



Winter 1980

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### Recommended Citation

Luis G. Stelzner, *The Fourth Amendment: The Reasonableness and Warrant Clauses*, 10 N.M. L. Rev. 33 (1980).

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# THE FOURTH AMENDMENT: THE REASONABLENESS AND WARRANT CLAUSES

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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.<sup>1</sup>

In these words the First Congress framed the fourth amendment to the Constitution. The amendment is oddly constructed for one of the central provisions of the Bill of Rights, containing two principal clauses whose meaning, relationship and relative importance have consistently created controversy.<sup>2</sup>

A cursory reading exposes the apparent ambiguity created by the draftsmen of the fourth amendment. The first clause memorializes a "right . . . to be secure . . . against unreasonable searches and seizures." It is followed by a second clause listing specific requisites for the issuance of a valid warrant. What is the relationship of one clause to the other? Is a search reasonable only if it complies with the specific instructions of the warrant clause? Does the reasonableness clause provide a broad search authority permitting some searches without warrants?

Two principal theories, the "general reasonableness" and "warrant" theories, have evolved as interpretations of these two conjunctive clauses. The classic expression of these conflicting theories is found in the majority opinion of Justice Minton and in Justice Frankfurter's dissent in *United States v. Rabinowitz*.<sup>3</sup>

Justice Minton observed that "[i]t is unreasonable searches that are prohibited by the Fourth Amendment [citation omitted]. It was recognized by the framers of the Constitution that there were reasonable searches for which no warrant was required."<sup>4</sup> Reasonableness

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1. U.S. Const. amend. IV.

2. See *United States v. Rabinowitz*, 339 U.S. 56 (1950) (Minton, J., majority opinion; Frankfurter, J., dissenting opinion), *overruled in* *Chimel v. California*, 395 U.S. 752 (1969); 1 W. LaFare, *Search and Seizure: Treatise on the Fourth Amendment* 5-6 (1978); 3 A. Amsterdam, *Trial Manual 3 for the Defense of Criminal Cases* 229 (1975).

3. 339 U.S. at 56-66, 68-86.

4. *Id.* at 60.

"is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches . . . . [T]he reasonableness of searches must find resolution in the facts and circumstances of each case."<sup>5</sup> Advocates of Minton's view contend that the reasonableness clause is preeminent in the amendment and independent of the warrant clause, which is simply a detailed prescription for the constitutionality of searches made with prior judicial authorization. They argue that warrantless searches and seizures are tested on the facts and circumstances of each case by a generalized, subjective reasonableness standard.<sup>6</sup>

Justice Frankfurter eloquently disagreed with Justice Minton. He urged that the fourth amendment be read in light of "the history that gave rise to the words."<sup>7</sup> The framers, declared Justice Frankfurter, said, "that a search is 'unreasonable' unless a warrant authorizes it, barring only exceptions justified by absolute necessity."<sup>8</sup> In other words, reasonableness must be read in terms of the amendment's second clause. The fourth amendment thus proscribes searches without warrant where it is practicable to obtain one, with a few historically defined exceptions.<sup>9</sup>

Fourth amendment jurisprudence has developed substantially since *Rabinowitz*. Minton's majority opinion has been overruled.<sup>10</sup> While it is clear that "reasonableness" is a concept broader than the precise rules of the warrant clause and applies to police activities that are not subject to the warrant requirement,<sup>11</sup> it is established that the state must, whenever practicable, obtain advance judicial approval of at least full-scale searches.<sup>12</sup>

Nevertheless, the controversy so effectively highlighted by Justices Minton and Frankfurter continues, though in somewhat modified form. Today the issue arises most frequently with respect to lesser intrusions such as frisks or temporary detentions for questioning.<sup>13</sup> The modern version of the controversy is best phrased by two questions. First, to what extent is reasonableness under the fourth amendment defined by the specific requirements of the warrant

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5. *Id.* at 63.

6. *Bell v. Wolfish*, 99 S. Ct. at 1884; *United States v. Rabinowitz*, 339 U.S. at 63-66.

7. 339 U.S. at 69.

8. *Id.* at 70.

9. *J. Amsterdam*, *supra* note 2, at 229.

10. *Chimel v. California*, 395 U.S. 752 (1969).

11. *W. LaFave*, *supra* note 2, at 439.

12. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978); *Terry v. Ohio*, 392 U.S. 1, 20 (1968); *Katz v. United States*, 389 U.S. 347, 357 (1967). *But see* 2 *W. LaFave*, *Search and Seizure: Treatise on the Fourth Amendment* 5 (1978).

13. *See, e.g.*, *Terry v. Ohio*, 392 U.S. 1 (1968).

clause and the abuses it proscribes? Secondly, under what circumstances will the Court, under the general test of reasonableness, allow relaxation of the warrant clause requirements?

This article will explore the historic roots of this fundamental fourth amendment debate. It will then review current manifestations of the controversy, and examine their significance and justification in history and precedent.

