

CLE Materials, James Madison Lecture, October 20, 2009

The Fourth Amendment to the Constitution of the United States (1791):

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.

Huckle v. Money, 95 Eng. Rep. 768, 768-69 (C.P. 1763) (Pratt, * Lord C.J.):

I shall now state the nature of this case, as it appeared upon the evidence at the trial: a warrant was granted by Lord Halifax, Secretary of State, directed to four messengers, to apprehend and seize the printers and publishers of a paper called the *North Briton*, Number 45, without any information or charge laid before the Secretary of State, previous to the granting thereof, and without naming any person whatsoever in the warrant; Carrington, the first of the messengers to whom the warrant was directed, from some private intelligence he had got that Leech was the printer of the *North Briton*, Number 45, directed the defendant to execute the warrant upon the plaintiff, (one of Leech's journeymen,) and took him into custody for about six hours, and during that time treated him well; the personal injury done to him was very small, so that if the jury had been confined by their oath to consider the mere personal injury only, perhaps 20 *l.* damages would have been thought damages sufficient; but the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial; they saw a magistrate over all the King's subjects, exercising arbitrary power, violating Magna Charta, and attempting to destroy the liberty of the kingdom, by insisting upon the legality of this general warrant before them; they heard the King's Counsel, and saw the solicitor of the Treasury endeavouring to support and maintain the legality of the warrant in a tyrannical and severe manner. These are the ideas which struck the jury on the trial; and I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishman would wish to live an hour; it was a most daring public attack made upon the liberty of the subject. I thought that the 29th chapter of Magna Charta, Nullus liber homo capiatur vel imprisonetur, &c. nec super eum ibimus, &c. nisi per legale iudicium parium suorum vel per legem terrae, &c. which is pointed against arbitrary power, was violated. I cannot say what damages I should have given if I had been upon the jury; but I directed and told them they were not bound to any certain damages against the Solicitor-General's argument. Upon the whole, I am of opinion the

* Charles Pratt was elevated to the peerage as the first Baron Camden on July 15, 1765.

damages are not excessive; and that it is very dangerous for the Judges to intermeddle in damages for torts; it must be a glaring case indeed of outrageous damages in a tort, and which all mankind at first blush must think so, to induce a Court to grant a new trial for excessive damages.

Wilkes v. Wood, 98 Eng. Rep. 489, 498 (C.P. 1763) (Pratt, Lord C.J.) (A *North Briton* case):

His Lordship then went upon the warrant, which he declared was a point of the greatest consequence he had ever met with in his whole practice. The defendants claimed a right, under precedents, to force persons houses, break open escrutores, seize their papers, &c. upon a general warrant, where no inventory is made of the things thus taken away, and where no offenders names are specified in the warrant, and therefore a discretionary power given to messengers to search wherever their suspicions may chance to fall. If such a power is truly invested in a Secretary of State, and he can delegate this power, it certainly may affect the person and property of every man in this kingdom, and is totally subversive of the liberty of the subject.

Money v. Leach, 97 Eng. Rep. 1075, 1088 (K.B. 1765) (Mansfield, Lord C.J.) (A *North Briton* case):

As to the validity of the warrant, upon the single objection of the uncertainty of the person, being neither named nor described -- The common law, in many cases, gives authority to arrest without warrant; more especially, where taken in the very act: and there are many cases where particular Acts of Parliament have given authority to apprehend, under general warrants; as in the case of writs of assistance, or warrants to take up loose, idle and disorderly people. But here it is not contended, that the common law gave the officer authority to apprehend; nor that there is any Act of Parliament which warrants this case.

Therefore it must stand upon principles of common law.

It is not fit, that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge; and should give certain directions to the officer. This is so, upon reason and convenience.

Then as to authorities -- Hale and all others hold such an uncertain warrant void: and there is no case or book to the contrary.

It is said, "that the usage has been so; and that many such have been issued, since the Revolution, down to this time."

But a usage, to grow into law, ought to be a general usage, communiter usitata et approbata; and which, after a long continuance, it would be mischievous to overturn.

This is only the usage of a particular office, and contrary to the usage of all other justices and conservators of the peace.

Entick v. Carrington, 19 Howell's State Trials 1029 (C.P. 1765) (Camden, Lord C.J.):

The great end, for which men entered into 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. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my license, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.

According to this reasoning, it is now incumbent upon the defendants to show the law by which this seizure is warranted. If that cannot be done, it is a trespass.

Papers are the owner's goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a practice legal, which would be subversive of all the comforts of society.

Boyd v. United States, 116 U.S. 616, 624-25 (1886) (Bradley, J.) (footnote omitted):

In order to ascertain the nature of the proceedings intended by the fourth amendment to the constitution under the terms "unreasonable searches and seizures," it is only necessary to recall the contemporary or then recent history of the controversies on the subject, both in this country and in England. The practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled

goods, which James Otis pronounced “the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law book;” since they placed “the liberty of every man in the hands of every petty officer.” This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the colonies to the oppressions of the mother country.

Olmstead v. United States, 277 U.S. 438, 472-74 (1928) (Brandeis, J., dissenting) (footnotes omitted):

Clauses guaranteeing to the individual protection against specific abuses of power, must have a similar capacity of adaptation to a changing world. It was with reference to such a clause that this court said in *Weems v. United States*, 217 U. S. 349, 373: “Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principal to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, ‘designed to approach immortality as nearly as human institutions can approach it.’ The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.”

