

# The Fourth Amendment

## Air Force

April 9, 2013  
Crystal City, Virginia

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# Roadmap



- Overview
  - Fourth Amendment Searches and Seizures
  - “REP” under Katz
  - U.S. v. Jones
  - Probable Cause
- Warrants
- Warrantless Searches and Seizures
- Workplace Searches & Miscellaneous
  - Computers/Electronics
  - Social media
  - Remedies for Violations
  - MSPB context



# Part I: Overview



# Two Clauses

- Prohibition against unreasonable searches and seizures
- Requirement that probable cause support each warrant issued

# Basic Concepts

- Governmental action required
- Prohibits only *unreasonable* searches and seizures
- Probable cause on oath or affirmation and particularity in description required for all warrants
- Presumptive requirement for a warrant
- Unlawful search /seizure does not preclude or invalidate prosecution, but usual remedy is suppression of evidence seized

# What is Reasonable?

Presumptively reasonable if have a  
warrant supported by probable  
cause

# Supreme Court in *Weeks/Boyd*

- Constitutional law principle that “a man’s home is his castle”
- Serves as “the very essence of constitutional liberty and security”
- “It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence, -- it is the invasion of this sacred right. . . .” (*Weeks v. United States*, 232 U.S. 383, at 291 (1914))

# What is a Search?

- *Post-Katz v. United States*, 389 U.S. 347 (1967), – government intrusion into an area where person has REP
  - Privacy-based, no need for physical intrusion
- Supreme Court two-part test – when is expectation of privacy legitimate (or reasonable) - REP
  - **Subjective** expectation of privacy in a place or thing
  - **Society recognizes** that expectation as objectively reasonable

# What is a Seizure?

- Fourth Amendment applies to gov't actions that terminate “freedom of movement through means intentionally applied”
- When a reasonable person
  - Would believe he/she not “free to leave” or
  - Would not feel free to decline officers’ requests or terminate the encounter
- Property seizure – when gov’t intrusion meaningfully interferes with individual’s possessory interests



# The Right to Privacy Post-*Jones*?

- January 23, 2012, Supreme Court decision in *U.S. v. Jones* changed the landscape
- Before *Jones*, GPS tracker attached to outside of vehicle generally held not be a search but merely technological assistance of recording vehicle movements on public roads in plain view
- *Jones*: Government attachment of GPS tracker on undercarriage of vehicle is trespass into effects of person for purpose of gathering information and therefore a search

# *U.S. v. Jones* GPS Case (cont.)

- 4<sup>th</sup> Amendment search occurs when physical trespass + information gathering occurs
  - Need both elements to be a search
- Trespass must be into “enumerated area” of *persons, houses, papers, or effects* enumerated in 4<sup>th</sup> Am.
- Open fields, consent distinguished from trespass

# *U.S. v. Jones* GPS Case (cont.)

- Gov't conceded it did not comply with warrant
  - Attached GPS on 11<sup>th</sup> day in MD when warrant required attachment within 10 days in DC, and tracked vehicle for 28 days
- Government forfeited argument that warrant was not necessary even if GPS attachment was held to be a search
- Government relied exclusively on the grounds it was not a search—plain view of vehicle in public, no privacy interest in exterior of vehicle as it is “thrust into the public eye”

# What is a Search Post-Jones?

1. Government trespass on a person, house, paper, or effect (e.g., car) for the purpose of obtaining information

**OR**

2. Government intrusion into an area where a person has a REP for the purpose of obtaining information

# Tracking – *Jones v. Katz*

- Jones Applicability
- Physical intrusion into protected area for purpose of gathering info
- Installation and monitoring of tracking device must occur while person has possessory interest
- Warrant required
- Katz Applicability
- Government intrusion into area where person has REP
- Katz applies only if installation of device occurs before person tracked has possessory interest in the object tracked
- Installation and monitoring issues are separate

# Where is REP (*Katz*)?

- Body of suspect?
  - Above or beneath the skin?
- Vehicles?
  - Which part?
- Homes?
  - Third party homes/social guests
  - Commercial guests
  - Paperboy/Avon lady/pizza delivery?
  - Carport?
- Hotel/Motel rooms?
  - Conversation
  - Marijuana smoke in hall
- Conversations?
- Clear glass jar or opaque jar?
- Closet vs. window?
- Exposed to the public?
- Abandoned?
  - Trash: Curtilage vs. curb
- Accessed by consent?

