search may range is an interesting and crucial matter.

The Court has drawn a wavering line. In *Harris v. United States*, it approved as "reasonable" the warrantless search of a four-room apartment pursuant to the arrest of the man found there. A year later, however, a reconstituted Court majority set aside a conviction based on evidence seized by a warrantless search pursuant to an arrest and adopted the "cardinal rule that, in seizing goods and articles, law enforcement agents must secure and use search warrants wherever reasonably practicable." This rule was set aside two years later by another reconstituted majority which adopted the premise that the test "is not whether it is reasonable to procure a search warrant, but whether the search was reasonable." Whether a search is reasonable, the Court said, "must find resolution in the facts and circumstances of each case." However, the Court soon returned to its emphasis upon the warrant. "The Fourth Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part." Therefore, "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through a warrant procedure." Exceptions to searches under warrants were to be closely contained by the rationale undergirding the necessity for the exception, and the scope of a search under one of the exceptions was similarly limited.

During the 1970s the Court was closely divided on which standard to apply. For a while, the balance tipped in favor of the view that warrantless searches are per se unreasonable, with a few carefully prescribed exceptions. Gradually, guided by the variable expectation of privacy approach to coverage of the Fourth Amendment, the Court broadened its view of permissible exceptions and of the scope of those exceptions.

By 1992, it was no longer the case that the "warrants-with-narrow-exceptions" standard normally prevails over a "reasonableness" approach. Exceptions to the warrant requirement have multiplied, tending to confine application of the requirement to cases that are exclusively "criminal" in nature. And even within that core area of "criminal" cases, some exceptions have been broadened. The most important category of exception is that of administrative searches justified by "special needs beyond the normal need for law enforcement." Under this general rubric the Court has upheld warrantless searches by administrative authorities in public schools, government offices, and prisons, and has upheld drug testing of public and transportation employees. In all of these instances the warrant and probable cause requirements are dispensed with in favor of a reasonableness standard that balances the government's regulatory interest against the individual's privacy interest; in all of these instances the government's interest has been found to outweigh the individual's. The broad scope of the administrative search exception is evidenced by the fact that an overlap between law enforcement objectives and administrative "special needs" does not result in application of the warrant requirement; instead, the Court has upheld warrantless inspection of automobile junkyards and dismantling operations in spite of the strong law enforcement component of the regulation. In the law enforcement context, where search by warrant is still the general rule, there has also been some loosening of the requirement. For example, the Court has shifted focus from whether exigent circumstances justified failure to obtain a warrant, to whether an officer had a "reasonable" belief that an exception to the warrant requirement applied; in another case the scope of a valid search "incident to arrest," once limited to areas within the immediate reach of the arrested suspect, was expanded to a "protective sweep" of the entire home if arresting officers have a reasonable belief that the home harbors an individual who may pose a danger.

Another matter of scope recently addressed by the Court is the category of persons protected by the Fourth Amendment--who constitutes "the people." This phrase, the Court determined, "refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with the United States to be considered part of that community." The Fourth Amendment therefore does not apply to the search and seizure by United States agents of property that is owned by a nonresident alien and located in a foreign country. The community of protected people includes U.S. citizens who go abroad, and aliens who have voluntarily entered U.S. territory and developed substantial connections with this country. There is no resulting broad principle, however, that the Fourth Amendment constrains federal officials wherever and against whomever they act.

The Interest Protected -- For the Fourth Amendment to be applicable to a particular set of facts, there must be a "search" and a "seizure," occurring typically in a criminal case, with a subsequent attempt to use judicially what was seized. Whether there was a search and seizure within the meaning of the Amendment, whether a complainant's interests were constitutionally infringed, will often turn upon consideration of his interest and whether it was officially abused. What does the Amendment protect? Under the common law, there was no doubt. Said Lord Camden in *Entick v. Carrington*: "The great end for which men entered in society was to secure their property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set foot upon my ground without my license but he is liable to an action though the damage be nothing" Protection of property interests as the basis of the Fourth Amendment found easy acceptance in the Supreme Court and that acceptance controlled decision in numerous cases. For example, in *Olmstead v. United States*, one of the two premises underlying the holding that wiretapping was not covered by the Amendment was that there had been no actual physical invasion of the defendant's premises; where there had been an invasion, a technical trespass, electronic surveillance was deemed subject to Fourth Amendment restrictions. The Court later rejected this approach, however. "The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts." Thus, because the Amendment "protects people, not places," the requirement of actual physical trespass is dispensed with and electronic surveillance was made subject to the Amendment's requirements.

The test propounded in *Katz* is whether there is an expectation of privacy upon which one may "justifiably" rely. "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." That is, the "capacity to claim the protection of the Amendment depends not upon a property right in the invaded place but upon whether the area was one in which there was reasonable expectation of freedom from governmental intrusion."

The two-part test that Justice Harlan suggested in *Katz* has purported to guide the Court in its deliberations, but its consequences are unclear. On the one hand, there is no difference in result between many of the old cases premised on property concepts and more recent cases in which the reasonable expectation of privacy flows from ownership concepts. On the other hand, many other cases have presented close questions that have sharply divided the Court. The first element, the "subjective expectation" of privacy, has largely dwindled as a viable standard, because, as Justice Harlan noted in a subsequent case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." As for the second element, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, the Court has said that "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." Thus, protection of the home is at the apex of Fourth Amendment coverage because of the right associated with ownership to exclude others; but ownership of other things, i.e., automobiles, does not carry a similar high degree of protection. That a person has taken normal precautions to maintain his privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation. Some expectations, the Court has held, are simply not those which society is prepared to accept. While perhaps not clearly expressed in the opinions, what seems to have emerged is a balancing standard, which requires "an assessing of the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement." As the intrusions grow more extensive and significantly jeopardize the sense of security of the individual, greater restraint of police officers through the warrant requirement may be deemed necessary. On the other hand, the Court's solicitude for law enforcement objectives may tilt the balance in the other direction.

Application of this balancing test, because of the Court's weighing in of law enforcement investigative needs and the Court's subjective evaluation of privacy needs, has led to the creation of a two-tier or sliding-tier scale of privacy interests. The privacy test was originally designed to permit a determination that a Fourth Amendment protected interest had been invaded. If it had been, then ordinarily a warrant was required, subject only to the narrowly defined exceptions, and the scope of the search under those exceptions was "strictly tied to and justified by the circumstances which rendered its initiation permissible." But the Court now uses the test to determine whether the interest invaded is important or persuasive enough so that a warrant is required to justify it; if the individual has a lesser expectation of privacy, then the invasion may be

justified, absent a warrant, by the reasonableness of the intrusion. Exceptions to the warrant requirement are no longer evaluated solely by the justifications for the exception, e.g., exigent circumstances, and the scope of the search is no longer tied to and limited by the justification for the exception. The result has been a considerable expansion, beyond what existed prior to Katz, of the power of police and other authorities to conduct searches.

Arrests and Other Detentions --That the Fourth Amendment was intended to protect against arbitrary arrests as well as against unreasonable searches was early assumed by Chief Justice Marshall and is now established law. At the common law, it was proper to arrest one who had committed a breach of the peace or a felony without a warrant, and this history is reflected in the fact that the Fourth Amendment is satisfied if the arrest is made in a public place on probable cause, regardless of whether a warrant has been obtained. However, in order to effectuate an arrest in the home, absent consent or exigent circumstances, police officers must have a warrant. The Fourth Amendment applies to "seizures" and it is not necessary that a detention be a formal arrest in order to bring to bear the requirements of warrants or probable cause in instances in which warrants may be forgone. Some objective justification must be shown to validate all seizures of the person, including seizures that involve only a brief detention short of arrest, although the nature of the detention will determine whether probable cause or some reasonable and articulable suspicion is necessary.

Until relatively recently, the legality of arrests was seldom litigated in the Supreme Court because of the rule that a person detained pursuant to an arbitrary seizure--unlike evidence obtained as a result of an unlawful search--remains subject to custody and presentation to court. But the application of self-incrimination and other exclusionary rules to the States and the heightening of their scope in state and federal cases alike brought forth the rule that verbal evidence, confessions, and other admissions, like all derivative evidence obtained as a result of unlawful seizures, could be excluded. Thus, a confession made by one illegally in custody must be suppressed, unless the causal connection between the illegal arrest and the confession had become so attenuated that the latter should not be deemed "tainted" by the former. Similarly, fingerprints and other physical evidence obtained as a result of an unlawful arrest must be suppressed.

Searches and Inspections in Noncriminal Cases .--Certain early cases held that the Fourth Amendment was applicable only when a search was undertaken for criminal investigatory purposes, and the Supreme Court until recently employed a reasonableness test for such searches without requiring either a warrant or probable cause in the absence of a warrant. But in 1967, the Court held in two cases that administrative inspections to detect building code violations must be undertaken pursuant to warrant if the occupant objects. "We may agree that a routine inspection of the physical condition of private property is a less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime. . . . But we cannot agree that the Fourth Amendment interests at stake in these inspection cases are merely 'peripheral.' It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." Certain administrative inspections utilized to enforce regulatory schemes with regard to such items as alcohol and firearms are, however, exempt from the Fourth Amendment warrant requirement and may be authorized simply by statute.

Camera and See were reaffirmed in *Marshall v. Barlow's, Inc.*, in which the Court held violative of the Fourth Amendment a provision of the Occupational Safety and Health Act which authorized federal inspectors to search the work area of any employment facility covered by the Act for safety hazards and violations of regulations, without a warrant or other legal process. The liquor and firearms exceptions were distinguished on the basis that those industries had a long tradition of close government supervision, so that a person in those businesses gave up his privacy expectations. But OSHA was a relatively recent statute and it regulated practically every business in or affecting interstate commerce; it was not open to a legislature to extend regulation and then follow it with warrantless inspections. Additionally, OSHA inspectors had unbounded discretion in choosing which businesses to inspect and when to do so, leaving businesses at the mercy of possibly arbitrary actions and certainly with no assurances as to limitation on scope and standards of inspections. Further, warrantless inspections were not necessary to serve an important governmental interest, inasmuch as most businesses would consent to inspection and it was not inconvenient to require OSHA to resort to an administrative warrant in order to inspect sites where consent was refused.

In *Donovan v. Dewey*, however, *Barlow's* was substantially limited and a new standard emerged permitting extensive governmental inspection of commercial property, absent warrants. Under the Federal Mine Safety and Health Act, governing underground and surface mines (including stone quarries), federal officers are directed to inspect underground mines at least four times a year and surface mines at least twice a year,

pursuant to extensive regulations as to standards of safety. The statute specifically provides for absence of advanced notice and requires the Secretary of Labor to institute court actions for injunctive and other relief in cases in which inspectors are denied admission. Sustaining the statute, the Court proclaimed that government had a "greater latitude" to conduct warrantless inspections of commercial property than of homes, because of "the fact that the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home, and that this privacy interest may, in certain circumstances, be adequately protected by regulatory schemes authorizing warrantless inspections."

