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The Search

1-1. THE FOURTH AMENDMENT

The rights protected by the Bill of Rights are cumulative rather than exclusive.\(^1\) The application of one Constitutional Amendment does not pre-empt or prevent the application of a different amendment.\(^2\) The Fourth Amendment provides protection from unreasonable searches and seizures. The Fourth Amendment provides:

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.\(^3\)

A. *Miranda*

*Miranda* warnings “are inapplicable to searches and seizures.”\(^4\)

B. Specific Protections

A review of the history\(^5\) of the Fourth Amendment demonstrates its protection against (1) unreasonable searches and seizures; (2) warrants issued on less than probable cause; and (3) person, place and object of the search must be particularly described. The draftsmen of the final version of the amendment were aware of the history of excesses by colonial and British authorities in conducting warrantless arrests and searches and the use of general warrants.\(^6\) “Privacy” had always been a great concern to the framers of the constitution and the court decisions thereafter.\(^7\)

Although the searches and seizures which deeply concerned the colonists, and which were foremost in the minds of the Framers, were those involving invasions of the home, it would be a mistake to conclude, as the Government contends, that the Warrant Clause was therefore intended to guard only against intrusions into the home. First, the Warrant Clause does not in terms distinguish between searches conducted in private homes and other searches. There is also a strong historical connection between the Warrant Clause and the initial clause of the Fourth Amendment, which draws no distinctions
among ‘persons, houses, papers, and effects’ in safeguarding against unreasonable searches and seizures.\(^8\)

### C. State Constitutions

Some states went so far as to include the word *privacy* in their State Constitution.\(^9\) After the adoption of the Fourth Amendment, state governments continued some unconstitutional practices.\(^10\) Enforcement of the Fourth Amendments prohibition against unreasonable searches brought about the creation of a number of exceptions.\(^11\)

### D. General Warrant Prohibition

The general warrant prohibition may not be avoided by simply acting without obtaining a warrant.\(^12\) An arrest must still be based on probable cause. A search without a warrant must fall within one of the recognized exceptions to the warrant clause, if not, the search is unconstitutional.

### E. Rules of Construction

At times the court will rely upon the historical context of the amendment;\(^13\) at other times the court says it is only a consideration.

“The Fourth Amendment protects ‘the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.’ U.S. Const. amend. IV. It is well established that the constitutional protection against an unreasonable search is distinct from the protection against an unreasonable seizure. (1) ‘A search compromises the individual interest in privacy; (2) a seizure deprives the individual of dominion over his or her person or property.’”\(^14\)

### F. Common Law Meaning

The term “search” retains its common law meaning.\(^15\)

A matter of invasion and quest, implying some sort of force, actual or constructive, much or little. A quest by an officer of the law, secret, intrusive, or accompanied by force. An examination or inspection, by authority of law, of one’s premises or person, with a view to the discovery of stolen, contraband, or illicit property, or of evidence of guilt to be used in the prosecution of a criminal action for some crime or offense with which one is charged.\(^16\)
The North Carolina rule is essentially the same.  

G. Tailored for Criminal Justice System

The Fourth Amendment is tailored explicitly for the criminal justice system, and its balance between individual and public interests always has been thought to define the “process that is due” for seizures of person or property in criminal cases, including the detention of suspects pending trial.  The Fourth Amendment applies to civil as well as criminal actions.

H. Pressure to Contract Protections

There is pressure on the courts to contract the rights of the bill of rights. As Justice Douglas in his Dissenting opinion in *Terry v. Ohio* said,

“There have been powerful hydraulic pressures throughout our history that bear heavily on the Court to water down constitutional guarantees and give the police the upper hand. That hydraulic pressure has probably never been greater than it is today.”

Yet if the individual is no longer to be sovereign, if the police can pick him up whenever they do not like the cut of his jib, if they can “seize” and “search” him in their discretion, we enter a new regime. The decision to enter it should be made only after a full debate by the people of this country.