# No REP?



# Using Devices – *Katz and Jones*

- Right to see, hear, smell with naked ears and eyes
- Need Title III court order to use device to intrude on area where person has REP
- What about using binoculars in a public park?
- Using telescope to look through house window?
- Bringing drug-sniffing dog to front porch? Is this a search?
  - *Florida v. Jardines*

# Government Action

- Government officials (not just police) – regulatory officials, public school officials, etc.
- Private individuals acting under government direction
- Private employer acting pursuant to government regulations
- Expansion of private search or seizure

# What is Probable Cause?



- Totality of the circumstances
- Case-by-case, fact-based review
- Reasonable standard
- A “fair probability” that gov’t action (search) will get evidence sought
  - Florida v. JL, 529 U.S. 266 (2000)

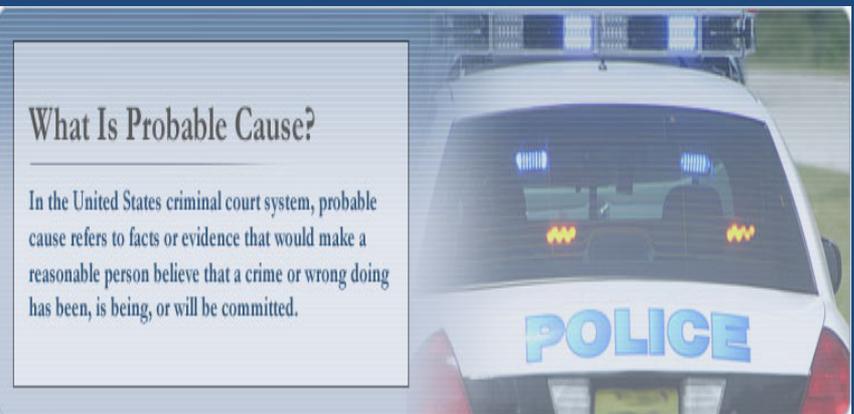
# What is Probable Cause?

- To search: a “fair probability that contraband or evidence of a crime will be found in a particular place”
- To arrest: information that would lead a reasonable person to believe that a crime has been committed by the suspect

A “practical, nontechnical conception” based on “common-sense conclusions about human behavior”

A “fluid concept” based on facts and circumstances

*Ill. V. Gates*, 462 U.S. 213 (1983)



# Probable Cause

- Incapable of precise definition or quantification into percentages because it deals with probabilities and depends on the totality of the circumstances
- Substance of all definitions is reasonable ground for belief of guilt
- Judges must determine “historical facts” and then decide whether these facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause

*(Maryland v. Pringle, 540 U.S. 366, 371)*

# PC Determination

- First, judges determine “historical facts”
- Then, judges decide whether these facts amount to PC
  - Again, reasonable standard
- Courts may accept judgment of LEO if backed by warrant (another reason to get a warrant)

# Sources of PC Facts

- Personal observations
  - Can use experience, training, expertise to draw inferences
- Info from reliable, known informant, or info from independent source if corroborated
- Weapons or other evidence
  - Seized during stops based on reasonable suspicion
  - Seen in plain view
  - During consent search
- Association



# What if the Person is an “Alien”?

- The Supreme Court has held that aliens have the benefit of constitutional protections when they have come within the territory of the United States and have developed a substantial connection with this country.
  - *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)

# Implications

- Get a warrant before intruding on enumerated areas
- Comply with warrant
- Ask the prosecutor if any warrantless GPS has occurred



## Part II

**COME BACK  
WITH A  
WARRANT.**

# Why a Warrant?

The point of the Fourth Amendment . . . is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

– *Johnson v. United States*, 333 U.S. 10 (1948)

# Warrant Requirements

- When unsure and if circumstances permit, get a warrant
- Warrantless searches are *per se* unreasonable unless they fall within one of limited recognized exceptions (*Katz v. U.S.*, 389 U.S. 347, 357 (1967)), so the risk is great of suppression of evidence without warrant
- Fed. R. Crim. Proc. 41 establishes specific requirements—modified effective December 2009
- Neutral referee and limitation on governmental power underpin all warrant requirements

# Searches with Warrants

- Judicial permission to search a particular place for specific evidence of a crime
- Issued by federal judges or state court judges of record, as long as neutral and detached
- Federal agents generally get warrants from federal magistrate judges

# How to Meet Warrant Requirement

- Impartial
- Judicial officer
- Must assess whether LEO has PC to make an arrest, conduct a search, or seize evidence, instrumentalities, fruits of a crime, or contraband
- Federal Rules of Criminal Procedure 41(b) – must be issued by federal magistrate judge or by state court of record within the federal district of that judge's authority

# Particularity

- Required by Fourth Amendment
- To prevent seizure of one thing under warrant describing another
- Describe places to be searched and objects to be seized so as to leave no discretion to LEO executing warrant
- Affidavit can cure an overbroad warrant

# It's Got to Fit

Will this panda. . .



Fit into one of these boxes?