Dewey was distinguished from *Barlow's* in several ways. First, Dewey involved a single industry, unlike the broad coverage in *Barlow's*. Second, the OSHA statute gave minimal direction to inspectors as to time, scope, and frequency of inspections, while FMSHA specified a regular number of inspections pursuant to standards. Third, deference was due Congress' determination that unannounced inspections were necessary if the safety laws were to be effectively enforced. Fourth, FMSHA provided businesses the opportunity to contest the search by resisting in the civil proceeding the Secretary had to bring if consent was denied. The standard of a long tradition of government supervision permitting warrantless inspections was dispensed with, because it would lead to "absurd results," in that new and emerging industries posing great hazards would escape regulation. Dewey suggests, therefore, that warrantless inspections of commercial establishments are permissible so long as the legislature carefully drafts its statute.

Dewey was applied in *New York v. Burger* to inspection of automobile junkyards and vehicle dismantling operations, a situation where there is considerable overlap between administrative and penal objectives. Applying the Dewey three-part test, the Court concluded that New York has a substantial interest in stemming the tide of automobile thefts, that regulation of vehicle dismantling reasonably serves that interest, and that statutory safeguards provided adequate substitute for a warrant requirement. The Court rejected the suggestion that the warrantless inspection provisions were designed as an expedient means of enforcing the penal laws, and instead saw narrower, valid regulatory purposes to be served: e.g., establishing a system for tracking stolen automobiles and parts, and enhancing the ability of legitimate businesses to compete. "A State can address a major social problem both by way of an administrative scheme and through penal sanctions," the Court declared; in such circumstances warrantless administrative searches are permissible in spite of the fact that evidence of criminal activity may well be uncovered in the process.

In other contexts, the Court has also elaborated the constitutional requirements affecting administrative inspections and searches. Thus, in *Michigan v. Tyler*, it subdivided the process by which an investigation of the cause of a fire may be conducted. Entry to fight the fire is, of course, an exception based on exigent circumstances, and no warrant or consent is needed; firemen on the scene may seize evidence relating to the cause under the plain view doctrine. Additional entries to investigate the cause of the fire must be made pursuant to warrant procedures governing administrative searches. Evidence of arson discovered in the course of such an administrative inspection is admissible at trial, but if the investigator finds probable cause to believe that arson has occurred and requires further access to gather evidence for a possible prosecution, he must obtain a criminal search warrant.

One curious case has approved a system of "home visits" by welfare caseworkers, in which the recipients are required to admit the worker or lose eligibility for benefits. In another unusual case, the Court held that a sheriff's assistance to a trailer park owner in disconnecting and removing a mobile home constituted a "seizure" of the home.

In addition, there are now a number of situations, some of them analogous to administrative searches, where "'special needs' beyond normal law enforcement . . . justify departures from the usual warrant and probable cause requirements." In one of these cases the Court, without acknowledging the magnitude of the leap from one context to another, has taken the Dewey/*Burger* rationale--developed to justify warrantless searches of business establishments--and applied it to justify the significant intrusion into personal privacy represented by urinalysis drug testing. Because of the history of pervasive regulation of the railroad industry, the Court reasoned, railroad employees have a diminished expectation of privacy that makes mandatory urinalysis less intrusive and more reasonable.

With respect to automobiles, the holdings are mixed. Random stops of automobiles to check drivers' licenses, vehicle registrations, and safety conditions were condemned as too intrusive; the degree to which random stops would advance the legitimate governmental interests involved did not outweigh the individual's legitimate expectations of privacy. On the other hand, in *South Dakota v. Opperman*, the Court sustained the

admission of evidence found when police impounded an automobile from a public street for multiple parking violations and entered the car to secure and inventory valuables for safekeeping. Marijuana was discovered in the glove compartment.

Searches and Seizures Pursuant to Warrant

Emphasis upon the necessity of warrants places the judgment of an independent magistrate between law enforcement officers and the privacy of citizens, authorizes invasion of that privacy only upon a showing that constitutes probable cause, and limits that invasion by specification of the person to be seized, the place to be searched, and the evidence to be sought. While a warrant is issued *ex parte*, its validity may be contested in a subsequent suppression hearing if incriminating evidence is found and a prosecution is brought.

Issuance by Neutral Magistrate --In numerous cases, the Court has referred to the necessity that warrants be issued by a "judicial officer" or a "magistrate." "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers." These cases do not mean that only a judge or an official who is a lawyer may issue warrants, but they do stand for two tests of the validity of the power of the issuing party to so act. "He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." The first test cannot be met when the issuing party is himself engaged in law enforcement activities, but the Court has not required that an issuing party have that independence of tenure and guarantee of salary which characterizes federal judges. And in passing on the second test, the Court has been essentially pragmatic in assessing whether the issuing party possesses the capacity to determine probable cause.

Probable Cause --The concept of "probable cause" is central to the meaning of the warrant clause. Neither the Fourth Amendment nor the federal statutory provisions relevant to the area define "probable cause;" the definition is entirely a judicial construct. An applicant for a warrant must present to the magistrate facts sufficient to enable the officer himself to make a determination of probable cause. "In determining what is probable cause . . . we are concerned only with the question whether the affiant had reasonable grounds at the time of his affidavit . . . for the belief that the law was being violated on the premises to be searched; and if the apparent facts set out in the affidavit are such that a reasonably discreet and prudent man would be led to believe that there was a commission of the offense charged, there is probable cause justifying the issuance of a warrant." Probable cause is to be determined according to "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." Warrants are favored in the law and utilization of them will not be thwarted by a hypertechnical reading of the supporting affidavit and supporting testimony. For the same reason, reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant." Courts will sustain the determination of probable cause so long as "there was substantial basis for the magistrate to conclude that" there was probable cause.

Much litigation has concerned the sufficiency of the complaint to establish probable cause. Mere conclusory assertions are not enough. In *United States v. Ventresca*, however, an affidavit by a law enforcement officer asserting his belief that an illegal distillery was being operated in a certain place, explaining that the belief was based upon his own observations and upon those of fellow investigators, and detailing a substantial amount of these personal observations clearly supporting the stated belief, was held to be sufficient to constitute probable cause. "Recital of some of the underlying circumstances in the affidavit is essential," the Court said, observing that "where these circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate has found probable cause," the reliance on the warrant process should not be deterred by insistence on too stringent a showing.

Requirements for establishing probable cause through reliance on information received from an informant has divided the Court in several cases. Although involving a warrantless arrest, *Draper v. United States* may be said to have begun the line of cases. A previously reliable, named informant reported to an officer that the defendant would arrive with narcotics on a particular train, and described the clothes he would be

wearing and the bag he would be carrying; the informant, however, gave no basis for his information. FBI agents met the train, observed that the defendant fully answered the description, and arrested him. The Court held that the corroboration of part of the informer's tip established probable cause to support the arrest. A case involving a search warrant, *Jones v. United States*, apparently utilized a test of considering the affidavit as a whole to see whether the tip plus the corroborating information provided a substantial basis for finding probable cause, but the affidavit also set forth the reliability of the informer and sufficient detail to indicate that the tip was based on the informant's personal observation. *Aguilar v. Texas* held insufficient an affidavit which merely asserted that the police had "reliable information from a credible person" that narcotics were in a certain place, and held that when the affiant relies on an informant's tip he must present two types of evidence to the magistrate. First, the affidavit must indicate the informant's basis of knowledge--the circumstances from which the informant concluded that evidence was present or that crimes had been committed--and, second, the affiant must present information which would permit the magistrate to decide whether or not the informant was trustworthy. Then, in *Spinelli v. United States*, the Court applied *Aguilar* in a situation in which the affidavit contained both an informant's tip and police information of a corroborating nature.

The Court rejected the "totality" test derived from *Jones* and held that the informant's tip and the corroborating evidence must be separately considered. The tip was rejected because the affidavit contained neither any information which showed the basis of the tip nor any information which showed the informant's credibility. The corroborating evidence was rejected as insufficient because it did not establish any element of criminality but merely related to details which were innocent in themselves. No additional corroborating weight was due as a result of the bald police assertion that defendant was a known gambler, although the tip related to gambling. Returning to the totality test, however, the Court in *United States v. Harris* approved a warrant issued largely on an informer's tip that over a two-year period he had purchased illegal whiskey from the defendant at the defendant's residence, most recently within two weeks of the tip. The affidavit contained rather detailed information about the concealment of the whiskey, and asserted that the informer was a "prudent person," that defendant had a reputation as a bootlegger, that other persons had supplied similar information about him, and that he had been found in control of illegal whiskey within the previous four years. The Court determined that the detailed nature of the tip, the personal observation thus revealed, and the fact that the informer had admitted to criminal behavior by his purchase of whiskey were sufficient to enable the magistrate to find him reliable, and that the supporting evidence, including defendant's reputation, could supplement this determination.

The Court expressly abandoned the two-part *Aguilar-Spinelli* test and returned to the "totality of the circumstances" approach to evaluate probable cause based on an informant's tip in *Illinois v. Gates*. The main defect of the two-part test, Justice Rehnquist concluded for the Court, was in treating an informant's reliability and his basis for knowledge as independent requirements. Instead, "a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." In evaluating probable cause, "the task of the issuing magistrate is simply to make a practical, commonsense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place."

Particularity --"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant." This requirement thus acts to limit the scope of the search, inasmuch as the executing officers should be limited to looking in places where the described object could be expected to be found.

First Amendment Bearing on Probable Cause and Particularity -- Where the warrant process is used to authorize seizure of books and other items entitled either to First Amendment protection or to First Amendment consideration, the Court has required government to observe more exacting standards than in other cases. Seizure of materials arguably protected by the First Amendment is a form of prior restraint that requires strict observance of the Fourth Amendment. At a minimum, a warrant is required, and additional safeguards may be required for large-scale seizures. Thus, in *Marcus v. Search Warrant*, the seizure of 11,000 copies of 280 publications pursuant to warrant issued ex parte by a magistrate who had not examined any of the publications but who had relied on the conclusory affidavit of a policeman was voided. Failure to scrutinize the materials and to particularize the items to be seized was deemed inadequate, and it was further noted that police "were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." A state procedure which was designed to comply with *Marcus* by the presentation of copies of books to be seized to the magistrate for his scrutiny prior to issuance of a warrant was nonetheless found

inadequate by a plurality of the Court, which concluded that "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since appellant was not afforded a hearing on the question of the obscenity even of the seven novels seven of 59 listed titles were reviewed by the magistrate before the warrant issued, the procedure was . . . constitutionally deficient." Confusion remains, however, about the necessity for and the character of prior adversary hearings on the issue of obscenity. In a later decision the Court held that, with adequate safeguards, no pre-seizure adversary hearing on the issue of obscenity is required if the film is seized not for the purpose of destruction as contraband (the purpose in *Marcus and A Quantity of Books*), but instead to preserve a copy for evidence. It is constitutionally permissible to seize a copy of a film pursuant to a warrant as long as there is a prompt post-seizure adversary hearing on the obscenity issue. Until there is a judicial determination of obscenity, the Court advised, the film may continue to be exhibited; if no other copy is available either a copy of it must be made from the seized film or the film itself must be returned.