### ORIGINS

The debate is informed by a history which began in the sixteenth century when the people of England were first subjected to general warrants.<sup>14</sup> General warrants varied in degree of offensiveness. Typically, however, they authorized government agents to search "all houses and places" for persons suspected of libels, and to "search in any of the chambers, studies, chests, or other like places for all manner of writing or papers . . . ."<sup>15</sup>

Despite public outcry and parliamentary opposition,<sup>16</sup> the British judiciary did not confront the practice of issuing general search warrants until the reign of George III, two centuries after general warrants were introduced.<sup>17</sup> In 1765 Lord Camden, Chief Justice of the Court of Common Pleas, pronounced the judgment in *Entick v. Carrington*,<sup>18</sup> a case regarded by the United States Supreme Court as "one of the landmarks of English liberty."<sup>19</sup> In *Entick*, Lord Camden condemned general warrants.

14. N. Lasson, *The History and Development of the Fourteenth Amendment to the United States Constitution* 23-27 (1937).

15. *Id.* at 27 (quoting C. F. Tucker-Brooke, *Works and Life of Christopher Marlowe* 54 ff (1930)) (from the text of a warrant issued by the Court of Star Chamber in 1593).

16. In 1680 the House of Commons investigated and ultimately impeached Chief Justice Scroggs, the foremost advocate of general warrants. One of the articles of impeachment was based on his issuance of "'general warrants attaching the persons and seizing the goods of his majesty's subjects, *not named or described particularly*, in the said warrants; by means whereof, many . . . have been vexed, their houses entered into, and they themselves grievously oppressed, contrary to law.'" N. Lasson, *supra* note 14, at 38.

17. Several controversial treason trials took place in the interim, in which general warrants were utilized to assist the prosecution. The trial of Algernon Sydney is an example. The Privy Council sent an order to seize all of Sydney's papers and writings. Some of these were used to meet the requirement of a second witness in treason cases. N. Lasson, *supra* note 14, at 39 n. 96. Some early constitutional scholars have noted that this seizure was ultimately connected with the adoption of the fourth amendment. *Id.* (citing T. Cooley, *The General Principles of Constitutional Law* 267 (4th ed. 1931)).

18. *Entick v. Carrington*, 19 Howell's State Trials 1029 (1765). An early challenge to general warrants was made in *Wilkes v. Wood*, 95 Eng. Rep. 766 (K.B. 1763). However, it was the forceful and eloquent opinion of Lord Camden in *Entick* that is striking today and, more importantly, stood out to the framers of the fourth amendment as the "true and ultimate expression of constitutional law." *Boyd v. United States*, 116 U.S. 616, 626 (1886); W. LaFave, *supra* note 2, at 4.

19. *Boyd v. United States*, 116 U.S. at 626.

If this point should be in favor of the government, the secret cabinets and bureaus in this kingdom would be thrown open to the search and inspection of a messenger, whenever the secretary of state shall see fit to charge, or even to suspect, a person to be the author, printer, or publisher of a seditious libel.<sup>20</sup>

Lord Camden's opinion was issued just eleven years before the colonies declared independence, and a quarter century before the fourth amendment was proposed by Congress. There is no doubt that when the fourth amendment was penned and adopted, "the language of Lord Camden was relied on as expressing the true doctrine on the subject of searches and seizures, and as furnishing the true criteria of the reasonable and 'unreasonable' character of such seizures . . ." <sup>21</sup> Lord Camden's words were both near in time to the framing of the Bill of Rights and also touched on a controversy which led directly to the first serious friction between British officials and the colonists—the use of writs of assistance to enforce England's protectionist trade restrictions in the colonies.<sup>22</sup>

The writs of assistance significantly affected the colonists in two ways, injuring both their pocketbooks and their cherished personal privacy. They were significantly more abusive and arbitrary than their English cousin, the general warrant.<sup>23</sup> The latter was at least limited in scope and duration to a particular case of libel. Writs of assistance provided a continuous authorization to search during the lifetime of the sovereign.<sup>24</sup>

Opposition to the writs was widespread, but particularly heated in Massachusetts.<sup>25</sup> In 1761, sixty-three Massachusetts merchants, represented by James Otis, petitioned against renewal of the writs of assistance.<sup>26</sup> The Superior Court of Judicature of the Massachusetts

20. *Entick v. Carrington*, 19 Howell's State Trials at 1063 cited in N. Lasson, *supra* note 14, at 47. The British Secretary of State, Lord Halifax, had issued a warrant to search for and seize John Entick, author of suspected seditious tracts, and his books and papers. Entick sued for trespass on a theory that the general warrant was unlawful. The court ruled in Entick's favor. *Id.*

21. *Boyd v. United States*, 116 U.S. at 630.

22. The writs were so called because they commanded all officers and subjects of the Crown to assist in their execution. N. Lasson, *supra* note 14, at 53-54.

23. "The writ empowered the officer . . . to search, at . . . will, wherever [he] suspected uncustomed goods to be, and to break open any receptacle or package falling under [his] suspecting eye." N. Lasson, *supra* note 14, at 54. Unlike the general warrants, the writs did not authorize arrests. Moreover, they permitted on land searches only in the daytime. *Id.*

24. *Id.* at 54. For a discussion of the history of writs of assistance in the colonies, see Quincy's Massachusetts Reports: 1761-1772, Writs of Assistance, at 395.

