



Liberty Tree

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THE FOURTH AMENDMENT ENFEEBLED



PART 4: UNREASONABLE SEARCHES AND SEIZURES

Federal agents pose with alcohol found in a raid circa 1932..

The Fourth Amendment provides that the right of the people to be secure *against* “unreasonable searches and seizures, shall not be violated.” Seizing on the word “unreasonable,” and declaring that the “reasonableness” of a search is the touchstone of the Amendment, the Supreme Court has approved many violative searches. A “valid” search incident to arrest, once limited to an area within the arrestee’s immediate reach, for example, was expanded to a search of an entire home, if officers had a ‘reasonable’ belief it harbors someone who poses a danger to them.¹ As another example, courts have allowed warrantless, invasive blood tests to determine a motorist’s blood alcohol level.²

Beginning in the prohibition era, the Supreme Court began deciding Fourth Amendment cases, where law enforcement officers had proceeded without obtaining warrants, on whether the justices deemed a particular search or seizure reasonable or unreasonable in the

circumstances. This use of the word “unreasonable,” meaning what the justices themselves deem inappropriate for law enforcement purposes, or done without what the justices believe is probable cause, was *not* the meaning intended by framers of the Fourth Amendment. In fact, changing the meaning of the words used by the framers has in essence illegally amended the Constitution by judicial fiat.

Off on a wrong path

The Supreme Court mangled the historical background and meaning of the Fourth Amendment in a

case arising from prohibition, *Carroll v. United States*, 267 U.S. 132 (1925), in order to *exclude* privately owned vehicles from being “secure” from warrantless searches.

Mr. Carroll had sought to have evidence (bottles of whiskey) excluded from trial because they were obtained in a warrantless search. Undercover agents had previously met with Mr. Carroll in an unfruitful attempt to get him to deliver them whiskey. When he did not deliver any whiskey, they noted the vehicle he was in, and began following that vehicle whenever they saw it. Upon the mere suspicion that, since he had discussed obtaining whiskey from them before, he would be conveying illegal whiskey whenever they saw him on the highway, they stopped (arrested) him on

FOURTH AMENDMENT

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.

1. *Maryland v. Buie*, 494 U.S. 325 (1990).

2. *Missouri v. McNeely*, 569 U.S. 141 (2013).

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suspicion alone and searched the vehicle, found the whiskey, and subsequently arrested Mr. Carroll and his companion for violating the National Prohibition (Volstead) Act.

To justify the warrantless search of the prohibition agents, Chief Justice Taft cited previous laws passed by Congress which were, in essence, general warrants forbidden by the Fourth Amendment. He noted that in 1789, its very first term, Congress authorized warrantless ship searches for suspected concealment of goods subject to duties. In 1815, and later again in 1865, Congress extended the "authority" to conduct warrantless searches "to stop, search and examine any vehicle, beast or person on which or whom they should suspect there was merchandise which was subject to duty."³ None of these laws, said Taft, "has ever been attacked as unconstitutional."⁴ But if Congress passes an unconstitutional statute, and no one ever challenges it in the courts, it is still unconstitutional. Rather than treating the *Carroll* case as if it were a *first* challenge to these types of laws, Justice Taft simply ruled that the previous laws were constitutional, without any analysis.

In contrast to previous laws, the Volstead Act did *not* contain any language explicitly authorizing agents to search vehicles without a warrant, nor to arrest without a warrant, but this didn't hinder Taft! Where the language provided for seizure when an officer "discover[ed]" anyone in the act of transporting liquor by automobile, Taft held "discovered" could mean through a warrantless search based upon an over-two-month-old hunch that the occupants of the vehicle might be transporting liquor.⁵ Add in the fact that Grand Rapids is 152 miles from Detroit, a hub for the introduction of liquor across the international boundary, and Carroll was traveling to Grand Rapids (*presumably* from Detroit), it was "reasonable" to believe they were engaged in transporting liquor! Taft stated that the "right to search and the validity of the seizure are ... dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." *Carroll*, at 159. Even worse, Taft said the warrantless arrest of the occupants of the automobile *before* the search was merely *incidental* to the search itself.

Taft asserted that the "common-law rule" for

warrantless arrests was that one could be made on a "on a reliable report of a felony," *Id.* at 157, 161, and also that "[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony." *Id.* at 156. He made these assertions apparently to support the notion that "reasonable" cause for a *misdemeanor*, *not* a felony, being committed was enough to search without a warrant.

