



Search and Seizure

Police officers have the difficult job of protecting people and property. Without the power to search and arrest, the government could not solve many crimes or punish criminals. In our society, though, one of the most treasured rights is the “right to be secure in [our] persons, houses, papers, and effects” (Wisc. Const. art. I, sec. II). That is, we have the rights to not be arrested and to not have our property searched. These interests in public safety and personal privacy clash every day. Our courts often determine the appropriate balance between these interests by applying constitutional rules that limit the government’s power to search and seize.

ORIGINS

When the United States was still a British colony, the government grew concerned that its customs laws were being violated by some colonists. Among the tools the government used to enforce the customs laws were general warrants with which an official could search any place he wished without explanation. Many colonists thought a person’s property should not be subject to search unless the government had good reason to search the property.

It is not surprising, then, that when the United States was formed, the Framers specifically protected against government searches and seizures in the Fourth Amendment to the U.S. Constitution. Wisconsin has a similar protection contained

in Article I, Section 11, of the state constitution. Though the two provisions are slightly different, they have nearly always been interpreted to have the same meaning. Wisconsin’s constitutional provision reads:

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 warrant 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.

These lines contain powerful limitations on the way state government interacts with Wisconsin residents, particularly when investigating whether a person has violated a law. Even so, the language is quite general, and there is continuing debate over the precise limits of government power.

Two of the most important protections in Article I, Section 11, are the limitations on the government’s authority to seize or arrest a person and to search a person and his or her property. The constitution specifically prohibits “unreasonable” searches and seizures. Hundreds of state court cases have attempted to explain what exactly is a seizure or search and when it is unreasonable.

SEIZURES

Not every encounter between a person and a police officer is a seizure. A police officer, like anyone else, may stop someone on the street to ask a question. A seizure occurs only when the officer communicates that a person is not free to leave. Seizures may be temporary and limited or may be full-blown arrests. The common factor is that the officer has used force or authority to restrain a person’s freedom. The officer need not specifically tell a person that he or she is being detained. Instead, we look at all of the circumstances and consider what a reasonable person would believe. Could the person simply ignore the officer and leave? Or must the person follow the officer’s directions? The courts have considered many factors in determining if a seizure has occurred, including specific statements from the officer, use of sirens, or use of weapons or physical restraint.

Part of determining if a seizure is reasonable is determining what sort of seizure has been made. Seizures that are temporary and limited are often called investigative stops. In an investigative stop a police officer conducts an investigation as quickly as possible to determine whether to release the person or to make an arrest. Because an investigative stop is considered a relatively minor limitation on a person’s freedom, an officer needs only “reasonable suspicion” that a crime has been committed or is

about to be committed. In a recent case, an officer working at night noticed a car weaving dramatically but within its own lane. The officer did not see anything clearly illegal, but he had reasonable suspicion to stop the car to investigate if the driver was intoxicated.

Full-blown arrests result in a more significant limitation on a person's freedom. When an officer makes this sort of seizure, the arrested person will often be physically restrained and taken to the police station or jail. For an officer to make an arrest he or she must have "probable cause," or information that would lead a reasonable police officer to believe that the arrested person probably committed or was committing a crime.

SEARCHES

While "search" can mean looking into or examining almost anything, the meaning under the constitution is much more limited. A police officer conducts a search for constitutional purposes only when he or she infringes on an expectation of privacy that society considers reasonable. That is, a search occurs only when an officer looks into or examines something that our society recognizes as private. In determining what qualifies as private, courts consider whether, under the facts of the case, a normal person would expect the thing searched to be private. Some decisions are obvious: a person's house and body are nearly always found to be private. But many decisions are debatable. For example, courts have found that objects tossed to the ground by a person running from the police are not private and that a motel room rented for a night is private. Also, specific facts may change these general rules. Courts consider

factors such as how many people had access to an item and whether an item was left in someone else's control in assessing whether someone's expectation that an item is private is reasonable.

