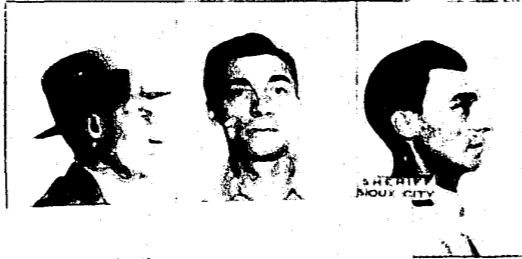


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Search and Seizure Policy Development and Implementation

“Understanding search and seizure terminology can be the difference between success and failure in developing the policy/procedure.”

The U.S. Supreme Court, in establishing a “bright line” demarcation (easily understood and applied rules) ¹ of permitted Government intrusion, has practically outlined when the Government may cross fourth amendment protected thresholds and seize physical evidence. Yet, many police training officers, policy planners, and law enforcement practitioners do not know the law of search and seizure. Many believe search and seizure to be complex and ominous. Officers muddle through investigatory searches, confident that they can search a person under arrest, but are far less certain about his car, office, or home. Many lawful searches are not made because of the officer’s uncertainty.

Regardless of an officer’s incognizance of the law, its complications and pitfalls, or of the good faith under which the officer acts, the Supreme Court established a bright line demarcation for a reason. The Supreme Court, and by extension all lower courts, expect police officers to *know and obey* the law.

This article follows two premises—(1) one must know the law to obey and enforce it, and (2) the responsibility for appropriate application

of the law by an officer is, in part, the responsibility of the law enforcement agency.

To state simply, there are two objectives to be pursued by law enforcement agencies: (1) Implement a search and seizure policy and procedure, and (2) supplement the policy and procedure with a training document and program.

The Goal

Officers will make mistakes. Realistically, no amount of training and planning can anticipate every possible search situation and appropriate response. For these reasons, a goal of 100-percent legal searches in only 90 percent of investigations should be expected. In *Texas v. Brown*, ² for example, police officers in Fort Worth, TX, seized a balloon suspected of containing contraband. Though all nine Supreme Court Justices upheld the constitutionality of the seizure, a majority could not agree on a particular rationale, and several Justices left open the question of the constitutionality of the search. No agency can

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hope to establish ironclad procedures to meet every situation or be impervious to legal analysis. In setting the expectation of 100-percent legal searches in 90 percent of investigations, though, the law enforcement agency fosters a thorough knowledge of the law, guides its officers in enforcement, and respects the truism that reasonable people can differ in the application of law to fact.

Preliminary Coordination

Development of policy and procedure regarding search and seizure should involve the top executive of the agency and representatives from the Planning and Research Section, the Education and Training Section, the State or district attorney's office, and the office of law, solicitor's office, or attorney general.

Any endeavor to develop a search and seizure policy and procedure must have the support of the organization's command personnel. In a paramilitary structure, this is most easily accomplished by an order from the highest authority, who must realize the need for and benefits of such a policy.

While planning and research personnel bear primary responsibility for drafting the proposed search and seizure policy/procedure, achieving the objective requires transmitting effectively the information to field officers.

To keep the policy and procedure from becoming cumbersome, a separate training guide or bulletin should be prepared. This guide will facilitate explaining the procedure and will provide a discussion forum for sensitive, problematic, and complex areas. For example, no procedure could efficiently include all information regarding the legally and politically sensitive topic of strip searches. The training bulletin and program could, however, cover this topic in depth.

Most local prosecutors will welcome an effective search and seizure policy/procedure. Errors and omissions in development and implementation may be avoided if the local prosecutor is included in almost every aspect of the research and development phase. Also, since every police department operates under authority of either local, State, or Federal Government, counsel to the Government should be included in the planning stages. Typically, counsel is familiar with the civil liability incurred by officers either personally, or as agents of the Government, and can help tailor the policy to curb potential civil litigation.

Research

One person should have primary responsibility for overseeing the research and development of the policy/procedure. In most instances, this task should be assigned to a member of the planning staff. Researching this topic requires more than a simple analysis of fourth amendment law. It is necessary to research a number of legal and extra-legal issues and then draft policy and procedure in a number of areas.

The staff member assigned to conduct the research should begin by contacting a professor of criminal procedure at any American Bar Association accredited school of law. The professor, like the prosecutor, can help avoid pitfalls by providing an outline of fourth amendment applicability, warrant preference, and exceptions to the search warrant requirement. The staff member must take time to become familiar with the nomenclature of the fourth amendment. For example, what one authority refers to as "fourth amendment inapplicable" may be alluded to as "no standing to object" by another authority. Understanding search and seizure terminology can be the difference between success and failure in developing the policy/procedure.

Next, a foundation document, such as *Criminal Procedure—An Analysis of Constitutional Cases and Concepts*,³ should be selected to serve as a basis for research. The value of such a text is in its sound analysis of legal principles.