# What About One of These Pandas?



# “Articulate”

- Law enforcement officers have to be able to articulate a basis for their actions for obtaining warrant and for defending challenges to warrantless searches and seizures. If no warrant, why?  
Exigencies/exceptions
- Develop habit of thinking as you go about:
  - What is the crime?
  - What is the basis for the search/seizure?
  - What am I looking for and where?
  - What is my basis to believe a crime has been committed, or that this person committed it, or evidence is here?

# Who Can Serve a Search Warrant?

A search warrant may in all cases be served by any of the officers mentioned in its direction or by an officer authorized by law to serve such warrant, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution.

— 18 USCS § 3105

# Execution of Warrant

## “Knock and Announce”

An officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.

18 USCS § 3109

# Exception to Knock and Announce



- No blanket exception
- Requirement relaxed when:
  - LEO believes suspect knows of LEO presence and announcement useless
  - LEO has “reasonable suspicion” that knocking would be dangerous or inhibit investigation
    - *Wilson v. Arkansas*, 514 U.S. 927 (1995)

# What is Reasonable Suspicion?



# PC, RS, Hunch. . . .

TO THE KNOWN

Truth

Beyond Reasonable Doubt

Preponderance of the Evidence

Probable Cause

Reasonable Suspicion

Hunch - Gut Feeling

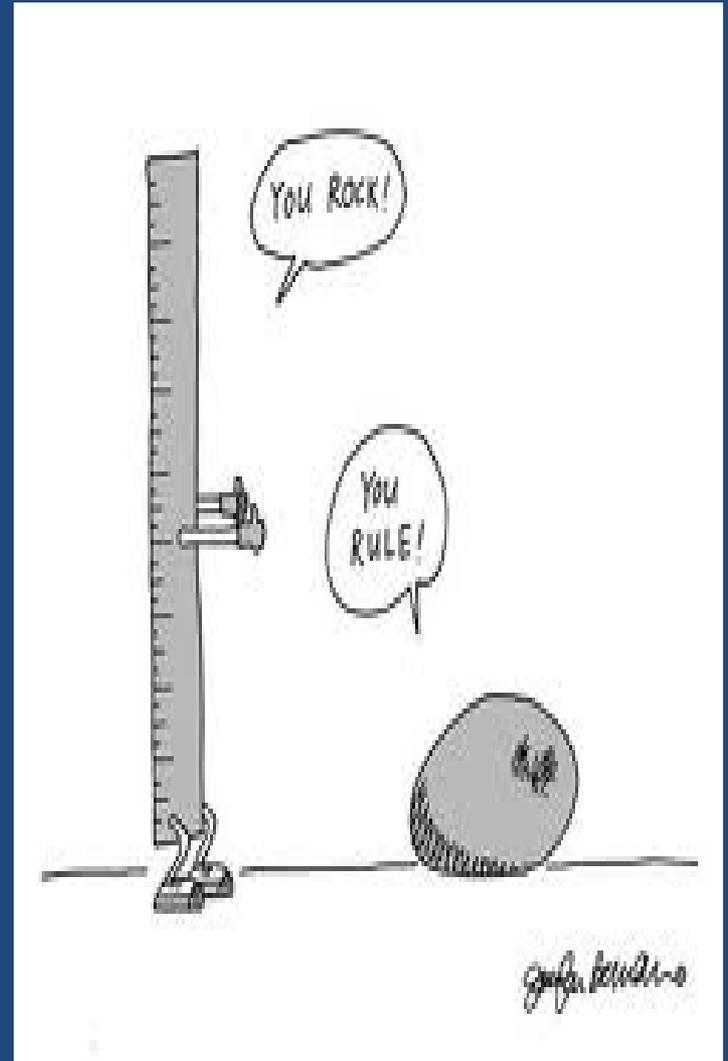
FROM THE UNKNOWN

# Part III: Warrantless Searches & Seizures



# Rule

Searches &  
seizures  
unreasonable  
and invalid  
unless based on  
PC and executed  
with warrant



# Exceptions to Warrant Rule

- Investigatory stops
- Investigatory detentions of property
- Searches incident to valid arrest
- Plain view
- Consent searches
- Vehicle searches
- Protective sweeps
- Container searches
- Inventory searches
- Border searches
- Searches at sea
- Administrative searches
- Special needs searches
- Abandoned property
- Exigent circumstances

# Warrantless General Rules

- Exigency and public safety almost always trump individual privacy rights but must be legitimate emergency and is limited to while exigency still exists
- Administrative and other warrantless searches require a non-criminal investigative purpose, i.e., the purpose is not to find evidence, fruits, or instruments of crime
- Plain view is your best friend. When you are in a place you are legally entitled to be, such as through a legitimate exigency or administrative search, any incriminating evidence in plain view, plain feel, plain smell, can be seized