25. N. Lasson, *supra* note 14, at 55.

26. *Id.* at 57-58. It seems somehow appropriate that in England the battle was fought by journalists in political opposition to the King, while it was merchants stung by taxes who opposed the writs in North America.

Bay Colony was not prepared to match the boldness of its English counterpart. It denied the merchants' petition and granted the application for the writs of assistance.<sup>27</sup>

Otis argued that general warrants were not sanctioned at common law, were unconstitutional<sup>28</sup> and therefore void.<sup>29</sup> He described the writs as "the worst instance of arbitrary power, the most destructive of English liberty."<sup>30</sup>

Though Otis did not succeed at bar, his oratory swayed the people.<sup>31</sup> John Adams, then a young spectator, remembered the scene years later.

Otis was a flame of fire! . . . Every man of a crowded audience appeared to me to go away, as I did, ready to take arms against Writs of Assistance. Then and there was the first scene of opposition to the arbitrary claims of Great Britain. Then and there the child's Independence was born. In 15 years, namely in 1776, he grew to manhood, and declared himself free.<sup>32</sup>

In the years between Otis' fiery oration and the Revolutionary War, controversy over the writs continued.<sup>33</sup> During that period, most of the North American colonial courts refused to authorize writs of assistance.<sup>34</sup> Ultimately, however, "a higher tribunal resolved the issue",<sup>35</sup> the North American colonies severed their rela-

27. Quincy's Massachusetts Reports: 1761-1772, Paxton's Case, at 57.

28. To Otis and the colonial lawyers of his day the Constitution was obviously not the document ratified in 1789. Rather, it was the body of documents, including the Magna Carta, and common law which made up the English "constitution."

29. Quincy's Massachusetts Reports: 1761-1772, Paxton's Case, at 56; 2 C. Adams, *The Life and Works of John Adams* 523-25 (1850).

30. 2 C. Adams, *supra* note 29, at 523 (quoting from Otis' corrected copy of a report given in Minot's History).

31. *Boyd v. United States*, 116 U.S. at 625; W. LaFave, *supra* note 2, at 4; N. Lasson, *supra* note 14, at 58-59.

32. 1 B. Schwartz, *The Bill of Rights: A Documentary History* 194 (1971) (quoting Letter of John Adams to William Tudor (1817)). Adams' memory of details of the event may have dimmed and been colored by subsequent events. But his recollection of Otis' impact on him and the audience were not mere illusion. Just fifteen years later, on July 3, 1776, he prepared to sign the Declaration of Independence. That morning he wrote to his wife, "When I look back to the year 1761 . . . and recollect the argument concerning the writs of assistance in the superior court, which I have hitherto considered as the commencement of the controversy between Great Britain and America, and recollect the series of political events, the chain of causes and effects, I am surprised at the suddenness of this revolution." N. Lasson, *supra* note 14, at 61 (quoting Letter from John Adams to Abigail Adams) (emphasis added).

33. See the detailed chronicle of correspondence, petitions and motions challenging the writs painstakingly assembled by Horace Gray, Jr., later Chief Justice of Massachusetts and Justice of the United States Supreme Court. *Writs of Assistance*, *supra* note 24, at 395-540.

34. *Id.* at 500-11.

35. *Davis v. United States*, 328 U.S. 582, 604 (1945) (Frankfurter, J., dissenting).

tionship with England, in no small part because of the furor over the writs.<sup>36</sup>

### THE BILL OF RIGHTS

The former colonies remained mindful of the Crown's abuses when drafting their declarations of rights. The Virginia Declaration of Rights was the first North American precedent for the federal Bill of Rights. Article Ten of that famous document provided:

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.<sup>37</sup>

In 1780, Massachusetts became the first state to proscribe "unreasonable searches and seizures."<sup>38</sup> Article XIV of the Massachusetts Declaration of Rights employed language similar to that ultimately adopted in the fourth amendment.

Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest or seizure: and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.<sup>39</sup>

When the Constitutional Convention met in Philadelphia, every state had adopted a declaration or bill of rights, and each had included a provision on searches and seizures.<sup>40</sup> Generally, these clauses were patterned on Virginia's proviso, specifically condemning

36. Remarkably, the list of grievances in the Declaration of Independence does not mention writs of assistance. However, the grievance against writs may have been included within the protest that the King had "sent hither swarms of officers to harass our people . . ." N. Lasson, *supra* note 14, at 80.

37. 1 B. Schwartz, *supra* note 32, at 235 (citing 6 American Archives 1561 (P. Force ed., 4th ser. 1846)).

38. N. Lasson, *supra* note 14, at 82.

39. 1 B. Schwartz, *supra* note 32, at 342.

40. The only search and seizure case decided under one of the state bills of rights before the fourth amendment was drafted was *Frisbie v. Butler*, 1 Kirby 213 (Conn. 1787). In *Frisbie*, the Connecticut Supreme Court found a warrant authorizing search of "all suspected places and persons" to be a general warrant and thus illegal. *Id.* at 215.

general warrants.<sup>41</sup> By 1780, each essential provision of the future fourth amendment existed somewhere in the enactments of the various states. These fourth amendment precursors provided for security from unreasonable searches and seizures, with warrants permissible only on oath or affirmation and required to designate specific persons or places and items to be seized upon some particular showing. Though each of the provisions varied somewhat, all contained language clearly designed to prevent the abuses suffered under the writs of assistance.<sup>42</sup> The former subjects of the King had not forgotten, indeed could not have forgotten in so short a time, the general warrants which had precipitated their rejection of the sovereign.