The seizure of a film without the authority of a constitutionally sufficient warrant is invalid; seizure cannot be justified as incidental to arrest, inasmuch as the determination of obscenity may not be made by the officer himself. Nor may a warrant issue based "solely on the conclusory assertions of the police officer without any inquiry by the magistrate into the factual basis for the officer's conclusions." Instead, a warrant must be "supported by affidavits setting forth specific facts in order that the issuing magistrate may 'focus searchingly on the question of obscenity.'" This does not mean, however, that a higher standard of probable cause is required in order to obtain a warrant to seize materials protected by the First Amendment. "Our reference in *Roaden* to a 'higher hurdle . . . of reasonableness' was not intended to establish a 'higher' standard of probable cause for the issuance of a warrant to seize books or films, but instead related to the more basic requirement, imposed by that decision, that the police not rely on the 'exigency' exception to the Fourth Amendment warrant requirement, but instead obtain a warrant from a magistrate"

In *Stanford v. Texas*, a seizure of more than 2,000 books, pamphlets, and other documents pursuant to a warrant which merely authorized the seizure of books, pamphlets, and other written instruments "concerning the Communist Party of Texas" was voided. "The constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. . . . No less a standard could be faithful to First Amendment freedoms."

However, the First Amendment does not bar the issuance or execution of a warrant to search a newsroom to obtain photographs of demonstrators who had injured several policemen, although the Court appeared to suggest that a magistrate asked to issue such a warrant should guard against interference with press freedoms through limits on type, scope, and intrusiveness of the search.

Property Subject to Seizure --There has never been any doubt that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime. But in *Gouled v. United States*, a unanimous Court limited the classes of property subject to seizures to these three and refused to permit a seizure of "mere evidence," in this instance defendant's papers which were to be used as evidence against him at trial. The Court recognized that there was "no special sanctity in papers, as distinguished from other forms of property, to render them immune from search and seizure," but their character as evidence rendered them immune. This immunity "was based upon the dual, related premises that historically the right to search for and seize property depended upon the assertion by the Government of a valid claim of superior interest, and that it was not enough that the purpose of the search and seizure was to obtain evidence to use in apprehending and convicting criminals." More evaded than followed, the "mere evidence" rule was overturned in 1967. It is now settled that such evidentiary items as fingerprints, blood, urine samples, fingernail and skin scrapings, voice and handwriting exemplars, conversations, and other demonstrative evidence may be obtained through the warrant process or without a warrant where "special needs" of government are shown.

However, some medically assisted bodily intrusions have been held impermissible, e.g., forcible administration of an emetic to induce vomiting, and surgery under general anesthetic to remove a bullet lodged in a suspect's chest. Factors to be weighed in determining which medical tests and procedures are reasonable include the extent to which the procedure threatens the individual's safety or health, "the extent of the intrusion upon the individual's dignitary interests in personal privacy and bodily integrity," and the importance of the evidence to the prosecution's case.

In *Warden v. Hayden*, Justice Brennan for the Court cautioned that the items there seized were not "'testimonial' or 'communicative' in nature, and their introduction therefore did not compel respondent to become a witness against himself in violation of the Fifth Amendment. . . . This case thus does not require

that we consider whether there are items of evidential value whose very nature precludes them from being the object of a reasonable search and seizure." This merging of Fourth and Fifth Amendment considerations derived from *Boyd v. United States*, the first case in which the Supreme Court considered at length the meaning of the Fourth Amendment. *Boyd* was a quasi-criminal proceeding for the forfeiture of goods alleged to have been imported in violation of law, and concerned a statute which authorized court orders to require defendants to produce any document which might "tend to prove any allegation made by the United States." That there was a self-incrimination problem the entire Court was in agreement, but Justice Bradley for a majority of the Justices also utilized the Fourth Amendment.

While the statute did not authorize a search but instead compulsory production, the Justice concluded that the law was well within the restrictions of the search and seizure clause. With this point established, the Justice relied on Lord Camden's opinion in *Entick v. Carrington* for the proposition that seizure of items to be used as evidence only was impermissible. Justice Bradley announced that the "essence of the offence" committed by the Government against *Boyd* "is not the breaking of his doors, and the rummaging of his drawers . . . but it is the invasion of his indefeasible right of personal security, personal liberty and private property. . . . Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other."

While it may be doubtful that the equation of search warrants with subpoenas and other compulsory process ever really amounted to much of a limitation, the present analysis of the Court dispenses with any theory of "convergence" of the two Amendments. Thus, in *Andresen v. Maryland*, police executed a warrant to search defendant's offices for specified documents pertaining to a fraudulent sale of land, and the Court sustained the admission of the papers discovered as evidence at his trial. The Fifth Amendment was inapplicable, the Court held, because there had been no compulsion of defendant to produce or to authenticate the documents. As for the Fourth Amendment, inasmuch as the "business records" seized were evidence of criminal acts, they were properly seizable under the rule of *Warden v. Hayden*; the fact that they were "testimonial" in nature, records in the defendant's handwriting, was irrelevant. Acknowledging that "there are grave dangers inherent in executing a warrant authorizing a search and seizure of a person's papers," the Court's response was to observe that while some "innocuous documents" would have to be examined to ascertain which papers were to be seized, authorities, just as with electronic "seizures" of conversations, "must take care to assure that they are conducted in a manner that minimizes unwarranted intrusions upon privacy."

Although *Andresen* was concerned with business records, its discussion seemed equally applicable to "personal" papers, such as diaries and letters, as to which a much greater interest in privacy most certainly exists. The question of the propriety of seizure of such papers continues to be the subject of reservation in opinions, but it is far from clear that the Court would accept any such exception should the issue be presented.

Execution of Warrants --The manner of execution of warrants is generally governed by statute and rule, as to time of execution, method of entry, and the like. It was a rule at common law that before an officer could break and enter he must give notice of his office, authority, and purpose and must in effect be refused admittance, and until recently this has been a statutory requirement in the federal system and generally in the States. In *Ker v. California*, the Court considered the rule of announcement as a constitutional requirement, although a majority there found circumstances justifying entry without announcement. In *Wilson v. Arkansas*, the Court determined that the common law "knock and announce" rule is an element of the Fourth Amendment reasonableness inquiry. The rule does not, however, require announcement under all circumstances. The presumption in favor of announcement yields under various circumstances, including those posing a threat of physical violence to officers, those in which a prisoner has escaped and taken refuge in his dwelling, and those in which officers have reason to believe that destruction of evidence is likely. Recent federal laws providing for the issuance of warrants authorizing in certain circumstances "no-knock" entries to execute warrants will no doubt present the Court with opportunities to explore the configurations of the rule of announcement. A statute regulating the expiration of a warrant and issuance of another "should be liberally construed in favor of the individual." Similarly, inasmuch as the existence of probable cause must be established by fresh facts, so the execution of the warrant should be done in timely fashion so as to ensure so far as possible the continued existence of probable cause.

In executing a warrant for a search of premises and of named persons on the premises, police officers may not automatically search someone else found on the premises. If they can articulate some reasonable basis for fearing for their safety they may conduct a "patdown" of the person, but in order to search they must

have probable cause particularized with respect to that person. However, in *Michigan v. Summers*, the Court held that officers arriving to execute a warrant for the search of a house could detain, without being required to articulate any reasonable basis and necessarily therefore without probable cause, the owner or occupant of the house, whom they encountered on the front porch leaving the premises. Applying its intrusiveness test, the Court determined that such a detention, which was "substantially less intrusive" than an arrest, was justified because of the law enforcement interests in minimizing the risk of harm to officers, facilitating entry and conduct of the search, and preventing flight in the event incriminating evidence is found. Also, under some circumstances officers may search premises on the mistaken but reasonable belief that the premises are described in an otherwise valid warrant.

Although for purposes of execution, as for many other matters, there is little difference between search warrants and arrest warrants, one notable difference is that the possession of a valid arrest warrant cannot authorize authorities to enter the home of a third party looking for the person named in the warrant; in order to do that, they need a search warrant signifying that a magistrate has determined that there is probable cause to believe the person named is on the premises.

Valid Searches and Seizures Without Warrants

While the Supreme Court stresses the importance of warrants and has repeatedly referred to searches without warrants as "exceptional," it appears that the greater number of searches, as well as the vast number of arrests, take place without warrants. The Reporters of the American Law Institute Project on a Model Code of Pre-Arrest Procedure have noted "their conviction that, as a practical matter, searches without warrant and incidental to arrest have been up to this time, and may remain, of greater practical importance" than searches pursuant to warrants. "The evidence on hand . . . compels the conclusion that searches under warrants have played a comparatively minor part in law enforcement, except in connection with narcotics and gambling laws." Nevertheless, the Court frequently asserts that "the most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specially established and well-delineated exceptions.'" The exceptions are said to be "jealously and carefully drawn," and there must be "a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative." While the record does indicate an effort to categorize the exceptions, the number and breadth of those exceptions have been growing.

Detention Short of Arrest: Stop-and-Frisk --Arrests are subject to the requirements of the Fourth Amendment, but the courts have followed the common law in upholding the right of police officers to take a person into custody without a warrant if they have probable cause to believe that the person to be arrested has committed a felony or has committed a misdemeanor in their presence. The probable cause is, of course, the same standard required to be met in the issuance of an arrest warrant, and must be satisfied by conditions existing prior to the policeman's stop, what is discovered thereafter not sufficing to establish retroactively reasonable cause. There are, however, instances when a policeman's suspicions will have been aroused by someone's conduct or manner, but probable cause for placing such a person under arrest will be lacking. In *Terry v. Ohio*, the Court almost unanimously approved an on-the-street investigation by a police officer which involved "patting down" the subject of the investigation for weapons.

The case arose when a police officer observed three individuals engaging in conduct which appeared to him, on the basis of training and experience, to be the "casing" of a store for a likely armed robbery; upon approaching the men, identifying himself, and not receiving prompt identification, the officer seized one of the men, patted the exterior of his clothes, and discovered a gun. Chief Justice Warren for the Court wrote that the Fourth Amendment was applicable to the situation, applicable "whenever a police officer accosts an individual and restrains his freedom to walk away." Since the warrant clause is necessarily and practically of no application to the type of on-the-street encounter present in *Terry*, the Chief Justice continued, the question was whether the policeman's actions were reasonable. The test of reasonableness in this sort of situation is whether the police officer can point to "specific and articulable facts which, taken together with rational inferences from those facts," would lead a neutral magistrate on review to conclude that a man of reasonable caution would be warranted in believing that possible criminal behavior was at hand and that both an investigative stop and a "frisk" was required. Inasmuch as the conduct witnessed by the policeman reasonably led him to believe that an armed robbery was in prospect, he was as reasonably led to believe that the men were armed and probably dangerous and that his safety required a "frisk." Because the object of the "frisk" is the discovery of dangerous weapons, "it must therefore be confined in scope to an intrusion

reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." If, in the course of a weapons frisk, "plain touch" reveals presence of an object that the officer has probable cause to believe is contraband, the officer may seize that object. The Court viewed the situation as analogous to that covered by the "plain view" doctrine: obvious contraband may be seized, but a search may not be expanded to determine whether an object is contraband.