When the Fourth and Fifth Amendments were adopted, “the form that evil had theretofore taken” had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination. It could compel the individual to testify – a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life -- a seizure effected, if need be, by breaking and entry. Protection against such invasion of “the sanctities of a man's home and the privacies of life” was provided in the Fourth and Fifth Amendments by specific language. *Boyd v. United States*, 116 U. S. 616, 630. But “time works changes, brings into existence new conditions and purposes.” Subtler and more far-reaching means of invading privacy have become available to the Government. Discovery and invention have made it possible for the Government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.

Moreover, “in the application of a constitution, our contemplation cannot be only of what has been, but of what may be.” The progress of science in furnishing the Government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these. To Lord Camden a far slighter intrusion seemed “subversive of all the comforts of society.” Can it be that the Constitution affords no protection against such invasions of individual security?

Chimel v. California, 395 U.S. 752, 760-61 (1969) (Stewart, J.) (footnote omitted):

Nor is the rationale by which the State seeks here to sustain the search of the petitioner's house supported by a reasoned view of the background and purpose of the Fourth Amendment. Mr. Justice Frankfurter wisely pointed out in his *Rabinowitz* dissent that the Amendment's proscription of “unreasonable searches and seizures” must be read in light of “the history that gave rise to the words” -- a history of “abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution” 339 U.S., at 69. The 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. As the Court put it in *McDonald v. United States*, 335 U.S. 451:

“We are not dealing with formalities. The presence of a search warrant serves a high function. Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. . . . And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home. We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.” *Id.*, at 455-456.

Wyoming v. Houghton, 526 U.S. 295, 299-300 (1999) (Scalia, J.):

The Fourth Amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” In determining whether a particular governmental action violates this provision, we inquire first whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed. *See Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621, 624 (1991). Where that inquiry yields no answer, we must evaluate the search or seizure under traditional standards of reasonableness by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests. *See, e.g., Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652-653.

Arizona v. Gant, ___ U.S. ___, 129 S.Ct. 1710, 1720 (2009) (Stevens, J.)(footnote omitted):

A rule that gives police the power to conduct a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of countless individuals. Indeed, the character of the threat implicates the central concern underlying the Fourth Amendment -- the concern about giving police officers unbridled discretion to rummage at will among a person's private effects.

United States v. Miranda, 325 Fed. App'x 858, 860 (11th Cir. 2009) (per curiam):

In this case, the searching officer was searching [the defendant's] hard drives pursuant to a warrant. In doing so, the officer had a lawful right to view each file to determine whether or not it was evidence of counterfeiting crimes. *See Slocum*, 708 F.2d at 604. The child pornography files were intermingled with counterfeiting files, so they were in plain view. Once the officer saw child pornography on [the defendant's] hard drives, its incriminating character was immediately apparent, so the officer could seize the files. *See Smith*, 459 F.3d at 1290. This is distinguishable from the child pornography found on [the defendant's] computer tower, which the district court suppressed because it was found during a search conducted solely for the purpose of finding child pornography, outside the scope of the counterfeiting warrant. For these reasons, the district court did not err in denying [the defendant's] motion to suppress the child pornography found on his laptop computer, external hard drive, and uninstalled hard drive.

United States v. Comprehensive Drug Testing, Inc., ___ F.3d ___, No. 05-10067, slip op. 11859, 11891-92 (9th Cir. August 26, 2009)(en banc)(Kozinski, C.J.):

Everyone's interests are best served [in electronic searches] if there are clear rules to follow that strike a fair balance between the legitimate needs of law enforcement and the right of individuals and enterprises to the privacy that is at the heart of the Fourth Amendment. [*United States v. Tamura*[, 694 F.2d 591 (9th Cir. 1982),] has provided a workable framework for almost three decades, and might well have sufficed in this case had its teachings been followed. We believe it is useful, therefore, to update *Tamura* to apply to the daunting realities of electronic searches which will nearly always present the kind of situation that *Tamura* believed would be rare and exceptional -- the inability of government agents to segregate seizable from non-seizable materials at the scene of the search, and thus the necessity to seize far more than is actually authorized.

We accept the reality that such over-seizing is an inherent part of the electronic search process and proceed on the assumption that, when it comes to the seizure of electronic records, this will be far more common than in the days of paper records. This calls for greater vigilance on the part of judicial officers in striking the right balance between the government's interest in law enforcement and the right of individuals to be free from unreasonable searches and seizures. The process of segregating electronic data that is seizable from that which is not must not become a vehicle for the government to gain access to data which it has no probable cause to collect. In general, we adopt *Tamura's* solution to the problem of necessary over-seizing of evidence: When the government wishes to obtain a warrant to examine a computer hard drive or electronic storage medium in searching for certain incriminating files, or when a search for evidence could result in the seizure of a computer, *see, e.g., United States v. Giberson*, 527 F.3d 882 (9th Cir. 2008), magistrate judges must be vigilant in observing the guidance we have set out throughout our opinion, which can be summed up as follows:

1. Magistrates should insist that the government waive reliance upon the plain view doctrine in digital evidence cases. *See* p. 11876 *supra*.

2. Segregation and redaction must be either done by specialized personnel or an independent third party. *See* pp. 11880-81 *supra*. If the segregation is to be done by government computer personnel, it must agree in the warrant application that the computer personnel will not disclose to the investigators any information other than that which is the target of the warrant.

3. Warrants and subpoenas must disclose the actual risks of destruction of information as well as prior efforts to seize that information in other judicial fora. *See* pp. 11877-78, 11886-87 *supra*.

4. The government's search protocol must be designed to uncover only the information for which it has probable cause, and only that information may be examined by the case agents. *See* pp. 11878, 11880-81 *supra*.

5. The government must destroy or, if the recipient may lawfully possess it, return non-responsive data, keeping the issuing magistrate informed about when it has done so and what it has kept. *See* p. 11881-82 *supra*.