The Constitution as originally proposed and ratified contained no bill of rights. That omission was nearly its undoing; the Constitution was ratified with the understanding that it would be immediately amended to include a bill of rights.<sup>43</sup>

When Washington took office in 1789, pressure for a bill of rights was unrelenting and the President urged adoption of such guarantees.<sup>44</sup> James Madison introduced in Congress a search and seizure clause which essentially contained the language of the Massachusetts Declaration of Rights:

The rights of the people 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.<sup>45</sup>

Madison's language explicitly defined "unreasonableness" in terms of the general warrant.

Two changes were made in Madison's draft. It somehow emerged from committee without the phrase "unreasonable searches and seizures," but the omitted language was reinstated by the House on motion of Elbridge Gerry. Representative Benson thought that the words "by warrants issuing" were not sufficient. He proposed

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41. N. Lasson, *supra* note 14, at 79-82.

42. For texts of the search and seizure provisions enacted by each state, see 1 B. Schwartz, *supra* note 32, at 231-375.

43. See W. LaFave, *supra* note 2, at 5; N. Lasson, *supra* note 14, at 97. Indeed, two states, North Carolina and Rhode Island, did not join the new Union until after the Bill of Rights was submitted to the states by Congress. *Id.* at 96-97 n. 62, 104.

44. W. LaFave, *supra* note 2, at 5; 2 B. Schwartz, *The Bill of Rights: A Documentary History* 1011 (1974); N. Lasson, *supra* note 14, at 97.

45. 1 *Annals of Congress* 434-35 (1789-1790); 2 B. Schwartz, *supra* note 44, at 1027.

stronger language—"and no warrant shall issue." His motion lost by a considerable majority.<sup>46</sup>

Benson was a clever, if not totally scrupulous, parliamentarian. He was subsequently appointed chairman of the committee charged to arrange the amendments as passed by the House. In this capacity, he simply reported out his own version of the search and seizure provision.<sup>47</sup> With Benson's unilateral modifications, the amendments were sent to the Senate. There the provision on search and seizure was received and approved without comment or alteration.<sup>48</sup> The version reported by Benson's committee and adopted by Congress was ratified by the states.<sup>49</sup>

It is Benson's language which created the two conjunctive clauses in the fourth amendment, and thus the confusion over their relationship. Under the language proposed by Madison and actually passed by the House, reasonableness is merely synonymous with the warrant clause. The right to security against unreasonable searches and seizures could seemingly only be violated by general searches and seizures which failed to meet the precise requirements of the warrant clause. The structure of Madison's original clause directly links the right to be free from unreasonable searches and seizures to the specific requirements of the warrant clause.

Arguably, Benson's amendment merely strengthened the link between the two clauses.<sup>50</sup> On the other hand, Benson's words could have been intended to separate the two clauses, and thus to create a right of security from unreasonable searches which extends to state activity beyond that expressly covered by the warrant clause.<sup>51</sup>

Fourth amendment interpretation is not merely an exercise for grammarians. "One cannot wrench 'unreasonable searches' from the text and context and historic content of the Fourth Amendment . . . . Words must be read with the gloss of the experience of those who framed them."<sup>52</sup> The tyrannies of the general warrant were living

46. 1 Annals of Congress 754; W. LaFave, *supra* note 2, at 5; 2 B. Schwartz, *supra* note 44, at 1112; N. Lasson, *supra* note 14, at 101.

47. W. LaFave, *supra* note 2, at 5; N. Lasson, *supra* note 14, at 101.

48. Senate J. (Aug. 25, 1789), *reprinted in* 1 Documentary History of the First Federal Congress of the United States of America: Senate Legislative J. 136 (De Pauw ed. 1972); 2 B. Schwartz, *supra* note 44, at 1146; N. Lasson, *supra* note 14, at 102.

49. Congress actually proposed twelve original amendments. The first two were never ratified. Thus, at least one early opinion refers to the fourth amendment as the sixth article of the Bill of Rights.

50. N. Lasson, *supra* note 14, at 103. *Cf.* Terry v. Ohio, 392 U.S. 1 (1968); Boyd v. United States, 116 U.S. 616 (1886).

51. W. LaFave, *supra* note 2, at 439.

52. United States v. Rabinowitz, 339 U.S. at 70 (Frankfurter, J., dissenting).

experience, not mere memories for Madison and his colleagues in the First Congress. The writs of assistance and the revolution, which was in part intended to redress the grievances caused by those writs, were fresh in the minds of the fourth amendment's framers. The Bill of Rights' authors detailed the requirements for a valid warrant, thus indicating that only a special warrant could support a constitutional search. This specific prescription, illuminated by the framers' experience, "gives the key to what [they] had in mind by prohibiting 'unreasonable' searches and seizures."<sup>53</sup>

### EARLY JUDICIAL TREATMENT

Early decisions of the United States Supreme Court interpreted the fourth amendment in light of its history. The Supreme Court first squarely addressed the right to be secure against unreasonable searches and seizures in *In re Jackson*,<sup>54</sup> almost 90 years after passage of the fourth amendment. In *Jackson*, the Court held that searches of letters and sealed packages in the mail could only be made pursuant to a warrant. Justice Field, on behalf of a unanimous Court, wrote:

Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection . . . as if they were retained by the parties forwarding them in their own domiciles. *The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household.*<sup>55</sup>

The Court thus indicated that fourth amendment reasonableness is determined by reference to the detailed mandates of the warrant clause. The Court in *Jackson* equated "reasonableness" with compliance with the warrant clause.