# Abandoned Property

- No reasonable expectation of privacy
- No standing/no trespass
- Examples
  - Hotel room after checkout
  - Trash in containers left for pickup
  - Luggage individual claims does not belong to him or her
  - Other items where totality of circumstances show abandonment

# Consent

- Three requirements:
  - Voluntary – product of free will (can be withdrawn)
  - Actual or apparent authority
  - Confine search to place authorized
- Who can consent?
  - Actual authority—anyone with reasonable expectation of privacy in place; can be common or joint among several people
  - Apparent authority—good faith and reasonable
  - Conflicts of consent—normally cannot waive another's right
- **Consent in writing** ideal to avoid questions later of proof and scope of consent

# Consent Scope

- Search limited to scope of consent
- Ask specifically for what you want—
  - Do you want to “look in the bag” or
  - Do you want to “search the bag”?
  - Point: Words matter
  - What are you searching for?
- Consent to “search the car” for drugs/weapons is given. So where can you look?

# Plain View

- No REP in items exposed to plain view, feel, hearing, or smell
- Three requirements:
  - Incriminating nature of evidence must be readily apparent, requiring no further investigation (unless have PC to search)
  - Observe from place you have legal right to be
  - Must be able to lawfully access the evidence
    - If not, get a warrant!

# Terry Frisk of Driver & Plain View

## Lawful Access

- Unlocked containers inside passenger compartment that might hold weapon
- If arrest driver, greater access

## No Access (unless arrest)

- Trunk
- Closed container in glove compartment
- Any place that the driver has to get out of the vehicle to access (same if arrested)

# Plain View – Technology

- How far can you go?
  - Sound recorders—plain hearing?
  - Cameras and telephoto lens—generally OK if open to view
    - Infrared and heat sensing devices
      - *Kyllo v. U.S.*, 533 U.S. 37 (2001) – “4<sup>th</sup> A draws a firm line at the entrance to the home”
    - Aerial/satellite surveillance—generally OK if open to view
  - Drug sniffing dogs (*Florida v. Jardines*)

# Exigent Circumstances (I)

- Definition: Emergency circumstances requiring immediate attention
- When:
  - Imminent destruction of evidence / no time to get warrant
  - Threat to LEO or public / crime scene emergencies
  - Hot pursuit of fleeing felon
  - Fleeing before warrant possible
- Basis for protective sweeps of limited duration/scope to ensure no other victims or dangerous perpetrators

# Exigent Circumstances (II)

## Requirements

- PC to believe that serious crime has been committed by the person running
- Begin from public space
- Immediate and continuous

Don't stop for coffee. . . .



# Exigent Examples (III)

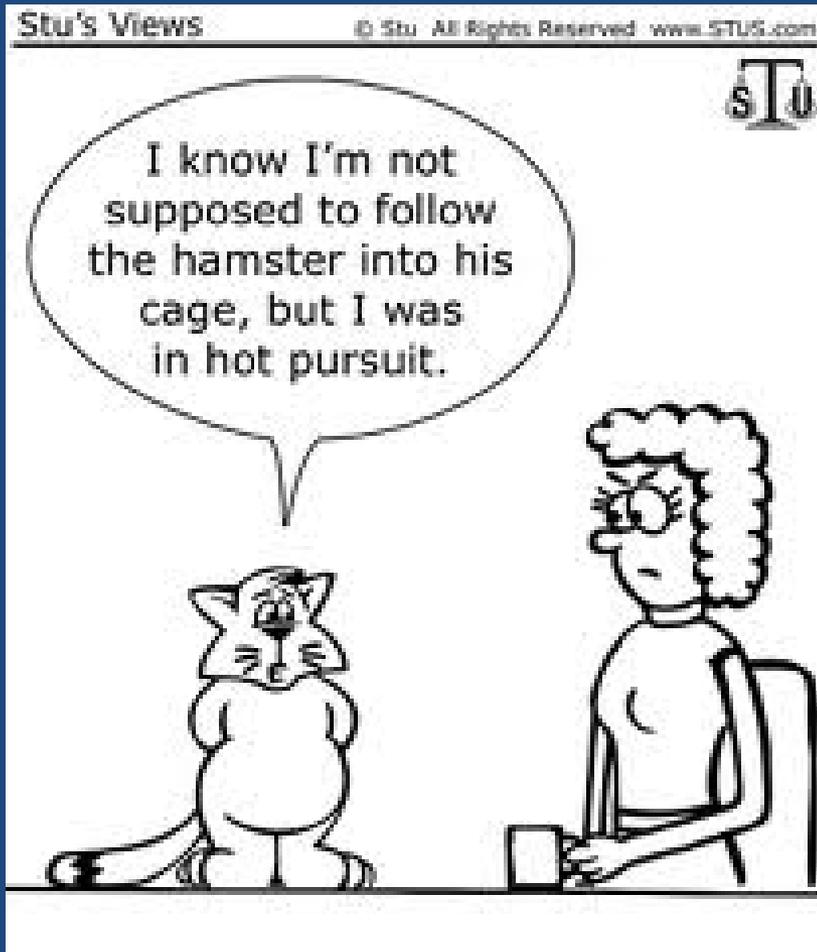
- Assault in progress
- Evidence being destroyed
- Blood dripping from the trunk of a vehicle
- Burning building