Fourth amendment research should occur next, with the objective of developing a basic understanding of the fourth amendment. Particular attention should be given to fourth amendment applicability, search warrant preference, and search warrant exceptions. With respect to the exceptions, the staff should be aware of the reason for the exceptions, the predicate necessary for intrusion, and the scope of the permitted intrusion, and any logical extensions of the exception (i.e., auto exception may include boats and aircraft). Once this initial research is completed, a rough draft of the search and seizure policy/procedure, reflecting the jurisdiction's and agency's interests and needs, may be formulated.

Problems

Simply knowing the law is not enough. For example, in the case of a strip search, consider a State which, though it has no authoritative case law on point, favors allowing law enforcement officers great latitude in conducting strip searches of arrested persons. In reviewing case law generally, the rationale of the court appears to support strip searches necessary for the protection of the arresting officer. Based on this, one might recommend allowing random strip searches of anyone arrested. However, most people acknowledge the problems that such a policy would create. Thus, there is a need for policy decision to buttress research and accepted practices.

Guidelines

The following points and recommendations are offered as a starting point when drafting search and seizure policy/procedure. Individual circumstances, training history, and experience may suggest alternatives better suited to agency needs.

Compliance—It is suggested that an officer's conduct be judged (for purposes of enforcing the policy/procedure) by a standard of honest and reasonable good faith compliance with the order. Mixed questions of law and fact often puzzle the brightest legal scholars. However, the integrity of our legal system relies on the honesty of police officers, especially when officers claim exceptions to the search warrant. In the area of prisoner searches, a *professional* standard of conduct is recommended, and it should be reinforced in a prisoner search training program.

Police Officer's Status—Very generally, the fourth amendment is implicated when privacy rights are intruded upon by the Government. Members of a department should be directed to consider *any* search and/or seizure by police to be a governmental action. If any member of the department encourages or directs a private individual to acquire evidence (search and/or seizure), it should be considered governmental action.

Probable Cause—Probable cause is the basis for a search warrant and should be defined and printed as part of the policy/procedure. Most search warrant exceptions are also based on probable cause.

Search Warrant Required—The department should require a search warrant for every search and seizure, unless the search and seizure meets a warrant exception. Where an officer truthfully applies for a warrant, and a neutral and detached magistrate or judge issues the warrant, the officer should be judged by the department to have prima facie proof of compliance with the policy/procedure requirement for a search warrant. Should the warrant fall on appeal for lack of probable cause, the officer should not be penalized.⁴

Service of Search Warrants—The department must decide on the acceptable methods for serving a search warrant. One suggestion is to require the presence of a supervisor at warrant service and the photographing of premises before and after a search is conducted. The objectives should be collecting and preserving all seizable evidence, avoiding unnecessary damage to property, and officer safety.

Stop and Frisk—The common law of stop and frisk, as cited in *Terry v. Ohio*,⁵ has been codified in some

"Since all searches are judged by the constitutional umbrella called 'reasonableness,' a speculative method of justification will not suffice."

jurisdictions. In Maryland, for example, code provisions create certain administrative responsibilities for an officer conducting such a "limited search." The policy/procedure should, at a minimum, reference these administrative responsibilities if they exist.

Arrestee Search—The predicate for a lawful arrestee search is a *lawful custodial arrest*. This should be defined in the policy/procedure and will often be based on statute. Custodial arrest provisions of the motor vehicle code should also be included.

Next, research should be conducted on strip and body cavity searches. While not necessarily the result of search incident to arrest, the usual strip search or body cavity search is conducted under some exception to the search warrant requirement (or simply conducted illegally). In almost every jurisdiction, case law exists which limits the intrusion into the privacy of the individual, or literally, the intrusion into the sanctity of an individual's body. Since this area is rife with civil litigation, it is important that a thorough evaluation of strip searches and body cavity searches be conducted. Since all searches are judged by the constitutional umbrella called "reasonableness," a speculative method of justification will not suffice. Knowing the law is essential.

Many problems can be avoided by developing a firm policy on arrestee search. Since the need for an officer to protect himself during or after an arrest cannot be disputed, it is important that officers be required to search arrested persons. However,

most people agree that full strip searches or body cavity searches are *not* necessary for an officer's safety in most arrest situations. Thus, the parameters of the strip search and body cavity search must be carefully considered.

It is recommended that a body cavity search (other than in an emergency) be conducted only under authority of a search warrant and at a medically safe location. Not every hospital will agree to allow such a search upon its premises, even if the officer has a search warrant and the search is to be conducted by a physician. To avoid confusion and difficulty, procedures at facilities should be arranged prior to implementing the policy/procedure. One consideration is the use of the facilities and doctors of a penal institution within the jurisdiction.