No review of the fourth amendment's development is complete without discussion of *Boyd v. United States*,<sup>56</sup> the case repeatedly

53. *Davis v. United States*, 328 U.S. at 605 (Frankfurter, J., dissenting).

54. *Ex parte Jackson*, 96 U.S. 727 (1877).

55. *Id.* at 733 (emphasis added). It is noteworthy, in light of the present Court's rather freewheeling application of a "balancing test" (see discussion in text accompanying notes 85-93 *infra*), that the Court in *Jackson* had no difficulty finding the people's right to be secure against unreasonable searches and seizures was "of far greater importance than the transportation of the mail," a constitutionally established power of Congress. *Id.* at 732.

56. 116 U.S. 616 (1886).

described by the Court as "[t]he leading case on the subject of search and seizure . . . ."<sup>57</sup> In *Boyd*, a subpoena for private papers and records to be used by the government in a forfeiture proceeding was challenged. The Court held that seizure of one's private papers by subpoena duces tecum was compelled self-incrimination in violation of the fifth amendment privilege. In the Court's view, evidence obtained contrary to the fifth amendment was also seized in violation of the fourth, and unlawful thereunder.<sup>58</sup>

Most important to this discussion is the *Boyd* Court's expansive view of the fourth amendment, which was based on its perception of the historic evolution of the freedoms guaranteed by the amendment. Justice Bradley, who delivered the Court's opinion, traced the development of constitutional search and seizure provisions to *Entick v. Carrington* and the North American Revolution.<sup>59</sup> He observed that to understand the terms "'unreasonable searches and seizures' it is only necessary to recall the controversies on the subject in this country and in England."<sup>60</sup> He referred, of course, to "the practice . . . of issuing writs of assistance to the revenue officers."<sup>61</sup> He then discussed *Entick* and the controversy over writs of assistance, concluding, "Can we doubt that when the Fourth and Fifth Amendments to the Constitution . . . were penned and adopted, the language of Lord Camden was relied on as . . . furnishing the true criteria of the reasonable and "unreasonable" character of such seizures?"<sup>62</sup>

The Court in its early fourth amendment opinions thus had not lost sight of either the history of that constitutional provision, or of the significance of that history. The justices in the late 19th century understood that the framers used the broad phrase "unreasonable searches and seizures" with reference to the particular evils of the writs of assistance, evils specifically condemned by the rigorous language of the warrant clause. With this historical insight, the Court in 1886 viewed fourth amendment protections expansively.

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57. *Carroll v. United States*, 267 U.S. 132, 147 (1925); see also *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 696 (1965).

58. *Id.* at 622, 630-33. Some of the analysis in *Boyd* has been limited or cast aside in subsequent opinions. See, e.g., *Andreson v. Maryland*, 427 U.S. 463 (1976) (limiting the view in *Boyd* of the link between the fourth and fifth amendments); *Warden v. Hayden*, 387 U.S. 294 (1967) (rejecting the "mere evidence" rule). But it remains clear that *Boyd* "was part of the process through which the Fourth Amendment . . . has become more than a dead letter in the federal courts." *Abel v. United States*, 362 U.S. 217, 255 (1960) (Brennan J., dissenting).

59. *Boyd v. United States*, 116 U.S. at 624-30.

60. *Id.* at 625.

61. *Id.* at 624-30.

62. *Id.* at 630.

UNPRINCIPLED REASONABLENESS: EVOLUTION, REJECTION  
AND REVIVAL

In the 1940's, the Court departed somewhat from the historic principles affirmed in *Boyd* and *Jackson. Harris v. United States*<sup>63</sup> and *United States v. Rabinowitz*<sup>64</sup> enlarged the permissible scope of searches incident to arrest. In each case the majority took a view of reasonableness that was neither informed by history nor grounded in the provisions of the warrant clause.

Justice Minton's majority opinion in *Rabinowitz* embodies the expanded view of reasonableness adopted in the 1940's.

What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are "unreasonable" searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case. [Citations omitted.] Reasonableness is in the first instance for the District Court to determine.<sup>65</sup>

In Minton's view, neither the history nor the language of the fourth amendment provide a principle for determining what is a reasonable search. Rather, the inquiry is made by district courts on an ad hoc basis.