# Police-Created Exigent Circumstances (IV)

- Not allowed
- But. . . . As long as LEO does not violate or threaten to violate the Fourth Amendment, any response to LEO conduct from inside the home that can be considered part of the exigent circumstances is not considered part of police-created exigent circumstances, so warrantless search okay
  - *Kentucky v. King*, 131 S. Ct. 1849 (May 11, 2011)

# Hot Pursuit



- Arrest or arrest attempt starts in an area with no REP
- Suspect flees into an area of REP
- Normally limited to felony offenses (common law)
- “‘Hot pursuit’ means some sort of a chase, but it need not be an extended hue and cry in and about the public streets”
  - *U.S. v. Santana*, 427 U.S. 38, 43 (1976)
- Must be continuous
- No requirement to have the suspect under personal observation the entire time

# Container Searches

- Generally, opaque containers considered to be within person's REP
- May secure the container from loss or destruction based on reasonable suspicion
- But cannot open and search inside container without a warrant
  - Unless exception applies
  - Automobile exception

# Cars, Trucks, Planes, Boats

- Warrant exception for “mobile conveyances”
- Why? Reduced REP
- Three requirements to search
  - Vehicle must be in public place (not in garage or curtilage)
  - Readily mobile – appears operational
  - PC to believe that contraband or evidence of a crime will be located in the vehicle

# Warrant Exception to Container Searches – i.e., Inventory Searches

- Illicit contents in plain view or inferred from appearance – okay
- To conduct an inventory search of seized container—
  - Interest in protecting owner’s property and officer safety must outweigh owner’s diminished expectation of privacy
  - Provided opening these containers is covered in the agency’s standard procedures
- If container in car and PC exists to search container or car
- If search simply repeated to the extent of a previously conducted private search (but don’t exceed scope!)

# Upheld Inventory Searches

- Vehicles in lawful custody
  - Passenger compartment
  - Glove compartment
  - Truck (exceptions)
  - Engine
  - Containers
- Abandoned property
- Containers and items in possession of lawfully detained person

# Search Incident to Arrest – First, Arrests (I)

- All arrests require probable cause
- Feds may arrest for a felony without a warrant if the crime occurs in an officer's presence
- Feds may arrest for a misdemeanor without a warrant if the crime occurs in the officer's presence
- Feds may not make a full custodial arrest for a misdemeanor without a warrant if the crime did not occur in an officer's presence

# Search Incident to Arrest (II)



- A lawful arrest justifies a full search incident to arrest of the person, not just a frisk
  - Can search containers and other items on arrestee or within person's **immediate control**
- Ensure your safety—do the full search!

# Search Incident to Arrest (III)

- Lawful arrest allows full search of person for safety of officer and evidence of crime
- Arrest does not justify search of arrestee's entire home
  - But can conduct limited protective sweep of closets and other spaces from which attack could come – only cursory and reasonable time
    - *Maryland v. Buie*, 494 U.S. 325 (1990)

# Can These Hurt You?



# Search Incident to Arrest (IV)

- *Arizona v. Gant* ties current law back to original “immediate control area” of 1969 case of *Chimel v. California*.
- *Gant* did not change SIA rules for searching and seizing weapon and evidence of crime on the arrestee’s person
- Factors to articulate accessibility of lunging area?
  - Distance, position of persons and objects
  - Number of officers vs. arrestees and other persons
  - Containers: open/closed, unlocked/locked
  - Arrestee’s attempts to access lunging area

# Are Cell Phones Containers?

No:

Ohio Supreme Court –  
*State v. Smith*, 920 N.E.2d  
949 (2009) (more privacy  
interest in cell phone  
content, so outweighs  
justification for search  
incident to arrest)

Colo. Court of Appeals  
(*People v. Taylor*)

Yes:

Fifth Circuit Court of  
Appeals – *United States v.*  
*Curtis* (Mar. 11, 2011) –  
upheld text search from  
cell phone after arrested  
for unrelated crime

Fourth Circuit

# Investigative Detention (*Terry*)

- *Terry v. Ohio*, 392 U.S. 1 (1968)
- “Stop and (maybe) Frisk”
- To Stop: Reasonable Suspicion / criminal activity
- To Frisk: Reasonable suspicion person is armed and dangerous
  - External only, not full search, limited to external clothing for weapons, not for evidence

# Case Study: Gun Rights (I)

- When would openly carrying a gun in a public park in Tennessee invite a “stop and frisk”?
- What about if it was an AK-47 with a thirty round clip, fully loaded?