Automobile Searches—Automobile exception searches should be distinguished from inventory searches. One of the decisions that must be made is whether, absent exigent circumstances, officers must secure a search and seizure warrant where probable cause exists to search a car which has been impounded by the police. More recent Supreme Court cases justify a warrantless search of a vehicle because of its diminished expectation of privacy coupled with probable cause.⁶

Evidence in DWI Cases—Another major area of the law, more open to criminal adjudication than civil disposition but nonetheless of increasing political importance, is the search and seizure area of "evanescent evidence," evidence which is capable of vanishing through the laws of nature and science. With national attention focused on the drunk driver, and the slaughter often resulting, States are

passing increasingly statutory provisions which allow law enforcement officers to deliver suspects to competent medical personnel who may warrantlessly withdraw blood and/or breath samples to determine blood-alcohol content. As alcohol dissipates in the bloodstream, its evidentiary value diminishes during an investigation. Failure to know the statutory exceptions to a warrant requirement may mean that physical evidence in automobile manslaughter cases is lost forever solely because of officer unawareness.

Consent—In the area of consent, a written consent form for use by the officer should be developed. A policy decision must be made regarding an officer being allowed to search an area where lawful consent is given but the consenting party refused to sign the consent form. The agency may decide, for example, that a supervisor should make this decision on a case-by-case basis.

Inventory Search—An element considered in evaluating inventory searches is the inventory procedures of the law enforcement agency. Procedures must be detailed on impoundment situations and subsequent inventory searches.

Postmortem Examinations—Some States have laws regarding the search of dead persons by police officers. The law may mandate that officers take possession of all valuable property from the deceased and release this property to the next of kin. In unattended death situations, the agency should procedurally assign this duty to a particular officer, lest it remain undone by any of the crime scene technicians, investigators, and

patrol officers at the scene of the death.

Wiretapping—Because of the complex procedural requirements of wiretapping statutes, coordinating wiretaps with the prosecutor is important. It will also be necessary to consider hostage and barricaded subject situations and to coordinate agency policy and needs with the local telephone company. A contract or agreement should be in place prior to an actual hostage or barricaded subject situation.

Abandoned Property—The policy of the agency should include provisions for conducting a thorough search of abandoned property or vehicles that come into the custody of agency members.

Implementation

Once the rough draft of the search and seizure policy/procedure has been completed, it is necessary to begin the final process toward implementation. This is a sensitive period, since the needs of the executive officer, planners, trainers, prosecutors, and civil attorneys may vary.

A representative of the prosecutor's office most familiar with search and seizure case law should review the draft of the search and seizure policy/procedure before a final copy is prepared. Once this has been done, a copy of the final draft should be distributed to all parties involved in the preliminary coordination. Each person should then be advised to forward comments in writing to the author of the document.

The next step is to distribute a copy to a select group of department search and seizure practitioners (field supervisors, officers, and criminal investigators) for their thoughts. Occa-

sionally, a conflict may arise which is not evident to the framers of the policy, but which would be immediately apparent to a day-to-day practitioner. For example, the policy on search and seizure of abandoned property may conflict with an agency policy on towing abandoned cars. Minor flaws such as this, which could be the death knell of an otherwise outstanding search policy, may easily be discovered during a review by practitioners.

A word of caution is in order. Do not become entrenched in philosophical differences over minor points of search and seizure law. It is important to maintain flexibility, since a well-crafted policy is better than no policy and reasonable men can disagree to the mutual benefit of all parties.

The policy statement itself should be brief, and the accompanying procedure should mandate specific behavior by the members of the agency. A final training document, with a cover letter from the executive officer, should be completed and reviewed by administrators prior to implementation.

Updating the Law

Criminal law changes regularly, dictating that a search and seizure policy/procedure and training document and program be reviewed and updated as needed. A natural opportunity for an annual review of the general order on search and seizure is in August, when the U.S. Supreme Court is not in session.

In addition, State and Federal search and seizure decisions which impact the parameters of permitted searches should be disseminated to law enforcement practitioners. The prosecutor's representative can help evaluate the potential impact of court decisions on the operations of law enforcement and should be contacted

prior to any supplemental procedures or training.

Conclusion

Using the methodology described here, the Howard County, MD, Police Department developed and implemented a search and seizure policy/procedure and training bulletin. The response of the State's attorney's office and county office of law has been positive, and the American Civil Liberties Union specifically approved the strip and body cavity search provisions. For the police officer, the mandates of the Supreme Court are now standard operating procedure.

Bright line demarcation of the Supreme Court has created both an opportunity and a responsibility for law enforcement practitioners. The most efficient method of assuring that departmental intrusion into constitutionally protected areas is lawful is through the implementation of a search and seizure policy/procedure and related training documents and programs.

Footnotes

- ¹ See, e.g., *New York v. Belton*, 453 U.S. 454 (1981).
- ² *Texas v. Brown*, 460 U.S. 730, 103 S. Ct. 1535, 75 L. Ed. 2d 502, 51 U.S.L.W. 4361 (1982).
- ³ Charles H. Whitebread, *Criminal Procedure—An Analysis of Constitutional Cases and Concepts*.
- ⁴ *United States v. Leon*, 104 S. Ct. 3405 (1984).
- ⁵ *Massachusetts v. Sheppard*, 104 S. Ct. 3424 (1984).
- ⁶ *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1858 (1968).
- ⁷ See, *Cody v. Dombrowski*, 413 U.S. 433 (1973); *United States v. Johns*, 105 S. Ct. 881 (1984).

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