Justice Frankfurter vigorously dissented in both *Rabinowitz* and *Harris*. He emphasized that the amendment's prescription of reasonable searches and seizures must be read in light of "the history that gave rise to the words," a history of "abuses so deeply felt . . . as to be one of the potent causes of the Revolution."<sup>66</sup> The abuses referred to by Justice Frankfurter were, of course, the general warrants and he wrote:

When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very restricted authority that even a search warrant could give, the framers said with all the clarity of the gloss of history that a search is "unreasonable" unless a warrant authorizes it, barring only exceptions justified by absolute necessity.<sup>67</sup>

*Rabinowitz* and *Harris* were overruled in 1969 by *Chimel v. California*.<sup>68</sup> The seven Justices comprising the *Chimel* majority ex-

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63. 331 U.S. 145 (1947), *overruled by* *Chimel v. California*, 395 U.S. 752 (1969).

64. 339 U.S. 56 (1950).

65. *Id.* at 63.

66. *Id.* at 70 (Frankfurter, J., dissenting).

67. *Id.*

68. 395 U.S. 752 (1969).

pressly endorsed Justice Frankfurter's view in *Rabinowitz* of the history and meaning of "reasonable searches and seizures." They further noted that "[i]n the scheme of the Amendment . . . the requirement that 'no Warrants shall issue, but upon probable cause,' plays a crucial part."<sup>69</sup> The search warrant requirement was "not lightly to be dispensed with . . ."<sup>70</sup>

The year 1968 marks an important development in fourth amendment history. In *Terry v. Ohio*,<sup>71</sup> the Court extended protection against "unreasonable searches and seizures" to the "protean variety of street encounters,"<sup>72</sup> which were intrusions for fourth amendment purposes, but within "an entire rubric of police conduct . . . which historically has not been and . . . could not be subjected to the warrant procedure."<sup>73</sup> Though distinguishing these "stop and frisk" practices from full-scale search or arrest, Chief Justice Warren in speaking for the majority stressed that "the notions which underlie both the warrant procedure and the requirement of probable cause remain fully relevant in this context."<sup>74</sup>

To assess reasonableness, the Court in *Terry* established a balancing test, "balancing the *need* to search [or seize] against the invasion which the search [or seizure] entails."<sup>75</sup> Throughout the opinion, the Chief Justice emphasized the "necessity" of swift police action under the circumstances of on-the-street stops and frisks, and the unreasonableness of denying officers the power to take "necessary measures" to determine whether a suspect is armed and dangerous.<sup>76</sup> It is the *need* for appropriate police action and self-protection in certain types of street encounters which the Court balanced against an intrusion "much less severe than that involved in traditional arrests."<sup>77</sup> This weighing of interests was, moreover, guided by the provisions of the warrant clause.<sup>78</sup>

The Court in *Terry* prohibited stops unless based on an objective standard in order to preserve "the more detached, neutral scrutiny of a judge"<sup>79</sup> even if only after the fact.<sup>80</sup> The Court also required

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69. *Id.* at 761.

70. *Id.* at 762.

71. 392 U.S. 1 (1968).

72. *Id.* at 15.

73. *Id.* at 20.

74. *Id.*

75. *Id.* at 21 (emphasis added).

76. *Terry v. Ohio*, 392 U.S. at 23-26.

77. *Dunaway v. New York*, 99 S. Ct. 22, 48 (1979).

78. *Terry v. Ohio*, 392 U.S. at 20-21.

79. *Id.* at 21. See also *Gerstein v. Pugh*, 420 U.S. 103, 112-14 (1975).

80. *Terry v. Ohio*, 392 U.S. at 20-21.

particularized grounds for the intrusion, requiring specific and articulable facts which, considered in light of rational inferences therefrom, reasonably warranted either a suspicion that criminal activity was afoot or that the suspect was armed and dangerous.<sup>8 1</sup>

Considerably less rigorous than the probable cause requirement specified in the warrant clause, the "reasonable suspicion test" nevertheless serves the same objective. As Chief Justice Warren observed, "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction."<sup>8 2</sup>

In short, *Terry* unshackled fourth amendment jurisprudence, extending its coverage to an increasingly important category of police activity, the investigative "stop and frisk."<sup>8 3</sup> While thus modernizing search and seizure law, the Court nonetheless respected the amendment's history and carefully considered each of the safeguards to reasonableness implicit in the warrant clause. It diluted those safeguards only to the extent necessary to deal realistically with street encounters.<sup>8 4</sup>

With the changes in Supreme Court personnel beginning the year after *Terry*, came subtle, almost imperceptible shifts in the application of *Terry's* balancing test. The exacting requirements of the warrant clause no longer provided the standard against which to measure reasonableness. Instead, "regularized" operations and decisions by high ranking law enforcement officials became constitutionally adequate surrogates for neutral judicial review.<sup>8 5</sup>

Moreover, the Court sanctioned substantial departures from the principles of the warrant clause<sup>8 6</sup> without the justification of necessity that had traditionally been required.<sup>8 7</sup> The Court no longer spoke in terms of the state's "need" to carry on a particular intrusion of fourth amendment rights. Rather, it weighed "the public interest against the fourth amendment interest of the individual . . . ."<sup>8 8</sup> The

81. *United States v. Brignoni-Ponce*, 422 U.S. 873, 880 (1975); *Terry v. Ohio*, 392 U.S. at 21. The Court in *Brignoni-Ponce* articulated the "reasonable suspicion" language now popularly used to describe the *Terry* test. *United States v. Brignoni-Ponce*, 422 U.S. at 880.