I. State Application of Federal Constitutional Rules

States lack the constitutional power to change impair the rights under the United States Constitution’s Bill of Rights. In other words, the United States Constitution as interpreted by the United States Supreme Court sets forth a floor of a person’s rights granted by the various amendments of the Bill of Rights or other constitutional rule created by the United States Constitution or decisions. In like manner, neither Federal Agencies nor Congress may impair the freedoms granted by the constitution.

States are authorized the change the scope of the protections given by the United States Constitution to the extent that the rights and protections of citizens are not impaired.
J. States May Grant Greater Rights

This floor sets forth the limit of government’s right to intrude upon a person’s right to pursue his or life as he or she chooses. The floor may be considered a wall that government may not pass. While state constitutions, legislation or court decisions may not push the wall back in order to reduce a person’s freedom, they can, however, give their citizens greater rights that the federal constitution grants.

K. Analysis Considered but not Binding Precedent

North Carolina adopted the analysis in Whren v. United States, but made it clear the courts are not bound by federal decisions.

L. No Preemption—Simultaneous Application

The application of one amendment does not pre-empt the application of a different amendment. The Court may apply a federal constitutional provision and a state constitutional provision at the same time.

M. Societal Expectations

In Randolph v. Georgia, the court said:

The constant element in assessing Fourth Amendment reasonableness in the consent cases, then, is the great significance given to widely shared social expectations, which are naturally enough influenced by the law of property, but not controlled by its rules.

(Emphasis added, citations omitted)

N. Field Sobriety Tests

A field sobriety test is a search but does not require a warrant. It requires only a reasonable suspicion that the driver is intoxicated.

O. Vicariously Raising Claim of Privacy

A person may not claim a reasonable expectation of privacy in the property of another. “Fourth Amendment rights are personal rights which, like some other constitutional rights, may not be vicariously asserted.”

1-2. SEARCH vis a vis SEIZURE

In making a Fourth Amendment analysis, a distinction must be made between a “search” and a “seizure.” A search is seeking that which is hidden. In
plain view situations it is the perceiving of the object.\textsuperscript{39} “A seizure of property, we have explained, occurs when there is some meaningful interference with an individual’s possessory interests in that property.”\textsuperscript{40} In addition, seizure requires the lawful right to be present at the location to seize and the right to access.\textsuperscript{41}

1-3. GOVERNMENT ACTION

The Fourth Amendment and the Fourteenth Amendment protect citizens from government action but not private searches.\textsuperscript{42}

A. Agents, Instrumentalities & Private Searches

Private Citizens can become the agents or instrumentalities of the government within the meaning of the Fourth Amendment. However, only persons authorized to give consent may consent to a search of third party premises.\textsuperscript{43} In determining whether a private citizen has acted as an instrument or agent of the Government, a court must consider:

\[(1) \text{whether the Government] "knew of and acquiesced in" the private activity and (2) whether the citizen was motivated on the basis of assisting the government—as opposed to on the basis of private gain. If both factors are present, a private party will be considered to have acted as a government agent ...}\textsuperscript{44}

The fact that the Government knew of and acquiesced in the ruse utilized to bring Harrison to the parking lot is not enough to show that it knew of and acquiesced in the allegedly unconstitutional forcible arrest by the bondsmen.\textsuperscript{45}

In an unpublished Fourth Circuit case, the court said:

[In] determining whether a private citizen’s search or seizure is attributable to the State and therefore subject to constitutional scrutiny demands a totality of the circumstances inquiry. Factors to be given special consideration include the (1) citizen’s motivation for the search or seizure, (2) the degree of governmental involvement, such as advice, encouragement, knowledge about the nature of the citizen’s activities, and the (3) legality of the conduct encouraged by the police.\textsuperscript{46} (4) When crime victims seek to recover their own property by searching a defendant’s premises, the search may be deemed a private act not attributable to the police.\textsuperscript{47} (Citations and internal quotes omitted)