# Case Study (II)

- No Fourth Amendment violation
- U.S. Court of Appeals for the Sixth Circuit, Aug. 30, 2012, citing *Terry* – RS based on “specific and articulable facts,” and length of stop and extent of intrusion “reasonably related in scope to the circumstance justifying” stop
- Constitutional Question: Whether LEOs had RS of a crime, not whether a crime occurred

# Summers Doctrine

- Search for contraband comes with limited authority to detain occupant during search
  - Can bring person back inside premises
- What about non-occupants?
  - Terry stop allowed if reasonable suspicion
- Terry stop RS may turn into PC for arrest – or cause for release
- *Bailey v. United States*, 133 S. Ct. 1031 (2013)

# Protective Sweeps

- Like Terry frisks but look for people instead of weapons
- When execute search warrant inside a residence – can “sweep” anywhere in immediate area to find those who might hide
- With arrest warrant, more narrow – look only where expect to find suspect

# Checkpoints

- Substantial government purposes other than to gather criminal evidence
- Limited intrusion for limited purposes
- Have SOPs & keep stop brief
- Examples
  - Sobriety check point
  - Driver's license and registration check point
  - Routine border searches
  - Customs
  - Military inspections (barracks room / health and safety)

# Administrative Searches

- Regulations should be posted—(40 U.S.C. § 1315(c) for DHS authority for Federal property)
- Procedures are neutral
- Necessary for the protection of property and persons on that property and other regulatory purposes
- Once person initially submits to the screening, may not change mind and leave
  - “Constitutionality of airport screening searches is not dependent on consent. . . .” *United States v. Aukai*, 497 F.3d 955, 960 (2007)

# Part IV: Workplace Searches & Miscellaneous Topics



# Myth About Workplace Searches

- MYTH: OIG criminal investigators do not need a search warrant to conduct a workplace search in a Government environment
- REALITY: While warrantless searches of government workplaces are generally permitted for administrative/work-related purposes, traditional Fourth Amendment analysis applies for search for evidence, fruits, or instruments of a crime

# Special Needs Searches

- Gov't employees do not lose Fourth Amendment rights just because they work for gov't
  - Diminished REP
- Supreme Court upheld warrantless searches of gov't employees and offices as “special needs” (beyond normal law enforcement)
  - *O'Connor v. Ortega*, 480 U.S. 709 (1987) (plurality)

# *O'Connor v. Ortega*

1. Gov employees may have REP in workplaces but must be subjectively and objectively reasonable
2. REP can be reduced through regulations and agency practices
3. REP can be defeated if search for work-related purposes and is reasonable in scope

# Reasonable Workplace Search?

- O'Connor's two inquiries:
  - Action “justified at its inception” AND
  - Permissible in scope
- After O'Connor, “reasonable under the circumstances” standard
- Employee's REP is limited by “operational realities of the workplace”
- Case by case basis – fact-specific

# How Can Expectation of Privacy Be Defeated?

- Probable Cause and warrant not required for workplace searches for “noninvestigatory, work-related purposes” (suspicionless) or in course of investigation of work-related misconduct
- Search must be “reasonable”

# Misconduct or Suspicionless Search?

- Reasonable suspicion not necessary when gov't conducting search for noninvestigatory purposes
- If RS of work-related misconduct exists, courts have decided in part based on notice to employees
  - Reasonable is key

# Search of Gov't Mobile Devices

Even if government employee has some  
REP in email messages or texts,  
employer's search of work-issued device  
is permissible as long as not excessive  
scope and reasonably related to work  
purpose

– *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)

# What is Operational Reality?

- In *Quon*, Supreme Court did not look at whether LEO had REP in his text messages – assumed *arguendo* that he did
  - Case resolved on issue of reasonableness of the search
- If SCOTUS had reviewed REP, would have looked into circumstances making up “operational reality”
- Electronic sphere still murky
- Employers need policy to provide notice that activities are monitored and (ideally) employer may access for law enforcement/investigation purposes (not just monitoring)
- Stick to policy!