82. 392 U.S. at 22.

83. See LaFave, "Street Encounters" and the Constitution: *Terry*, *Sibron*, *Peters and Beyond*, 67 Mich. L. Rev. 40, 42-46 (1968).

84. See text accompanying notes 73-77.

85. See *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

86. See *Bell v. Wolfish*, 99 S. Ct. 1861 (1979); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976).

87. See *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio* 392 U.S. 1 (1968); *United States v. Rabinowitz*, 339 U.S. 56 (1950) (Frankfurter, J., dissenting).

88. *United States v. Martinez-Fuerte*, 428 U.S. at 555 (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) and *Terry v. Ohio*, 392 U.S. 1 (1968)).

public interest did not have to be a public necessity. The interests seemed almost equally balanced.

Great deference has been shown in some of the Burger Court decisions to the reasons articulated by the state for choosing one search technique over a less intrusive alternative.<sup>89</sup> During its last term, the Court upheld routine visual inspections of the body cavities of pretrial detainees without any particularized showing of even reasonable suspicion because the prison's choice of such procedure had "not been shown to be irrational or unreasonable."<sup>90</sup> This is a rather tenuous basis for upholding a serious invasion of privacy and personal dignity. For the first time, the Court has also upheld "seizures" of persons on nothing more than an officer's hunch.<sup>91</sup> It has allowed "searches" of the most private parts of the body without probable cause or even a reasonable suspicion.<sup>92</sup> These holdings represent a substantial departure from the Court's solicitude for fourth amendment rights,<sup>93</sup> and a revival of the subjective reasonableness theory of the forties.<sup>94</sup>

#### A RETURN TO PRINCIPLED REASONABLENESS—THE COURT IN THE 1979 TERM

The opinion in *Bell v. Wolfish*,<sup>95</sup> handed down last term, marks one of the most substantial departures from traditional fourth amendment doctrine.<sup>96</sup> Yet, in the same term the Court decided two cases

89. *Bell v. Wolfish*, 99 S. Ct. at 1884-85 & n. 40.

90. *Id.* at 1884 n. 40. The dissent, after a detailed discussion demonstrating that the challenged practices were unnecessary, even arbitrary, concluded that they merely satisfied the convenience of the staff.

91. See *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (an officer may order a driver out of a properly stopped vehicle without reasonable suspicion based on articulable facts); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (an immigration officer may stop vehicles going through a fixed checkpoint without reasonable suspicion). The only apparent requirement in *Martinez-Fuerte*, *Mimms*, or *Wolfish* is that a search or seizure be part of a regularized procedure.

92. See *Bell v. Wolfish*, 99 S. Ct. 1861 (1979).

93. Cf. *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *Katz v. United States*, 389 U.S. 347 (1967); *Boyd v. United States*, 116 U.S. 616 (1886); *Ex parte Jackson*, 96 U.S. 727 (1877).

94. In the early 1970's, the Court decided three cases in which administrative inspections were allowed without requiring warrants, probable cause, or reasonable suspicion. *United States v. Biswell*, 406 U.S. 311 (1972) (inspection of licensed gun dealer's storeroom); *Wyman v. James*, 400 U.S. 309 (1971) (home visits by welfare caseworker); *Colonnade Catering v. United States*, 397 U.S. 72 (1970) (inspection of liquor dealer's premises).

These cases further evidence the Court's move towards a relaxed standard of reasonableness. *Biswell* and *Colonnade Catering*, at least, have been effectively limited as exceptions based on peculiar sets of facts. See *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 313 (1978).

95. 99 S. Ct. 1861 (1979).

96. See text accompanying note 92 *supra*.

in which, while applying the balancing test, it refused to dilute the reasoning and result in *Terry*. In *Brown v. Texas*<sup>97</sup> and *Delaware v. Prouse*<sup>98</sup> the Court required that officers have the *Terry*-mandated "reasonable suspicion" based on "articulable facts"<sup>99</sup> in order to stop for questioning either pedestrians (in *Brown*) or auto drivers (in *Prouse*). Thus the Court at least indirectly endorsed *Terry's* respect for the historically defined concerns addressed in the fourth amendment's warrant clause.

Perhaps more significant is the Court's decision in *Dunaway v. New York*.<sup>100</sup> There the Court found that local police had violated the fourth and fourteenth amendments when, "without probable cause to arrest, they took petitioner into custody, transported him to the police station, and detained him there for interrogation."<sup>101</sup> The Court rejected a "reasonable police conduct under the circumstances" test for determining the propriety of custodial detentions for questioning, noting that under such a test "the protections intended by the Framers would all too easily disappear . . ."<sup>102</sup> The Court emphasized that "'probable cause has roots that are deep in our history . . .'"<sup>103</sup> and that "[h]ostility to seizures based on mere suspicion was a prime motivation for the adoption of the Fourth Amendment . . ."<sup>104</sup>

#### CONCLUSION—THE LESSON OF HISTORY IN FOURTH AMENDMENT ANALYSIS

*Dunaway* exemplifies the current state of the Frankfurter-Minton controversy. It appears that both jurists have been partially vindicated. The warrant clause requirements are directly applicable to all full-scale searches and seizures. Absent certain historically recognized exceptions, prior judicial approval, specificity of description, and particularized probable cause are fourth amendment requisites.