Terry did not pass on a host of problems, including the grounds that could permissibly lead an officer to momentarily stop a person on the street or elsewhere in order to ask questions rather than frisk for weapons, the right of the stopped individual to refuse to cooperate, and the permissible response of the police to that refusal. Following that decision, the standard for stops for investigative purposes evolved into one of "reasonable suspicion of criminal activity." That test permits some stops and questioning without probable cause in order to allow police officers to explore the foundations of their suspicions. While not elaborating a set of rules governing the application of the tests, the Court was initially restrictive in recognizing permissible bases for reasonable suspicion. Extensive intrusions on individual privacy, e.g., transportation to the stationhouse for interrogation and fingerprinting, were invalidated in the absence of probable cause. More recently, however, the Court has taken less restrictive approaches.

It took the Court some time to settle on a test for when a "seizure" has occurred, and the Court has recently modified its approach. The issue is of some importance, since it is at this point that Fourth Amendment protections take hold. The Terry Court recognized in dictum that "not all personal intercourse between policemen and citizens involves 'seizures' of persons," and suggested that "only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." Years later Justice Stewart proposed a similar standard, that a person has been seized "only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." This reasonable perception standard was subsequently endorsed by a majority of Justices, and was applied in several cases in which admissibility of evidence turned on whether a seizure of the person not justified by probable cause or reasonable suspicion had occurred prior to the uncovering of the evidence. No seizure occurred, for example, when INS agents seeking to identify illegal aliens conducted work force surveys within a garment factory; while some agents were positioned at exits, others systematically moved through the factory and questioned employees. This brief questioning, even with blocked exits, amounted to "classic consensual encounters rather than Fourth Amendment seizures." The Court also ruled that no seizure had occurred when police in a squad car drove alongside a suspect who had turned and run down the sidewalk when he saw the squad car approach. Under the circumstances (no siren, flashing lights, display of a weapon, or blocking of the suspect's path), the Court concluded, the police conduct "would not have communicated to the reasonable person an attempt to capture or otherwise intrude upon one's freedom of movement."

Soon thereafter, however, the Court departed from the Mendenhall reasonable perception standard and adopted a more formalistic approach, holding that an actual chase with evident intent to capture did not amount to a "seizure" because the suspect did not comply with the officer's order to halt. Mendenhall, said the Court in *California v. Hodari D.*, stated a "necessary" but not a "sufficient" condition for a seizure of the person through show of authority. A Fourth Amendment "seizure" of the person, the Court determined, is the same as a common law arrest; there must be either application of physical force (or the laying on of hands), or submission to the assertion of authority. Indications are, however, that *Hodari D.* does not signal the end of the reasonable perception standard, but merely carves an exception applicable to chases and perhaps other encounters between suspects and police.

Later in the same term the Court ruled that the Mendenhall "free-to-leave" inquiry was misplaced in the context of a police sweep of a bus, but that a modified reasonable perception approach still governed. In conducting a bus sweep, aimed at detecting illegal drugs and their couriers, police officers typically board a bus during a stopover at a terminal and ask to inspect tickets, identification, and sometimes luggage of selected passengers. The Court did not focus on whether an "arrest" had taken place, as adherence to the *Hodari D.* approach would have required, but instead suggested that the appropriate inquiry is "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter." "When the person is seated on a bus and has no desire to leave," the Court explained, "the degree to which a reasonable person would feel that he or she could leave is not an accurate measure of the coercive effect of the encounter."

A Terry search need not be limited to a stop and frisk of the person, but may extend as well to a protective search of the passenger compartment of a car if an officer possesses "a reasonable belief, based on specific and articulable facts . . . that the suspect is dangerous and . . . may gain immediate control of weapons." How lengthy a Terry detention may be varies with the circumstances. In approving a 20-minute

detention of a driver made necessary by the driver's own evasion of drug agents and a state police decision to hold the driver until the agents could arrive on the scene, the Court indicated that it is "appropriate to examine whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the defendant."

Similar principles govern detention of luggage at airports in order to detect the presence of drugs; Terry "limitations applicable to investigative detentions of the person should define the permissible scope of an investigative detention of the person's luggage on less than probable cause." The general rule is that "when an officer's observations lead him reasonably to believe that a traveler is carrying luggage that contains narcotics, the principles of Terry . . . would permit the officer to detain the luggage briefly to investigate the circumstances that aroused his suspicion, provided that the investigative detention is properly limited in scope." Seizure of luggage for an expeditious "canine sniff" by a dog trained to detect narcotics can satisfy this test even though seizure of luggage is in effect detention of the traveler, since the procedure results in "limited disclosure," impinging only slightly on a traveler's privacy interest in the contents of personal luggage, and does not constitute a search within the meaning of the Fourth Amendment. By contrast, taking a suspect to an interrogation room on grounds short of probable cause, retaining his air ticket, and retrieving his luggage without his permission taints consent given under such circumstances to open the luggage, since by then the detention had exceeded the bounds of a permissible Terry investigative stop and amounted to an invalid arrest. But the same requirements for brevity of detention and limited scope of investigation are apparently inapplicable to border searches of international travelers, the Court having approved a 24-hour detention of a traveler suspected of smuggling drugs in her alimentary canal.

Search Incident to Arrest --The common-law rule permitting searches of the person of an arrestee as an incident to the arrest has occasioned little controversy in the Court. The dispute has centered around the scope of the search. Since it was the stated general rule that the scope of a warrantless search must be strictly tied to and justified by the circumstances which rendered its justification permissible, and since it was the rule that the justification of a search of the arrestee was to prevent destruction of evidence and to prevent access to a weapon, it was argued to the court that a search of the person of the defendant arrested for a traffic offense, which discovered heroin in a crumpled cigarette package, was impermissible, inasmuch as there could have been no destructible evidence relating to the offense for which he was arrested and no weapon could have been concealed in the cigarette package. The Court rejected this argument, ruling that "no additional justification" is required for a custodial arrest of a suspect based on probable cause.

However, the Justices have long found themselves embroiled in argument about the scope of the search incident to arrest as it extends beyond the person to the area in which the person is arrested, most commonly either his premises or his vehicle. Certain early cases went both ways on the basis of some fine distinctions, but in *Harris v. United States*, the Court approved a search of a four-room apartment pursuant to an arrest under warrant for one crime and in which the search turned up evidence of another crime. A year later, in *Trupiano v. United States*, a raid on a distillery resulted in the arrest of a man found on the premises and a seizure of the equipment; the Court reversed the conviction because the officers had had time to obtain a search warrant and had not done so. "A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest." This decision was overruled in *United States v. Rabinowitz*, in which officers arrested defendant in his one-room office pursuant to an arrest warrant and proceeded to search the room completely. The Court observed that the issue was not whether the officers had the time and opportunity to obtain a search warrant but whether the search incident to arrest was reasonable. Though *Rabinowitz* referred to searches of the area within the arrestee's "immediate control," it provided no standard by which this area was to be determined, and extensive searches were permitted under the rule.

In *Chimel v. California*, however, a narrower view was asserted, the primacy of warrants was again emphasized, and a standard by which the scope of searches pursuant to arrest could be ascertained was set out. "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'--construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

"There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs--or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself. Such searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."

Although the viability of *Chimel* had been in doubt for some time as the Court refined and applied its analysis of reasonable and justifiable expectations of privacy, it has in some but not all contexts survived the changed rationale. Thus, in *Mincey v. Arizona*, the Court rejected a state effort to create a "homicide-scene" exception for a warrantless search of an entire apartment extending over four days. The occupant had been arrested and removed and it was true, the Court observed, that a person legally taken into custody has a lessened right of privacy in his person, but he does not have a lessened right of privacy in his entire house. And, in *United States v. Chadwick*, emphasizing a person's reasonable expectation of privacy in his luggage or other baggage, the Court held that, once police have arrested and immobilized a suspect, validly seized bags are not subject to search without a warrant. Police may, however, in the course of jailing an arrested suspect conduct an inventory search of the individual's personal effects, including the contents of a shoulder bag, since "the scope of a station-house search may in some circumstances be even greater than those supporting a search immediately following arrest."

Still purporting to reaffirm *Chimel*, the Court in *New York v. Belton* held that police officers who had made a valid arrest of the occupant of a vehicle could make a contemporaneous search of the entire passenger compartment of the automobile, including containers found therein. Believing that a fairly simple rule understandable to authorities in the field was desirable, the Court ruled "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item.'"

Chimel has, however, been qualified by another consideration. Not only may officers search areas within the arrestee's immediate control in order to alleviate any threat posed by the arrestee, but they may extend that search if there may be a threat posed by "unseen third parties in the house." A "protective sweep" of the entire premises (including an arrestee's home) may be undertaken on less than probable cause if officers have a "reasonable belief," based on "articulable facts," that the area to be swept may harbor an individual posing a danger to those on the arrest scene.

Vehicular Searches --In the early days of the automobile the Court created an exception for searches of vehicles, holding in *Carroll v. United States* that vehicles may be searched without warrants if the officer undertaking the search has probable cause to believe that the vehicle contains contraband. The Court explained that the mobility of vehicles would allow them to be quickly moved from the jurisdiction if time were taken to obtain a warrant.

Initially the Court limited *Carroll*'s reach, holding impermissible the warrantless seizure of a parked automobile merely because it is movable, and indicating that vehicles may be stopped only while moving or reasonably contemporaneously with movement. Also, the Court ruled that the search must be reasonably contemporaneous with the stop, so that it was not permissible to remove the vehicle to the stationhouse for a warrantless search at the convenience of the police.

The Court next developed a reduced privacy rationale to supplement the mobility rationale, explaining that "the configuration, use, and regulation of automobiles often may dilute the reasonable expectation of privacy that exists with respect to differently situated property." "One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects. . . . It travels public thoroughfares where both its occupants and its contents are in plain view." While motor homes do serve as residences and as repositories for personal effects, and while their contents are often shielded from public view, the Court extended the automobile exception to them as well, holding that there is a diminished expectation of privacy in a mobile home parked in a parking lot and licensed for vehicular travel, hence "readily mobile."

The reduced expectancy concept has broadened police powers to conduct automobile searches without warrants, but they still must have probable cause to search a vehicle and they may not make random stops of vehicles on the roads, but instead must base stops of individual vehicles on probable cause or some "articulable and reasonable suspicion" of traffic or safety violation or some other criminal activity. By contrast, fixed-checkpoint stops in the absence of any individualized suspicion have been upheld. Once police have validly stopped a vehicle, they may also, based on articulable facts warranting a reasonable belief that weapons may be present, conduct a Terry-type protective search of those portions of the

passenger compartment in which a weapon could be placed or hidden. And, in the absence of such reasonable suspicion as to weapons, police may seize contraband and suspicious items "in plain view" inside the passenger compartment.

Once police have probable cause to believe there is contraband in a vehicle, they may remove it from the scene to the stationhouse in order to conduct a search, without thereby being required to obtain a warrant. "The justification to conduct such a warrantless search does not vanish once the car has been immobilized; nor does it depend upon a reviewing court's assessment of the likelihood in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant." The Justices were evenly divided, however, on the propriety of warrantless seizure of an arrestee's automobile from a public parking lot several hours after his arrest, its transportation to a police impoundment lot, and the taking of tire casts and exterior paint scrapings. Because of the lessened expectation of privacy, inventory searches of impounded automobiles are justifiable in order to protect public safety and the owner's property, and any evidence of criminal activity discovered in the course of the inventories is admissible in court.