If the police wish to search something that is constitutionally protected, they often must obtain a search warrant from a "neutral magistrate," generally a judge who has no involvement in the investigation. To obtain a warrant, an officer must provide an affidavit containing specific facts that show it is likely that objects related to a crime will be found in the location the officer wishes to search. The judge reviews the affidavit and determines if there is probable cause—a fair probability that contraband or evidence of a crime will be found in a particular place. If the judge issues a search warrant, the police may search the place described in the warrant for the items described in the warrant.

Courts often say that any search performed without a warrant is presumptively unconstitutional. There are, however, many exceptions. Perhaps most importantly, police can search without a warrant if the person whose property is to be searched consents. Another often-used exception is for "exigent" or emergency circumstances when a search must be performed immediately because of danger of physical harm or destruction of evidence. Limited searches may sometimes be performed without a warrant. A "frisk" may be done if an officer has made an investigative stop and has reason to believe that the person being investigated may be armed.

EXCLUSIONARY RULE

Courts use the "exclusionary rule"

to enforce constitutional search and seizure limitations. Under this rule, courts exclude from trial evidence that was obtained by violation of the constitution. For example, if police did not have a search warrant and none of the exceptions apply, drugs found in a search of a person's house might not be allowed as evidence if the person's trial is for drug violations. Also, if a person was arrested, but the police did not have probable cause, a confession from that person in a post-arrest interrogation might not be allowed into evidence at that person's trial. Often the exclusionary rule can make it impossible for a court to convict a person because it excludes the strongest evidence of a crime. The constitution does not specifically require the exclusionary rule, but courts have found the rule necessary to force officers to abide by constitutional limitations on search and seizure. In these situations, the courts believe it is more important to enforce the limits on governmental searches and seizures than to punish someone who has committed a crime.

CONCLUSION

The law that has developed around governmental searches and seizures is vast and growing. Few constitutional issues are more contentious. Indeed, much of the current law governing search and seizure has only recently been written and may be just a supreme court justice vote away from being rewritten. The amount and vigor of the debate reflects the importance of striking the correct balance between personal privacy and public safety.

Governing Wisconsin: "Search and Seizure"

Study Questions

1	What would give a police officer "probable cause" to conduct a search or seizure?	
2	How does a search warrant help balance a person's interest in privacy and freedom with the government's interest in preserving public safety?	
3	How does the "exclusionary rule" help make searches and seizures more fair?	
4	What are some circumstances in which the police may perform a search without a warrant?	
5	Give examples of places where a person would or would not have a reasonable expectation of privacy, that is, where a search warrant would or would not be required.	
6	Why might a court refuse to allow a confession as evidence if it was obtained during a warrantless arrest with no probable cause?	

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Study Questions in the Cognitive Domain

1	What would give a police officer “probable cause” to conduct a search or seizure?	Information that would lead a reasonable person to conclude that a crime has been committed.	Cognition
2	How does a search warrant help balance a person’s interest in privacy and freedom with the government’s interest in preserving public safety?	A search warrant must show probable cause that the search will reveal evidence of a crime. The warrant must be sworn to and be signed by a neutral magistrate. The warrant is limited to the specific location and items it describes.	Comprehension
3	How does the “exclusionary rule” help make searches and seizures more fair?	Courts use the exclusionary rule to enforce constitutional search and seizure rules. If evidence is seized without a warrant, and if the case goes to trial, the court is likely to exclude the evidence. The rule tends to make warrantless searches futile and encourages the police to obtain a warrant.	Application
4	What are some circumstances in which the police may perform a search without a warrant?	The police may perform a search without a warrant when a person consents to the search, if it appears that evidence may be destroyed immediately, in an area next to where a person was arrested, or if an officer believes a suspect is armed.	Analysis
5	Give examples of places where a person would or would not have a reasonable expectation of privacy, that is, where a search warrant would or would not be required.	Whether a person has a reasonable expectation of privacy depends on specific facts of the case. Search warrants are often required to search a home, an office, a purse, a bank account, a person’s body, or a medical record. Search warrants are not often required for a school locker or for an object thrown to the ground.	Synthesis
6	Why might a court refuse to allow a confession as evidence if it was obtained during a warrantless arrest with no probable cause?	Because it is more important for courts to ensure that the government not engage in illegal searches than it is to hear all the evidence against everyone who is charged with a crime.	Evaluation