# Pay Attention to Wording of Banner/Policy

## Yes, REP. . . .

- Member of Navy had REP in emails on government server despite banner
  - Banner described access to “monitor” the system, not to engage in law enforcement
    - *United States v. Long*, 64 M.J. 57 (C.A.A.F. 2006)

## NO REP

- Deputy U.S. Marshal had no REP in BlackBerry
  - DOJ, USMS policies and banner
  - USMS policy said that employer could access anything on government computer systems “whenever it has a legitimate government purpose for doing so.”
  - Gathering evidence of suspected unlawful behavior was legit government purpose w/in policy
  - Here, allegations were violations of agency policy (workplace-related) AND federal criminal law
    - *United States v. Linder*, 2012 U.S. Dist. LEXIS 112134 (Aug. 9, 2012)

# FLETC Manual Guidance (I)

- See p. 434 of FLETC Legal Division Handbook (2012)
- Computer users may waive rights to privacy through policies and/or banners
- Alternatively, banner may result in implied consent to a search
- However. . . . (next slide)

# FLETC Manual (II) Best Practice

- *Some courts are reluctant to apply implied consent doctrine w/o evidence that suspect knew of the search and consented to it*
- *Other courts have held that banner language sufficient to permit intrusions only for general housekeeping but not for law enforcement purposes*
- *The best practice is to consult with an AUSA before relying on a banner search*

# FLETC Manual(III)

## What is the Purpose of the Search?

### Is the Investigation Criminal?

If sole purpose is to prepare criminal prosecution against gov employee. . . .

PC and warrant are required absent exigent circumstances

### Or is it a Dual Purpose Search?

If purpose is to

(1) uncover administrative violation/work-related misconduct and

(2) uncover potential criminal evidence. . . .

falls under the *O'Connor* exception to PC and warrant requirement

# Government Workplace Tips

- Get evidence of waived or diminished REP
  - Login banners
  - Signed user agreements or rules of behavior
  - Posted signs
  - Internal policies or regulations
  - Employee newsletters or union publications
  - Newspaper clippings/media coverage
  - Training on computer/electronic usage policies
- Get a warrant if want to search for **solely criminal violation** not related to workplace misconduct or non-investigatory administrative search

# Computers (I)

- Generally, container analysis applies to files and other materials stored on computers—could you open a closed container under the same circumstances?
- Several particular additional statutes implicated
- Critical resource is DOJ's *Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations*, 3<sup>rd</sup> Edition 2009, at <http://www.justice.gov/criminal/cybercrime/ssmanual/ssmanual2009.pdf>. Electronic copies available from [www.cybercrime.gov](http://www.cybercrime.gov).

# Computers (II)

Federal laws include

- 18 U.S.C. §§ 2510-22, Wire and Electronic Communications Interception and Interception of Oral Communications (Wiretap Act aka “Title III”)
- 18 U.S.C. §§ 2701-12, Stored Wire and Electronic Communications and Transactional Records Access (Stored Communications Act)
- 18 U.S.C. §§ 3121-27, Pen Registers and Trap and Trace Devices

# Computers (III)

- Reasonable expectation of privacy violated?
  - Generally yes, but not all government workplace computers
- If so, warrantless exception applicable?
- If REP and no exception, need a warrant
- Losing control of file generally waives REP—extinguished on delivery—but if encrypted still protected
- Is computer one container or multiple containers?
  - May need multiple warrants—different searches (fraud documents versus pornography)

# Computers (IV)

- Many “computer” concepts apply to “smart” phones, BlackBerries, iPods, digital cameras, and a myriad of other electronic devices.
  - Changing technologies may affect exigency rationales and scope of searches incident to arrest
  - Probably can’t open computer files in inventory or border searches—inventory hardware devices seized
- Can duplicate private search (repair technician reports criminal evidence found) without warrant if same scope

# Computers (V)

- Can easily implicate international issues with files, persons, networks, or computers located in foreign countries and linked through cyberspace—contact DOJ’s Office of International Affairs or Computer Crimes and Intellectual Property Section (CCIPS)
- Must coordinate through CCIPS if search implicates authors’ or journalists’ First Amendment rights under Privacy Protection Act, 42 U.S.C. 2000aa.

# SCA, Pen/Trap and Title III

- Stored Communications Act (SCA) compelled disclosure under subpoena , court order (with and w/o notice), or search warrant. Warrant allows broadest access. See DOJ Quick Reference Guide in materials.
- Pen/Trap and Title III (Wiretap Act) have complex rules and usually require working with counsel or prosecutor.
- Consensual monitoring exception allows one party to conversation to “wear a wire” and permit recording conversation.

# FBI vs. Google: *The Battle to Unlock Phones*

- Do LEOs have the right to get passwords of smartphones (even with a warrant)?
- Google doesn't think so!



# Let's Talk About Social Media

facebook

twitter™

 Blogger™

You Tube  
Broadcast Yourself™

 myspace.com™  
a place for friends

Linked in®

flickr®  
from YAHOO!

 reddit

digg

foursquare

yelp. 



# Case Study

- Let's say you want to access employee Facebook account
  - Is it public?
  - Are there privacy settings?
  - Accessed from work device?
- What if Joe comes to you to complain about Judy, a co-worker and Facebook friend. Judy's account has privacy settings. Can you ask Joe to gather information for your investigation?