It is not lawful for the police in undertaking a warrantless search of an automobile to extend the search to the passengers therein. But because passengers in an automobile have no reasonable expectation of privacy in the interior area of the car, a warrantless search of the glove compartment and the spaces under the seats, which turned up evidence implicating the passengers, invaded no Fourth Amendment interest of the passengers. Luggage and other closed containers found in automobiles may also be subjected to warrantless searches based on probable cause, the same rule now applying whether the police have probable cause to search only the containers or whether they have probable cause to search the automobile for something capable of being held in the container.

Vessel Searches --Not only is the warrant requirement inapplicable to brief stops of vessels, but also none of the safeguards applicable to stops of automobiles on less than probable cause are necessary predicates to stops of vessels. In *United States v. Villamonte-Marquez*, the Court upheld a random stop and boarding of a vessel by customs agents, lacking any suspicion of wrongdoing, for purpose of inspecting documentation. The boarding was authorized by statute derived from an act of the First Congress, and hence had "an impressive historical pedigree" carrying with it a presumption of constitutionality. Moreover, "important factual differences between vessels located in waters offering ready access to the open sea and automobiles on principal thoroughfares in the border area" justify application of a less restrictive rule for vessel searches. The reason why random stops of vehicles have been held impermissible under the Fourth Amendment, the Court explained, is that stops at fixed checkpoints or roadblocks are both feasible and less subject to abuse of discretion by authorities. "But no reasonable claim can be made that permanent checkpoints would be practical on waters such as these where vessels can move in any direction at any time and need not follow established 'avenues' as automobiles must do." Because there is a "substantial" governmental interest in enforcing documentation laws, "especially in waters where the need to deter or apprehend smugglers is great," the Court found the "limited" but not "minimal" intrusion occasioned by boarding for documentation inspection to be reasonable. Dismissing Justice Brennan's argument that the Court for the first time was approving "a completely random seizure and detention of persons and an entry onto private, noncommercial premises by police officers, without any limitations whatever on the officers' discretion or any safeguards against abuse."

Consent Searches --Fourth Amendment rights, like other constitutional rights, may be waived, and one may consent to search of his person or premises by officers who have not complied with the Amendment. The Court, however, has insisted that the burden is on the prosecution to prove the voluntariness of the consent and awareness of the right of choice. Reviewing courts must determine on the basis of the totality of the circumstances whether consent has been freely given or has been coerced. Actual knowledge of the right to refuse consent is not essential to the issue of voluntariness, and therefore police are not required to acquaint a person with his rights, as through a Fourth Amendment version of Miranda warnings. But consent will not be regarded as voluntary when the officer asserts his official status and claim of right and the occupant yields to these factors rather than makes his own determination to admit officers. When consent is obtained through the deception of an undercover officer or an informer gaining admission without, of course, advising a suspect who he is, the Court has held that the suspect has simply assumed the risk that an invitee would betray him, and evidence obtained through the deception is admissible.

Additional issues arise in determining the validity of consent to search when consent is given not by the suspect but by a third party. In the earlier cases, third party consent was deemed sufficient if that party "possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." Now, however, actual common authority over the premises is no longer required; it is enough if

the searching officer had a reasonable but mistaken belief that the third party had common authority and could consent to the search.

Border Searches --"That searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration." Authorized by the First Congress, the customs search in these circumstances requires no warrant, no probable cause, not even the showing of some degree of suspicion that accompanies even investigatory stops. Moreover, while prolonged detention of travelers beyond the routine customs search and inspection must be justified by the Terry standard of reasonable suspicion having a particularized and objective basis, Terry protections as to the length and intrusiveness of the search do not apply.

Inland stoppings and searches in areas away from the borders are a different matter altogether. Thus, in *Almeida-Sanchez v. United States*, the Court held that a warrantless stop and search of defendant's automobile on a highway some 20 miles from the border by a roving patrol lacking probable cause to believe that the vehicle contained illegal aliens violated the Fourth Amendment. Similarly, the Court invalidated an automobile search at a fixed checkpoint well removed from the border; while agreeing that a fixed checkpoint probably gave motorists less cause for alarm than did roving patrols, the Court nonetheless held that the invasion of privacy entailed in a search was just as intrusive and must be justified by a showing of probable cause or consent. On the other hand, when motorists are briefly stopped, not for purposes of a search but in order that officers may inquire into their residence status, either by asking a few questions or by checking papers, different results are achieved, so long as the stops are not truly random. Roving patrols may stop vehicles for purposes of a brief inquiry, provided officers are "aware of specific articulable facts, together with rational inferences from those facts, that reasonably warrant suspicion" that an automobile contains illegal aliens; in such a case the interference with Fourth Amendment rights is "modest" and the law enforcement interests served are significant. Fixed checkpoints provide additional safeguards; here officers may halt all vehicles briefly in order to question occupants even in the absence of any reasonable suspicion that the particular vehicle contains illegal aliens.

"Open Fields" --In *Hester v. United States*, the Court held that the Fourth Amendment did not protect "open fields" and that, therefore, police searches in such areas as pastures, wooded areas, open water, and vacant lots need not comply with the requirements of warrants and probable cause. The Court's announcement in *Katz v. United States* that the Amendment protects "people not places" cast some doubt on the vitality of the open fields principle, but all such doubts were cast away in *Oliver v. United States*. Invoking *Hester's* reliance on the literal wording of the Fourth Amendment (open fields are not "effects") and distinguishing *Katz*, the Court ruled that the open fields exception applies to fields that are fenced and posted. "An individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." Nor may an individual demand privacy for activities conducted within outbuildings and visible by trespassers peering into the buildings from just outside. Even within the curtilage and notwithstanding that the owner has gone to the extreme of erecting a 10-foot high fence in order to screen the area from ground-level view, there is no reasonable expectation of privacy from naked-eye inspection from fixed-wing aircraft flying in navigable airspace. Similarly, naked-eye inspection from helicopters flying even lower contravenes no reasonable expectation of privacy. And aerial photography of commercial facilities secured from ground-level public view is permissible, the Court finding such spaces more analogous to open fields than to the curtilage of a dwelling.

"Plain View" --Somewhat similar in rationale is the rule that objects falling in the "plain view" of an officer who has a right to be in the position to have that view are subject to seizure without a warrant or that if the officer needs a warrant or probable cause to search and seize his lawful observation will provide grounds therefore. The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.

The Court has analogized from the plain view doctrine to hold that once officers have lawfully observed contraband, "the owner's privacy interest in that item is lost," and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant.

Public Schools --In *New Jersey v. T.L.O.*, the Court set forth the principles governing searches by public school authorities. The Fourth Amendment applies to searches conducted by public school officials because "school officials act as representatives of the State, not merely as surrogates for the parents." However, "the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject." Neither the warrant requirement nor the probable cause standard is appropriate, the Court ruled. Instead, a simple reasonableness standard governs all searches of students' persons and

effects by school authorities. A search must be reasonable at its inception, i.e., there must be "reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." School searches must also be reasonably related in scope to the circumstances justifying the interference, and "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." In applying these rules, the Court upheld as reasonable the search of a student's purse to determine whether the student, accused of violating a school rule by smoking in the lavatory, possessed cigarettes. The search for cigarettes uncovered evidence of drug activity held admissible in a prosecution under the juvenile laws.

Government Offices --Similar principles apply to a public employer's work-related search of its employees' offices, desks, or file cabinets, except that in this context the Court distinguished searches conducted for law enforcement purposes. In *O'Connor v. Ortega*, a majority of Justices agreed, albeit on somewhat differing rationales, that neither a warrant nor a probable cause requirement should apply to employer searches "for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct." Four Justices would require a case-by-case inquiry into the reasonableness of such searches; one would hold that such searches "do not violate the Fourth Amendment."

Prisons and Regulation of Probation -- Searches of prison cells by prison administrators are not limited even by a reasonableness standard, the Court having held that "the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell." Thus, prison administrators may conduct random "shakedown" searches of inmates' cells without the need to adopt any established practice or plan, and inmates must look to the Eighth Amendment or to state tort law for redress against harassment, malicious property destruction, and the like.

Neither a warrant nor probable cause is needed for an administrative search of a probationer's home. It is enough, the Court ruled in *Griffin v. Wisconsin*, that such a search was conducted pursuant to a valid regulation that itself satisfies the Fourth Amendment's reasonableness standard (e.g., by requiring "reasonable grounds" for a search). "A State's operation of a probation system, like its operation of a school, government office or prison, or its supervision of a regulated industry, . . . presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable cause requirements." "Probation, like incarceration, is a form of criminal sanction," the Court noted, and a warrant or probable cause requirement would interfere with the "ongoing non- adversarial supervisory relationship" required for proper functioning of the system.

Drug Testing --In two 1989 decisions the Court held that no warrant, probable cause, or even individualized suspicion is required for mandatory drug testing of certain classes of railroad and public employees. In each case, "special needs beyond the normal need for law enforcement" were identified as justifying the drug testing. In *Skinner v. Railway Labor Executives' Ass'n*, the Court upheld regulations requiring railroads to administer blood, urine, and breath tests to employees involved in certain train accidents or violating certain safety rules; upheld in *National Treasury Employees Union v. Von Raab* was a Customs Service screening program requiring urinalysis testing of employees seeking transfer or promotion to positions having direct involvement with drug interdiction, or to positions requiring the incumbent to carry firearms. The Court in *Skinner* found a "compelling" governmental interest in testing the railroad employees without any showing of individualized suspicion, since operation of trains by anyone impaired by drugs "can cause great human loss before any signs of impairment become noticeable." By contrast, the intrusions on privacy were termed "limited." Blood and breath tests were passed off as routine; the urine test, while more intrusive, was deemed permissible because of the "diminished expectation of privacy" in employees having some responsibility for safety in a pervasively regulated industry. The lower court's emphasis on the limited effectiveness of the urine test (it detects past drug use but not necessarily the level of impairment) was misplaced, the Court ruled. It is enough that the test may provide some useful information for an accident investigation; in addition, the test may promote deterrence as well as detection of drug use. In *Von Raab* the governmental interests underlying the Customs Service's screening program were also termed "compelling": to ensure that persons entrusted with a firearm and the possible use of deadly force not suffer from drug-induced impairment of perception and judgment, and that "front-line drug interdiction personnel be physically fit, and have unimpeachable integrity and judgment." The possibly "substantial" interference with privacy interests of these Customs employees was justified, the Court concluded, because, "unlike most private citizens or government employees generally, they have a "diminished expectation of privacy."