But his assertions about the common law were *wrong*, as will be discussed below. As Justice McReynolds, in his dissent, pointed out:

Criminal statutes must be strictly construed and applied, in harmony with rules of the common law. ... And the well-settled doctrine is that an arrest for a misdemeanor may not be made without a warrant unless the offense is committed in the officer's presence. ... 'An officer, at common law, was not authorized to make an arrest without a warrant, for a mere mis-demeanor not committed in his presence.' *Id.* at

164-165 (internal citations omitted).

McReynolds pointed out that the arrest of Carroll, which was by law to be made only upon the *discovery* of illegal liquor, actually was a warrantless arrest on mere suspicion which *preceded* the discovery, contrary to common law principles:

The validity of the seizure under consideration depends on the legality of the arrest. This did not follow the seizure, but the reverse is true. Plaintiffs in error were first brought within the officers' power, and, while therein, the seizure took place. If an officer, upon mere suspicion of a misdemeanor, may stop one on the public highway, take articles away from him and thereafter use them as evidence to convict him of crime, what becomes of the Fourth and Fifth Amendments?⁶

Justice McReynolds, we have the answer to the question you posed a hundred years ago. When officers, upon mere suspicion of misdemeanors, can stop one on a public highway, take articles away from him and use those articles to convict him of a crime, the Fourth and Fifth Amendments have been decimated, and America has devolved into a

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3. *Carroll v. United States*, 267 U.S. 132, 151 (1925).

4. *Id.* at 152.

5. Of course, as stated in the last *Liberty Tree*, since the officers supposedly had probable cause to suspect the vehicle and occupants of transporting liquor, nothing stopped them from obtaining a warrant to search the vehicle wherever they found it.

6. *Id.* at 166.

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tyrannical police state.

Fourth Amendment vs. Fifth Amendment

The origin of the Fourth Amendment is traced especially to the controversy in Massachusetts over the “general warrants” issued to customs agents in order to break open houses and search every place that they suspected goods subject to duties were concealed.⁷ These broad warrants did not name specific persons, places, or even the items to be searched for, and thus the officers were able to disturb the privacy and peace of citizens without any justification.

The Fourth Amendment was directed against Congress to forbid it from enacting legislation which would authorize general warrants as had been utilized in the colonies. The Amendment did *not* address the use of general warrants in crimes and offenses under common law, since the only warrants legal under common law were those supported by sworn statements and which particularly described the persons, places, and things which could be searched or seized by a peace officer. This requirement of warrants was understood to be part of the “law of the land,” also known as “due process of law.”

Thus, warrants in the cases of crimes are addressed by the framers in the Fifth Amendment, which says that “nor shall any person be ... deprived of life, liberty, or property, *without due process of law.*”⁸

Today, the phrase “unreasonable searches and seizures” has been erroneously applied by the courts to *undermine* the due process guarantee of the Fifth Amendment.

Common law arrests and searches in the colonies

In the 18th century, there were no police departments in the colonies or States. Instead, a peace officer, most commonly a constable — a low status “freeman” — performed duties as a part-time

officer for a year at a time. Constables often depended on bystanders to execute an arrest, and had the authority to command the assistance of others to make such arrests.

In addition, legal force was employed mostly as a direct response to crimes with *victims*. The victim of a robbery or assault would call a watchman, and then apply to a justice of the peace for a warrant, making out a sworn statement supporting the warrant, and a constable would then be authorized by that warrant to make a search or arrest. Unlike the constable, the justice of the peace was generally a man of high status in the local community who directed the constable through the judicial warrant (sometimes called a “writ” or “process”).

Under the common law tradition inherited from the English, a search or arrest was *presumed* an unlawful trespass unless justified by common law or an act of parliament.⁹ Any officer or private person who unlawfully arrested or searched could be sued by the victim for trespass. Thus, outside of witnessing a felony firsthand and arresting immediately, a peace officer was unlikely to conduct any warrantless searches or arrests.

Arrests without a warrant, at the time the Constitution was being drafted, could only legally be accomplished three ways: (1) when a public offense was committed or attempted in the officer’s presence, (2) when the arrestee had committed a felony, either in or out of the officer’s presence, and (3) when a felony had been committed, and the officer had reasonable cause to

believe the arrestee had committed it.¹⁰ Only when a misdemeanor was committed in an officer’s presence could the officer arrest without a warrant; otherwise, a warrant had to be obtained on the basis of sworn testimony. Thus, justifications for arrest were all based on the *fact* that an offense or a felony had been committed, “probable cause,” that is, some fact or facts which merely gave rise to *suspicion* that a felony had been committed, was *not* enough!! An arrestee could sue for trespass even before any trial regarding the offense was begun, and this provided a deterrent to unlawful or malicious arrests or searches.