Other substantially less intrusive search and seizure activities are tested under the reasonableness clause. Reasonableness is defined by reference to the warrant clause requirements and with a view to the historic abuses specifically addressed by that provision. Those abuses included searches and seizures upon mere suspicion, not meaning-

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97. *Brown v. Texas*, 99 S. Ct. 2637 (1979).

98. *Delaware v. Prouse*, 99 S. Ct. 1391 (1979).

99. *United States v. Brignoni-Ponce*, 422 U.S. at 884.

100. 99 S. Ct. 2248 (1978).

101. *Id.* at 2253.

102. *Id.* at 2257.

103. *Id.* at 2256 (quoting *Henry v. United States*, 361 U.S. 98 (1959)).

104. *Id.* at 2256-57.

fully subject to judicial review, and without specific limitations on the scope of the intrusion. It is in applying the test of reasonableness to such less intrusive police activities that the modern version of the debate between Justices Frankfurter and Minton is crystallized.

Justice Brennan's opinion in *Dunaway* marks a return to a reasoned consideration of the history which gave rise to the constitutional guarantee against unreasonable search and seizure. It is only in the context of that history that the peculiar construction of the fourth amendment has meaning which can be translated into standards for applying the *Terry* balancing test for reasonableness.

Despite somewhat tenuous precedent, a balancing test is a useful means of determining the "reasonableness" of certain "brief and narrowly circumscribed intrusions . . ." <sup>105</sup> As in *Terry*, however, such a test must be applied carefully in light of the historically dictated safeguards of the fourth amendment as specified in the warrant clause.

First of all, the balancing test is only appropriate in those exceptional cases of "narrowly defined" <sup>106</sup> categories of searches or seizures "substantially less intrusive" <sup>107</sup> than ordinary search or seizure. <sup>108</sup> In all other circumstances, "the requisite balancing has been performed in centuries of precedent." <sup>109</sup> Moreover, a court applying the balancing test to a particular police practice must strive to guarantee that any relaxation in the specificity of the showing required to justify such intrusion, or flexibility in the limitations on its scope be only such as is clearly demanded by actual necessity. Finally, the courts must provide the most timely and principled judicial review consistent with proven necessity.

If it was not clear before, it is clear since *Terry* that fourth amendment "reasonableness" is not synonymous with the warrant requirements specified in the second clause. <sup>110</sup> It is, however, one thing to say that the first clause of the amendment is not simply redundant and quite another to assert that the two provisions are unrelated. Such a claim flies in the faces of the repeatedly emphasized historical development of search and seizure law, the language of the amendment, including its somewhat bizarre legislative history, and finally, the unfolding of fourth amendment jurisprudence.

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105. *Dunaway v. New York*, 99 S. Ct. at 2257.

106. *Id.* at 2256.

107. *Id.* at 2255.

108. *Dunaway v. New York*, 99 S. Ct. at 2257.

109. *Id.*

110. W. LaFave, *supra* note 2, at 439.

Two aspects of the writs of assistance were most deplored. First, they lacked specificity as to places or persons to be searched and as to items to be seized. They also authorized police to arrest and search on mere suspicion, without meaningful judicial review.

As discussed above, it was these abuses which the authors of the fourth amendment believed unreasonable, and it was to these particularly severe features of the writs of assistance that the warrant clause was expressly addressed. The warrant clause prohibits searches or seizures based on mere suspicion and requires a showing of probable cause. That probable cause standard effectively balances the interests of individual privacy and public safety for most types of fourth amendment intrusions.<sup>111</sup> The fourth amendment also demands specific descriptions of places to be searched and persons or things to be seized. Implicit in the warrant clause is the additional requirement of prior judicial review of warrant application.<sup>112</sup>

Consequently, reasonableness in the context of the fourth amendment must be defined by reference to the exacting requirements of the warrant clause and the protection those mandates were designed to provide. It is the warrant clause which provides the standard for determining what is a reasonable search and seizure under the fourth amendment.<sup>113</sup> A search is reasonable to the extent that it avoids the abuses of the general warrant and conforms to the norms of specificity, judicial review, and particularized showing mandated by the warrant clause.

*Bell v. Wolfish* may be an aberration in fourth amendment analysis because it involves the fourth amendment rights of prisoners whose very right to fourth amendment protections is unclear.<sup>114</sup> *Brown, Prouse* and particularly *Dunaway* may indicate that the Court is renewing its commitment to principled determination of reasonableness by reference to the origins of search and seizure law.

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111. *Dunaway v. New York*, 99 S. Ct. at 2257.

112. *Katz v. United States*, 389 U.S. 357 (1967).

113. See *Dunaway v. New York*, 99 S. Ct. 2248 (1979); *Chimel v. California*, 395 U.S. 752 (1969); *Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Rabinowitz*, 339 U.S. 56 (1950) (Frankfurter, J., dissenting); *Davis v. United States*, 328 U.S. 582 (1945); *Boyd v. United States*, 116 U.S. 616 (1886).

114. See *Bell v. Wolfish*, 99 S. Ct. at 1877; *Lanza v. New York*, 370 U.S. 139, 143-44 (1962).