Emphasizing the "special needs" of the public school context, reflected in the "custodial and tutelary" power that schools exercise over students, and also noting schoolchildren's diminished expectation of privacy, the Court in *Vernonia School District v. Acton* upheld a school district's policy authorizing random urinalysis drug testing of students who participate in interscholastic athletics. The Court redefined the term "compelling"

governmental interest. The phrase does not describe a "fixed, minimum quantum of governmental concern," the Court explained, but rather "describes an interest which appears important enough to justify the particular search at hand." Applying this standard, the Court concluded that "detering drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs . . . or deterring drug use by engineers and trainmen." On the other hand, the interference with privacy interests was not great, the Court decided, since schoolchildren are routinely required to submit to various physical examinations and vaccinations. Moreover, "legitimate privacy expectations are even less for student athletes, since they normally suit up, shower, and dress in locker rooms that afford no privacy, and since they voluntarily subject themselves to physical exams and other regulations above and beyond those imposed on non-athletes. The Court "cautioned against the assumption that suspicionless drug testing will readily pass muster in other contexts," identifying as "the most significant element" in *Vernonia* the fact that the policy was implemented under the government's responsibilities as guardian and tutor of schoolchildren.

Electronic Surveillance and the Fourth Amendment

The Olmstead Case -- With the invention of the microphone, the telephone, and the dictograph recorder, it became possible to "eavesdrop" with much greater secrecy and expediency. Inevitably, the use of electronic devices in law enforcement was challenged, and in 1928 the Court reviewed convictions obtained on the basis of evidence gained through taps on telephone wires in violation of state law. On a five-to-four vote, the Court held that wiretapping was not within the confines of the Fourth Amendment. Chief Justice Taft, writing the opinion of the Court, relied on two lines of argument for the conclusion. First, inasmuch as the Amendment was designed to protect one's property interest in his premises, there was no search so long as there was no physical trespass on premises owned or controlled by a defendant. Second, all the evidence obtained had been secured by hearing, and the interception of a conversation could not qualify as a seizure, for the Amendment referred only to the seizure of tangible items. Furthermore, the violation of state law did not render the evidence excludible, since the exclusionary rule operated only on evidence seized in violation of the Constitution.

Federal Communications Act --Six years after the decision in the *Olmstead* case, Congress enacted the Federal Communications Act and included in Sec. 605 of the Act a broadly worded proscription on which the Court seized to place some limitation upon governmental wiretapping. Thus, in *Nardone v. United States*, the Court held that wiretapping by federal officers could violate Sec. 605 if the officers both intercepted and divulged the contents of the conversation they overheard, and that testimony in court would constitute a form of prohibited divulgence. Such evidence was therefore excluded, although wiretapping was not illegal under the Court's interpretation if the information was not used outside the governmental agency. Because Sec. 605 applied to intrastate as well as interstate transmissions, there was no question about the applicability of the ban to state police officers, but the Court declined to apply either the statute or the due process clause to require the exclusion of such evidence from state criminal trials. State efforts to legalize wiretapping pursuant to court orders were held by the Court to be precluded by the fact that Congress in Sec. 605 had intended to occupy the field completely to the exclusion of the States.

Nontelephonic Electronic Surveillance --The trespass rationale of *Olmstead* was utilized in cases dealing with "bugging" of premises rather than with tapping of telephones. Thus, in *Goldman v. United States*, the Court found no Fourth Amendment violation when a listening device was placed against a party wall so that conversations were overheard on the other side. But when officers drove a "spike mike" into a party wall until it came into contact with a heating duct and thus broadcast defendant's conversations, the Court determined that the trespass brought the case within the Amendment. In so holding, the Court, without alluding to the matter, overruled in effect the second rationale of *Olmstead*, the premise that conversations could not be seized.

The Berger and Katz Cases -- In *Berger v. New York*, the Court confirmed the obsolescence of the alternative holding in *Olmstead* that conversations could not be seized in the Fourth Amendment sense. *Berger* held unconstitutional on its face a state eavesdropping statute under which judges were authorized to issue warrants permitting police officers to trespass on private premises to install listening devices. The warrants were to be issued upon a showing of "reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overheard or recorded." For the five-Justice majority, Justice Clark discerned several constitutional defects in the law. "First, . . . eavesdropping is authorized without requiring belief that any

particular offense has been or is being committed; nor that the 'property' sought, the conversations, be particularly described.

"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 is thereby wholly aborted. Likewise the statute's failure to describe with particularity the conversations sought gives the officer a roving commission to 'seize' any and all conversations. It is true that the statute requires the naming of 'the person or persons whose communications, conversations or discussions are to be overheard or recorded. . . .' But this does no more than identify the person whose constitutionally protected area is to be invaded rather than 'particularly describing' the communications, conversations, or discussions to be seized. . . . Secondly, authorization of eavesdropping for a two-month period is the equivalent of a series of intrusions, searches, and seizures pursuant to a single showing of probable cause. Prompt execution is also avoided. During such a long and continuous (24 hours a day) period the conversations of any and all persons coming into the area covered by the device will be seized indiscriminately and without regard to their connection with the crime under investigation. Moreover, the statute permits. . . extensions of the original two-month period--presumably for two months each--on a mere showing that such extension is 'in the public interest.' . . . Third, the statute places no termination date on the eavesdrop once the conversation sought is seized. . . . Finally, the statute's procedure, necessarily because its success depends on secrecy, has no requirement for notice as do conventional warrants, nor does it overcome this defect by requiring some showing of special facts. On the contrary, it permits unconsented entry without any showing of exigent circumstances. Such a showing of exigency, in order to avoid notice, would appear more important in eavesdropping, with its inherent dangers, than that required when conventional procedures of search and seizure are utilized. Nor does the statute provide for a return on the warrant thereby leaving full discretion in the officer as to the use of seized conversations of innocent as well as guilty parties. In short, the statute's blanket grant of permission to eavesdrop is without adequate judicial supervision or protective procedures."

Both Justices Black and White in dissent accused the Berger majority of so construing the Fourth Amendment that no wiretapping- eavesdropping statute could pass constitutional scrutiny, and in *Katz v. United States*, the Court in an opinion by one of the Berger dissenters, Justice Stewart, modified some of its language and pointed to Court approval of some types of statutorily-authorized electronic surveillance. Just as Berger had confirmed that one rationale of the *Olmstead* decision, the inapplicability of "seizure" to conversations, was no longer valid, *Katz* disposed of the other rationale. In the latter case, officers had affixed a listening device to the outside wall of a telephone booth regularly used by *Katz* and activated it each time he entered; since there had been no physical trespass into the booth, the lower courts held the Fourth Amendment not relevant. The Court disagreed, saying that "once it is recognized that the Fourth Amendment protects people--and not simply 'areas'--against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." Because the surveillance of *Katz's* telephone calls had not been authorized by a magistrate, it was invalid; however, the Court thought that "it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place." The notice requirement, which had loomed in *Berger* as an obstacle to successful electronic surveillance, was summarily disposed of. Finally, Justice Stewart observed that it was unlikely that electronic surveillance would ever come under any of the established exceptions so that it could be conducted without prior judicial approval.

Following *Katz*, Congress enacted in 1968 a comprehensive statute authorizing federal officers and permitting state officers pursuant to state legislation complying with the federal law to seek warrants for electronic surveillance to investigate violations of prescribed classes of criminal legislation. The Court has not yet had occasion to pass on the federal statute and to determine whether its procedures and authorizations comport with the standards sketched in *Osborn*, *Berger*, and *Katz* or whether those standards are somewhat more flexible than they appear to be on the faces of the opinions.

Warrantless "National Security" Electronic Surveillance -- In *Katz v. United States*, Justice White sought to preserve for a future case the possibility that in "national security cases" electronic surveillance upon the authorization of the President or the Attorney General could be permissible without prior judicial approval. The Executive Branch then asserted the power to wiretap and to "bug" in two types of national security situations, against domestic subversion and against foreign intelligence operations, first basing its authority on a theory of "inherent" presidential power and then in the Supreme Court withdrawing to the argument that such surveillance was a "reasonable" search and seizure and therefore valid under the Fourth Amendment.

Unanimously, the Court held that at least in cases of domestic subversive investigations, compliance with the warrant provisions of the Fourth Amendment was required. Whether or not a search was reasonable, wrote Justice Powell for the Court, was a question which derived much of its answer from the warrant clause; except in a few narrowly circumscribed classes of situations, only those searches conducted pursuant to warrants were reasonable. The Government's duty to preserve the national security did not override the guarantee that before government could invade the privacy of its citizens it must present to a neutral magistrate evidence sufficient to support issuance of a warrant authorizing that invasion of privacy. This protection was even more needed in "national security cases" than in cases of "ordinary" crime, the Justice continued, inasmuch as the tendency of government so often is to regard opponents of its policies as a threat and hence to tread in areas protected by the First Amendment as well as by the Fourth. Rejected also was the argument that courts could not appreciate the intricacies of investigations in the area of national security nor preserve the secrecy which is required.

The question of the scope of the President's constitutional powers, if any, remains judicially unsettled. Congress has acted, however, providing for a special court to hear requests for warrants for electronic surveillance in foreign intelligence situations, and permitting the President to authorize warrantless surveillance to acquire foreign intelligence information provided that the communications to be monitored are exclusively between or among foreign powers and there is no substantial likelihood any "United States person" will be overheard.

Enforcing the Fourth Amendment: The Exclusionary Rule

A right to be free from unreasonable searches and seizures is declared by the Fourth Amendment, but how one is to translate the guarantee into concrete terms is not specified. Several possible methods of enforcement have been suggested over time; however, the Supreme Court has settled, not without dissent, on only one as an effective means to make real the right.

Alternatives to the Exclusionary Rule --Theoretically, there are several alternatives to the exclusionary rule. An illegal search and seizure may be criminally actionable and officers undertaking one thus subject to prosecution, but the examples when officers are criminally prosecuted for overzealous law enforcement are extremely rare. A policeman who makes an illegal search and seizure is subject to internal departmental discipline which may be backed up in the few jurisdictions which have adopted them by the oversight of and participation of police review boards, but again the examples of disciplinary actions are exceedingly rare. Persons who have been illegally arrested or who have had their privacy invaded will usually have a tort action available under state statutory or common law.

Moreover, police officers acting under color of state law who violate a person's Fourth Amendment rights are subject to a suit for damages and other remedies under a civil rights statute in federal courts. While federal officers and others acting under color of federal law are not subject jurisdictionally to this statute, the Supreme Court has recently held that a right to damages for violation of Fourth Amendment rights arises by implication out of the guarantees secured and that this right is enforceable in federal courts. While a damage remedy might be made more effectual, a number of legal and practical problems stand in the way. Police officers have available to them the usual common-law defenses, most important of which is the claim of good faith. Federal officers are entitled to qualified immunity based on an objectively reasonable belief that a warrantless search later determined to violate the Fourth Amendment was supported by probable cause or exigent circumstances. And on the practical side, persons subjected to illegal arrests and searches and seizures are often disreputable persons toward whom juries are unsympathetic, or they are indigent and unable to bring suit. The result, therefore, is that the Court has emphasized exclusion of unconstitutionally seized evidence in subsequent criminal trials as the only effective enforcement method.