In England in the 18th century, constables were inhabitants of the neighborhoods they policed. If they trespassed, arrested, or seized without a warrant, they ran the risk of being prosecuted by the arrestee. This kept most constables only enforcing the law in response to victim complaints, or specific warrants issued by the Justices of the Peace. However, from the 16th century on, British statutes also awarded half of any fines to anyone who would prosecute other people for victimless “crimes” such as economic or vice regulations. The people who profitted from this system were called “informers,” and the local communities usually despised them for profiting from others’ misery. One such informer and constable, William Payne, was well known for numerous such arrests and prosecutions. He was satirized by Paul Sandby in 1777 as **The Well Fed English Constable.**

7. See *Liberty Tree*, December 2023.

8. See Davies, Thomas Y. “Recovering the Original Fourth Amendment,” 98 Mich. L. Rev. 3 (1999), n. 333.

9. *Id.*, pp. 624-625.

10. *Id.*, pp. 628-633.

Thus, Taft's statement in *Carroll* that under common law "[t]he usual rule is that a police officer may arrest without warrant one believed by the officer upon reasonable cause to have been guilty of a felony" was dead wrong; this would *not* have been the legal process at the time the Constitution was written.

Unreasonable searches and seizures

Justice Taft's *Carroll* opinion approved a warrantless search of an automobile for illegal liquor, in part because of the supposed exigency presented by the mobility of the vehicle, was the first Supreme Court case to set the stage for using "unreasonable" as authorizing a type of "reasonableness in the circumstances" standard for warrantless searches.

In 1755, Samuel Johnson, in his *Dictionary of the English Language*, set forth several meanings for the word "unreasonable." The meaning "[n]ot agreeable to reason" has often been *replaced* in judicial rulings with a meaning closer to "[g]reater than is fit; immoderate." In many cases, the latter meaning has been substituted in order to find warrantless searches in keeping with the Fourth Amendment because they don't offend the conscience (of the judge), or are a minor trespass of property or body (in the judge's view). Forcibly taking a blood sample from a suspected drunk driver is a trespass on the body which could never have been sustained without a warrant under common law.

Then again, courts have justified warrantless arrests if the suspicions of the officer merely *make sense* to the judge, and as Taft demonstrated in *Carroll*, judges are willing to take even a man's failure to deliver illegal liquor, combined with his travel along a busy highway, as enough to arrest a man without a warrant.

Of course, holding warrantless searches reasonable threatens to swallow up the Fourth Amendment warrant requirement altogether. If "probable cause" can justify a warrantless search, why require warrants at all?

The reasonable-in-the-circumstances (i.e., fit or proper in the circumstances) justification used by courts today for warrantless actions is without historical foundation. The true meaning of "unreasonable searches or seizures" can be traced to its usage in Massachusetts arising out of the general warrant controversy. In 1780, Massachusetts was the



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first state to add the word reasonable to its Bill of Rights, Art. XIV: "Every subject has a right to be secure from all unreasonable searches and seizures of his person, his house, his papers, and all his possessions ..."

John Adams personally drafted the Massachusetts provision, and he had been present at James Otis' fiery argument against general warrants in 1761. Otis' argument relied in part on Lord Coke's opinion in *Dr. Bonham's Case* in 1610, wherein Coke stated that an act of Parliament is "void" if it is "against common right and reason."¹¹

The common law
itselfe is nothing but
REASON

Blackstone, the famous commentator on common law, in discussing the inherent rights of Englishmen in 1765, invoked Coke's assertion to state that imprisonment under an unspecific warrant would be "against reason," or "unreasonable."¹²

Speaking of common law principles, Coke said that "reason is the life of the law, nay, the common law itselfe is nothing else but reason; which is to be understood of an articial perfection of reason, gotten by long study, observation, and experience, and not of every man's naturall reason ... no man out of his own private reason ought to be wiser than the law, which is the perfection of reason."¹³ In sum, anything "against reason" was against the reason of the common law, and therefore illegal.

This understanding of "against reason" or "unreasonable" as against the precepts of the common law shows that "unreasonable searches and seizures" are searches and seizures *outside* of the common law principles established at the time of the Constitution's ratification. Such searches are *illegal* at common law and cannot meet the due process standard under the Fifth Amendment. At common law, no searches or seizures could take place unless the crime took place in the view of the officer, or he had a warrant issued by a judge upon a sworn statement of a complainant. All actions taken outside those parameters are *unreasonable*.



9. *Carroll v. United States*, 267 U.S. 132, 145-146 (1925).

10. *Id.*, at 149.

11. Davies, p. 690.

12. *Id.*, p. 692.

13. Coke, Sir Edward, 1 *The Institutes of the Laws of England* 97b (19th ed. 1832) (originally published 1628).