# Accessing Non-Employee Social Media

- Great resource!
- No Fourth Amendment right if information exposed to public (no REP)
  - Privacy settings?
- Identity? Terms of service. . . .
  - The Attorney General's Guidelines on FBI Undercover Operations
- Subpoenas and warrants



# YOUR Activities, aka, *The Officer Who Posted Too Much on MySpace*

- Would you mind if a member of the public accessed all your texts and emails (sent on a gov't device) through a FOIA request?
- Are you ready to face all your online postings in an open courtroom during cross?

UNREDACTED – “that grl/guy is a bozo”

*The Internet = locker room bravado talk that lives in perpetuity*

# Remedies



**I'M GOING TO KICK YOUR ASS  
AND GET AWAY WITH IT.**

# Exclusionary Rule

- Evidence obtained in violation of Fourth, Fifth, or Sixth Amendment may not be introduced at trial
  - “But for” violation
  - Can you purge the taint?
- Purpose
- Exceptions:
  - Impeachment of defendant at trial (only defendant)
  - “Good faith exception” – **reasonable** reliance on magistrate
  - Inevitable discovery doctrine

# Fruit of the Poisonous Tree

- Extension of Exclusionary Rule
- Any evidence obtained indirectly as a result of a constitutional violation is also barred
- Limited exceptions
  - Discovery in part as result of untainted source
  - Inevitable discovery despite tainted source
  - Link from illegal action to tainted evidence too attenuated

# Tools to Minimize Exclusion

- Articulation at the front end
- Cleansing statements
- Independent, untainted source for same evidence
- Demonstrate attenuation
  - Acting in good faith, even if a warrant lacked probable cause, may permit use of the evidence
  - Good faith also protects agents even if the law subsequently changes. *Davis v. U.S.*, 564 U.S. \_\_\_, 131 S.Ct. 2419 (June 16, 2011).

# Merit Systems Protection Board and the Fourth Amendment

Exclusionary rule does not extend to MSPB  
proceedings

–*Delk v. Dept. of Interior*, 57 MSPR 528  
(1993)

# Workplace – Anonymous Tips (I)

- What is workspace?
  - “Related to work and within employer’s control”  
(*O’Connor v. Ortega*)
- Vehicle on agency property, in lot next to federal prison
- Notice posted at entrance – subject to searches
- Reasonable search – based on nature of institution (no need for RS)
  - *Wiley v. Dept. of Justice*, 89 MSPR 542 (2001)
- But. . . . (next slide)

# Workplace – Anonymous Tips(II)

- U.S. Court of Appeals for the Federal Circuit reversed MSPB in *Wiley*
- Uncorroborated anonymous tip not enough to develop RS (or PC!)
- Totality of the circumstances – informant's veracity, reliability, and basis of knowledge
- Corroborate by direct observation, direct info
- Reliable in assertion of illegality, not in identifying suspect

# Harmonize *Delk* and *Wiley*

- MSPB will not block admission of evidence *illegally* seized by LEOs conducting search as part of criminal investigation
- But same type of evidence subject to exclusion if *employing agency* unlawfully conducts the search

# Collective Bargaining Agreements

- Another protection to employees
- MSPB found that agency violated provision in CBA restricting its right to search employees' lockers
  - But error was harmless b/c search would have yielded evidence used in adverse action if contract had been followed
  - *Robinson v. USPS*, 28 MSPR 681 (1985)

# Interrogations

- Investigator misconduct:
  - Generally, no exclusionary rule
  - Unlikely to find statements coerced
- Constitutional objections:
  - Key – whether employee may properly refuse to answer questions posed during investigation if charges could be criminal
  - Law not clear

In Closing. . . .



# Why Get a Warrant

- Warrantless Searches are Presumed Unreasonable
- Avoid suppression of evidence
- Reduce chances of litigation
- Warrants Can Save An Otherwise Doubtful Search
  - Evidence obtained pursuant to valid warrant admissible even if violate the “knock and announce” rule
- “There is a strong preference for searches and entries conducted under the judicial auspices of a warrant.” - -
  - *United States v. Holloway*, 290 F.3d 1331, 1334 (11th Cir. 2002), cert. denied, 537 U.S. 1161 (2003).

# Synthesis and Practical Tips

- Watchword? – *Reasonableness*
  - Warrant presumptively required
- Remedies for 4th Amendment violation
  - Suppressed evidence
  - Litigation – against you and your agency!
- Articulate basis for action – Probable cause for warrant or recognized exception without warrant
- Warrantless searches fact-based
  - Use them legitimately and in good faith
- Plain view is your best friend
- Don't forget to use social media and all electronic communications devices wisely!