Development of the Exclusionary Rule -- Exclusion of evidence as a remedy for Fourth Amendment violations found its beginning in *Boyd v. United States*, which, as was noted above, involved not a search and seizure but a compulsory production of business papers which the Court likened to a search and seizure. Further, the Court analogized the Fifth Amendment's self-incrimination provision to the Fourth Amendment's protections to derive a rule which required exclusion of the compelled evidence because the defendant had been compelled to incriminate himself by producing it. The *Boyd* case was closely limited to its facts and an exclusionary rule based on Fourth Amendment violations was rejected by the Court a few years later, with the Justices adhering to the common-law rule that evidence was admissible however acquired.

Nevertheless, ten years later the common-law view was itself rejected and an exclusionary rule propounded in *Weeks v. United States*. Weeks had been convicted on the basis of evidence seized from his home in the course of two warrantless searches; some of the evidence consisted of private papers like those sought to be compelled in the *Boyd* case. Unanimously, the Court held that the evidence should have been excluded by the trial court. The Fourth Amendment, Justice Day said, placed on the courts as well as on law enforcement officers restraints on the exercise of power compatible with its guarantees. "The tendency of those who execute the criminal laws of the country to obtain convictions by means of unlawful searches and enforced confessions . . . should find no sanction in the judgment of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights." The ruling is ambiguously based but seems to have had as its foundation an assumption that admission of illegally-seized evidence would itself violate the Amendment. "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secured against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land."

Because the Fourth Amendment did not restrict the actions of state officers, there was no question about the application of an exclusionary rule in state courts as a mandate of federal constitutional policy. But in *Wolf v. Colorado*, a unanimous Court held that freedom from unreasonable searches and seizures was such a fundamental right as to be protected against state violations by the due process clause of the Fourteenth Amendment. However, the Court held that the right thus guaranteed did not require that the exclusionary rule be applied in the state courts, since there were other means to observe and enforce the right. "Granting that in practice the exclusion of evidence may be an effective way of deterring unreasonable searches, it is not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective."

It developed, however, that the Court had not vested in the States total discretion in regard to the admissibility of evidence, as the Court proceeded to evaluate under the due process clause the methods by which the evidence had been obtained. Thus, in *Rochin v. California*, evidence of narcotics possession had been obtained by forcible administration of an emetic to defendant at a hospital after officers had been unsuccessful in preventing him from swallowing certain capsules. The evidence, said Justice Frankfurter for the Court, should have been excluded because the police methods were too objectionable. "This is conduct that shocks the conscience. Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach's contents . . . is bound to offend even hardened sensibilities. They are methods too close to the rack and screw." The *Rochin* standard was limited in *Irvine v. California*, in which defendant was convicted of bookmaking activities on the basis of evidence secured by police who repeatedly broke into his house and concealed electronic gear to broadcast every conversation in the house. Justice Jackson's plurality opinion asserted that *Rochin* had been occasioned by the element of brutality, and that while the police conduct in *Irvine* was blatantly illegal the admissibility of the evidence was governed by *Wolf*, which should be consistently applied for purposes of guidance to state courts. The Justice also entertained considerable doubts about the efficacy of the exclusionary rule. *Rochin* emerged as the standard, however, in a later case in which the Court sustained the admissibility of the results of a blood test administered while defendant was unconscious in a hospital following a traffic accident, the Court observing the routine nature of the test and the minimal intrusion into bodily privacy.

Then, in *Mapp v. Ohio*, the Court held that the exclusionary rule should and did apply to the States. It was "logically and constitutionally necessary," wrote Justice Clark for the majority, "that the exclusion doctrine--an essential part of the right to privacy--be also insisted upon as an essential ingredient of the right" to be secure from unreasonable searches and seizures. "To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment." Further, the Court then held that since illegally-seized evidence was to be excluded from both federal and state courts, the standards by which the question of legality was to be determined should be the same, regardless of whether the court in which the evidence was offered was state or federal.

The Foundations of the Exclusionary Rule -- Important to determination of such questions as the application of the exclusionary rule to the States and the ability of Congress to abolish or to limit it is the fixing of the constitutional source and the basis of the rule. For some time, it was not clear whether the exclusionary rule was derived from the Fourth Amendment, from some union of the Fourth and Fifth

Amendments, or from the Court's supervisory power over the lower federal courts. It will be recalled that in *Boyd* the Court fused the search and seizure clause with the provision of the Fifth Amendment protecting against compelled self-incrimination. *Weeks v. United States*, though the Fifth Amendment was mentioned, seemed to be clearly based on the Fourth Amendment. Nevertheless, in opinions following *Weeks* the Court clearly identified the basis for the exclusionary rule as the self-incrimination clause of the Fifth Amendment. Then in *Mapp v. Ohio*, the Court tied the rule strictly to the Fourth Amendment, finding exclusion of evidence seized in violation of the Amendment to be the "most important constitutional privilege" of the right to be free from unreasonable searches and seizures, finding that the rule was "an essential part of the right of privacy" protected by the Amendment.

"This Court has ever since *Weeks* was decided in 1914 required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required-- even if judicially implied--deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to a 'form of words.'" It was a necessary step in the application of the rule to the States to find that the rule was of constitutional origin rather than a result of an exercise of the Court's supervisory power over the lower federal courts, inasmuch as the latter could not constitutionally be extended to the state courts. In fact, Justice Frankfurter seemed to find the exclusionary rule to be based on the Court's supervisory powers in *Wolf v. Colorado* in declining to extend the rule to the States. That the rule is of constitutional origin *Mapp* establishes, but this does not necessarily establish that it is immune to statutory revision.

Suggestions appear in a number of cases, including *Weeks*, to the effect that admission of illegally-seized evidence is itself unconstitutional. These were often combined with a rationale emphasizing "judicial integrity" as a reason to reject the proffer of such evidence. Yet the Court permitted such evidence to be introduced into trial courts, when the defendant lacked "standing" to object to the search and seizure which produced the evidence or when the search took place before the announcement of the decision extending the exclusionary rule to the States. At these times, the Court turned to the "basic postulate of the exclusionary rule itself. The rule is calculated to prevent, not to repair. Its purpose is to deter--to compel respect for the constitutional guaranty in the only effectively available way--by removing the incentive to disregard it." "*Mapp* had as its prime purpose the enforcement of the Fourth Amendment through the inclusion of the exclusionary rule within its rights. This, it was found, was the only effective deterrent to lawless police action. Indeed, all of the cases since *Wolf* requiring the exclusion of illegal evidence have been based on the necessity for an effective deterrent to illegal police action."

Narrowing Application of the Exclusionary Rule -- For as long as we have had the exclusionary rule, critics have attacked it, challenged its premises, disputed its morality. By the early 1980s a majority of Justices had stated a desire either to abolish the rule or to sharply curtail its operation, and numerous opinions had rejected all doctrinal bases save that of deterrence. At the same time, these opinions voiced strong doubts about the efficacy of the rule as a deterrent, and advanced public interest values in effective law enforcement and public safety as reasons to discard the rule altogether or curtail its application. Thus, the Court emphasized the high costs of enforcing the rule to exclude reliable and trustworthy evidence, even when violations have been technical or in good faith, and suggested that such use of the rule may well "generate disrespect for the law and administration of justice," as well as free guilty defendants. No longer does the Court declare that "the essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that it shall not be used at all."

Although the exclusionary rule has not been completely repudiated, its utilization has been substantially curbed. Initial decisions chipped away at the rule's application. Defendants who themselves were not subjected to illegal searches and seizures may not object to the introduction against themselves of evidence illegally obtained from co-conspirators or codefendants, and even a defendant whose rights have been infringed may find the evidence coming in, not as proof of guilt, but to impeach his testimony. Defendants who have been convicted after trials in which they were given a full and fair opportunity to raise claims of Fourth Amendment violations may not subsequently raise those claims on federal habeas corpus because of the costs outweighing the minimal deterrent effect. Evidence obtained through a wrongful search and seizure may sometimes be used in the criminal trial, if the prosecution can show a sufficient attenuation of the link between police misconduct and obtaining of the evidence. If an arrest or a search which was valid at the time it was effectuated becomes bad through the subsequent invalidation of the statute under which the arrest or search was made, evidence obtained thereby is nonetheless admissible. A grand jury witness was not permitted to refuse to answer questions on the ground that they were based on evidence obtained from an unlawful search and seizure, and federal tax authorities were permitted to use in a civil proceeding evidence found to have been unconstitutionally seized from defendant by state authorities.

The most severe curtailment of the rule came in 1984 with adoption of a "good faith" exception. In *United States v. Leon*, the Court created an exception for evidence obtained as a result of officers' objective, good-faith reliance on a warrant, later found to be defective, issued by a detached and neutral magistrate. Justice White's opinion for the Court could find little benefit in applying the exclusionary rule where there has been good-faith reliance on an invalid warrant. Thus, there was nothing to offset the "substantial social costs exacted by the rule." "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates," and in any event the Court considered it unlikely that the rule could have much deterrent effect on the actions of truly neutral magistrates. Moreover, the Court thought that the rule should not be applied "to deter objectively reasonable law enforcement activity," and that "penalizing the officer for the magistrate's error . . . cannot logically contribute to the deterrence of Fourth Amendment violations." The Court also suggested some circumstances in which courts would be unable to find that officers' reliance on a warrant was objectively reasonable: if the officers have been "dishonest or reckless in preparing their affidavit," if it should have been obvious that the magistrate had "wholly abandoned" his neutral role, or if the warrant was obviously deficient on its face (e.g., lacking in particularity). The Court applied the *Leon* standard in *Massachusetts v. Sheppard*, holding that an officer possessed an objectively reasonable belief that he had a valid warrant after he had pointed out to the magistrate that he had not used the standard form, and the magistrate had indicated that the necessary changes had been incorporated in the issued warrant.

The Court then extended *Leon* to hold that the exclusionary rule is inapplicable to evidence obtained by an officer acting in objectively reasonable reliance on a statute later held violative of the Fourth Amendment. Justice Blackmun's opinion for the Court reasoned that application of the exclusionary rule in such circumstances would have no more deterrent effect on officers than it would when officers reasonably rely on an invalid warrant, and no more deterrent effect on legislators who enact invalid statutes than on magistrates who issue invalid warrants.

It is unclear from the Court's analysis in *Leon* and its progeny whether a majority of the Justices would also support a good-faith exception for evidence seized without a warrant, although there is some language broad enough to apply to warrantless seizures. It is also unclear what a good-faith exception would mean in the context of a warrantless search, since the objective reasonableness of an officer's action in proceeding without a warrant is already taken into account in determining whether there has been a Fourth Amendment violation. The Court's increasing willingness to uphold warrantless searches as not "unreasonable" under the Fourth Amendment, however, may reduce the frequency with which the good-faith issue arises in the context of the exclusionary rule.

Operation of the Rule: Standing --The Court for a long period followed a rule of "standing" by which it determined whether a party was the appropriate person to move to suppress allegedly illegal evidence. Akin to Article III justiciability principles, which emphasize that one may ordinarily contest only those government actions that harm him, the standing principle in Fourth Amendment cases "required of one who seeks to challenge the legality of a search as the basis for suppressing relevant evidence that he alleges, and if the allegation be disputed that he establish, that he himself was the victim of an invasion of privacy." The Court recently has departed from the concept of "standing" to telescope the inquiry into one inquiry rather than two. Finding that "standing" served no useful analytical purpose, the Court has held that the issue of exclusion is to be determined solely upon a resolution of the substantive question whether the claimant's Fourth Amendment rights have been violated. "We can think of no decided cases of this Court that would have come out differently had we concluded . . . that the type of standing requirement . . . reaffirmed today is more properly subsumed under substantive Fourth Amendment doctrine. Rigorous application of the principle that the rights secured by this Amendment are personal, in place of a notion of 'standing,' will produce no additional situations in which evidence must be excluded. The inquiry under either approach is the same." One must therefore show that "the disputed search and seizure has infringed an interest of the defendant which the Fourth Amendment was designed to protect."

The Katz reasonable expectation of privacy rationale has now displaced property-ownership concepts which previously might have supported either standing to suppress or the establishment of an interest that has been invaded. Thus, it is no longer sufficient to allege possession or ownership of seized goods to establish the interest, if a justifiable expectation of privacy of the defendant was not violated in the seizure. Also, it is no longer sufficient that one merely be lawfully on the premises in order to be able to object to an illegal search; rather, one must show some legitimate interest in the premises that the search invaded. The same illegal search might, therefore, invade the rights of one person and not of another. Again, the effect of the application of the privacy rationale has been to narrow considerably the number of people who can complain of an unconstitutional search.

I. SUMMARY OF KEY TERMS IN THE AREA OF ELECTRONIC SURVEILLANCE AND INTERCEPTION

A. Definitions (note that USA Patriot discussed in Module V will apply analogous definitions to cyberspace surveillance)

Pen Register

A Pen Register records telephone numbers called from a particular phone. The Register also records the date, time, and length of calls. Note that this is information that is already gathered for billing purposes by a communications service provider.

Trap and Trace Order

A Trap and Trace Order records the telephone numbers of telephones that are used to place calls to a particular phone. (i.e. Makes a log of incoming phone numbers.) Note that information of this sort is not gathered in the ordinary course of business.

Wiretaps

Wiretaps are used for ongoing surveillance of a telephone line or other electronic communications line. It allows interception of content (i.e. conversations or other data) passed over the line. Note that this is more information than is gathered by a Pen Register or Trap and Trace Orders – neither of these intercept content - rather, they simply collect numbers dialed/received.

B. Four Levels of Government Search Authority

(1) Subpoena

The requirements for obtaining a subpoena are minimal. There is no 'relevancy standard' - no requirement that the information sought be relevant to an ongoing criminal investigation. Subpoenas can be issued by a prosecutor (sometimes through a grand jury investigation) without judicial intervention. However, a subpoena may not be used to obtain information or evidence protected by the Fourth Amendment unless Fourth Amendment requirements are satisfied.

(2) Pen Registers and Trap and Trace Order

A judge who independently evaluates the request of the government must grant pen Register Orders. The standard for granting a Pen Register Order is that the order must be relevant to an ongoing criminal investigation. An order is valid for 60 days and may be renewed for 60 day increments. The courts have held that the Fourth Amendment does not apply to Pen Register and Trap and Trace Orders, and therefore the government need not show "probable cause."

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 dictates requirements for Trap and Trace Orders. For more information about Title III, see below.

(3) Warrants

A warrant is required if the target has a reasonable expectation of privacy in the targeted material (Fourth Amendment requirement; see below). Requirements for obtaining a warrant are more stringent than those for obtaining a trap/trace order. E.g., the government must show "probable cause." A warrant must describe the place to be searched or thing to be seized with specificity.

(4) Wiretaps

Title III dictates requirements for wiretaps. Wiretaps are used for ongoing listening and invasion, and require a more comprehensive showing of need than a warrant. Title III also mandates court supervision and minimal intrusion for ongoing wiretaps.

II. Summary of U.S. Constitutional Requirements

A. The Fourth Amendment to the United States Constitution

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.

B. Supreme Court Interpretations of the Fourth Amendment

The U.S. Constitution ordinarily grants individuals rights against the government (and not private parties). Since government agents are usually the ones who are engaging in a claimed invasion, the U.S. legal system relies upon an independent judiciary to enforce these Constitutional rights. Often--though not always--such cases arise in the context of a criminal trial in which a defendant seeks to exclude certain evidence from the trial record on account the government obtained the information in violation of the Fourth Amendment.

In early 20th Century decisions, the U.S. Supreme Court relied on a "property-based" rationale for interpreting the Fourth Amendment. For example, in *Olmstead v. United States*, the Court held that wiretapping was not covered by the Amendment because the government had not physically invaded the defendant's premises. In a 1967 decision, however, *Katz v. United States*, the Court rejected this approach, holding that the government could not electronically eavesdrop on a telephone conversation held by a person in a public telephone booth by attaching a listening device to the outside of the booth without complying with the Fourth Amendment. The Court rejected the government's argument that since the speaker had no property interest in the booth his Fourth Amendment rights weren't violated. As the Court said in another case decided the same year:

"The premise that property interests control the right of the Government to search and seize has been discredited. . . . We have recognized that the principal object of the Fourth Amendment is the protection of privacy rather than property, and have increasingly discarded fictional and procedural barriers rested on property concepts."

Katz concluded in a famous tag line that the Amendment "protects people, not places." Henceforth, electronic surveillance was made subject to the Amendment's requirements.

After *Katz*, the Court developed a two-pronged test to determine if an individual had a reasonable expectation of privacy against intrusions by the government that triggered the Fourth Amendment. First, an individual had to believe a given communication is private. This was a subjective test of the individual's belief. Second, for an expectation of privacy to be deemed reasonable, a disinterested observer (i.e., a court) would have to agree that the individual's expectation of privacy was reasonable. This is supposedly an objective test. If these two factors are satisfied, then the government must comply with the Fourth Amendment. As recently put by the Court:

"A Fourth Amendment search occurs when the government violates a subjective expectation of privacy that society recognizes as reasonable." Conversely, "a Fourth Amendment search does not occur--even in the explicitly protected location of a house-- unless the individual manifested a subjective expectation of privacy in the object of the challenged search, and society is willing to recognize that expectation as reasonable."

The two-part test ostensibly guides the Supreme Court and lower courts in its decisions, but interpreting such a vague standard leaves substantial room for judgment. The first requirement, the "subjective expectation" of privacy, has in practice eroded as a workable standard, because, as Justice Harlan concluded in a later case, "our expectations, and the risks we assume, are in large part reflections of laws that translate into rules the customs and values of the past and present." In short, the Supreme Court sets the standards, and those standards in turn become the future reference points for individuals' "expectations" of privacy against the governmental intrusions.

Accordingly, the second part of the test, whether one has a "legitimate" expectation of privacy that society finds "reasonable" to recognize, has become the default touchstone of what "privacy" means under the Fourth Amendment. That is, the "capacity to claim the protection of the Amendment depends . . . upon whether the area was one in which there was reasonable expectation of freedom from governmental

intrusion." (emphasis added) In answering this question, the Court has said that "legitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society."

Note that, despite the rejection of the "property" rationale in Katz, the Court re-embraces the same concept via a backdoor description of "expectations." The problem, of course, is that when these concepts of real space are applied to cyberspace (or even telephonic communications) an individual owns no "property" in the mechanisms of transmission (e.g., the wires that carry the dataflow) that would support her claim of privacy in the communication. In sum, although the Fourth Amendment protects a person's privacy, not her property, owning the property in which transmissions occur has become the surest means of protecting privacy.

In specific terms, the Court has given the most protection to an individual's home, while other "places" an individual frequents (e.g., automobile) or information about his activities are given little protection. Revealing information about one's activities to another person has become a surefire road to the no privacy destination. In *United States v. Miller*, for example, the Court gave a restrictive reading to "reasonable expectations" in a case involving a bank depositor who claimed the government was required to satisfy Fourth Amendment standards in order to obtain his financial records from his bank. The *Miller* Court held that the depositor had no "legitimate 'expectation of privacy' in financial information 'voluntarily conveyed to . . . banks and exposed to their employees in the ordinary course of business.'"

Similarly, in a key case posing the question of whether the government was required to obtain a warrant before installing a pen register, the Supreme Court held that an individual targeted in pen register monitoring does not have a reasonable expectation of privacy in the telephone numbers dialed from his home telephone. According to *Smith v. Maryland*, an individual is assumed to know that in dialing, he "conveys numerical information to the phone company" and that the phone company "records this information for a variety of legitimate business purposes." The Court rejected strong dissents that argued that the numbers dialed consisted of communication "content". Therefore, the Court held that the installation and use of a pen register "was not a 'search,' and no warrant was required."

The Court has not yet held that the content of those communications may be revealed without violating the Fourth Amendment. One could imagine, for example, an extension of the *Smith* rationale that the user knows when he dials he "conveys numerical information to the phone company" because he is using the phone company's switching systems. Presumably, the user also knows that when he speaks, he is using the phone company's lines and switching stations since the user must speak using the communication devices of his telephone service provider. However, The key distinction between (1) the "content" of the communication and (2) the telephone numbers dialed, time, length and date of call, has led one commentator to coin the phrase "communication attributes" to describe the latter. We will rely on this distinction as we consider the treatment of cyberspace communications.

As a general matter, without necessarily intending to do so, the Court has developed a balancing approach to the question of what constitutes an individual's "reasonable expectations" under the Fourth Amendment. This approach assesses "the nature of a particular practice and the likely extent of its impact on the individual's sense of security balanced against the utility of the conduct as a technique of law enforcement."

What are the factors that guide the "balance?" That a person has taken precautions to maintain her privacy, that is, precautions customarily taken by those seeking to exclude others, is usually a significant factor in determining legitimacy of expectation. As indicated above, property interests in the thing or information are also relevant, and in the recent *Kyllo* case, apparently determinative. However, because the "needs" of law enforcement are weighed against these interests, it is difficult to determine in advance how much weight a court will give to any factor.

III. Key Statutes: Title III of the Omnibus Crime Control and Safe Streets Act of 1968. and the Electronic Communications Privacy Act of 1986 (ECPA)

Title III of the Omnibus Crime Control and Safe Streets Act of 1968 attempted to codify the Fourth Amendment principles set forth by Katz. Title III proscribes the interception of oral and wire communications, "while making provision for law enforcement to intercept these communications for use in criminal investigations."

The Electronic Communications Privacy Act of 1986 ("ECPA") amended Title III when it became clear that Title III was not adequate to deal with developing technologies in the field of electronic communication. The ECPA was designed to align Title III with new innovations such as "cellular telephones, computer-to-computer transmissions, and electronic mail systems"

Title I of the ECPA prohibits unauthorized interception of electronic communications. "Unauthorized" includes communications obtained without the authority of an appropriate court order. Title II proscribes the unauthorized access to stored wire and electronic communications. However, although the ECPA was designed to update Title III, it did not resolve conflicting understandings of what would be protected under the "reasonable expectation of privacy" standard. While the privacy standard still governs communications obtained by the government, the standard is difficult to apply because it is not obvious whether a user's hope of privacy is one a court will protect as "reasonable."