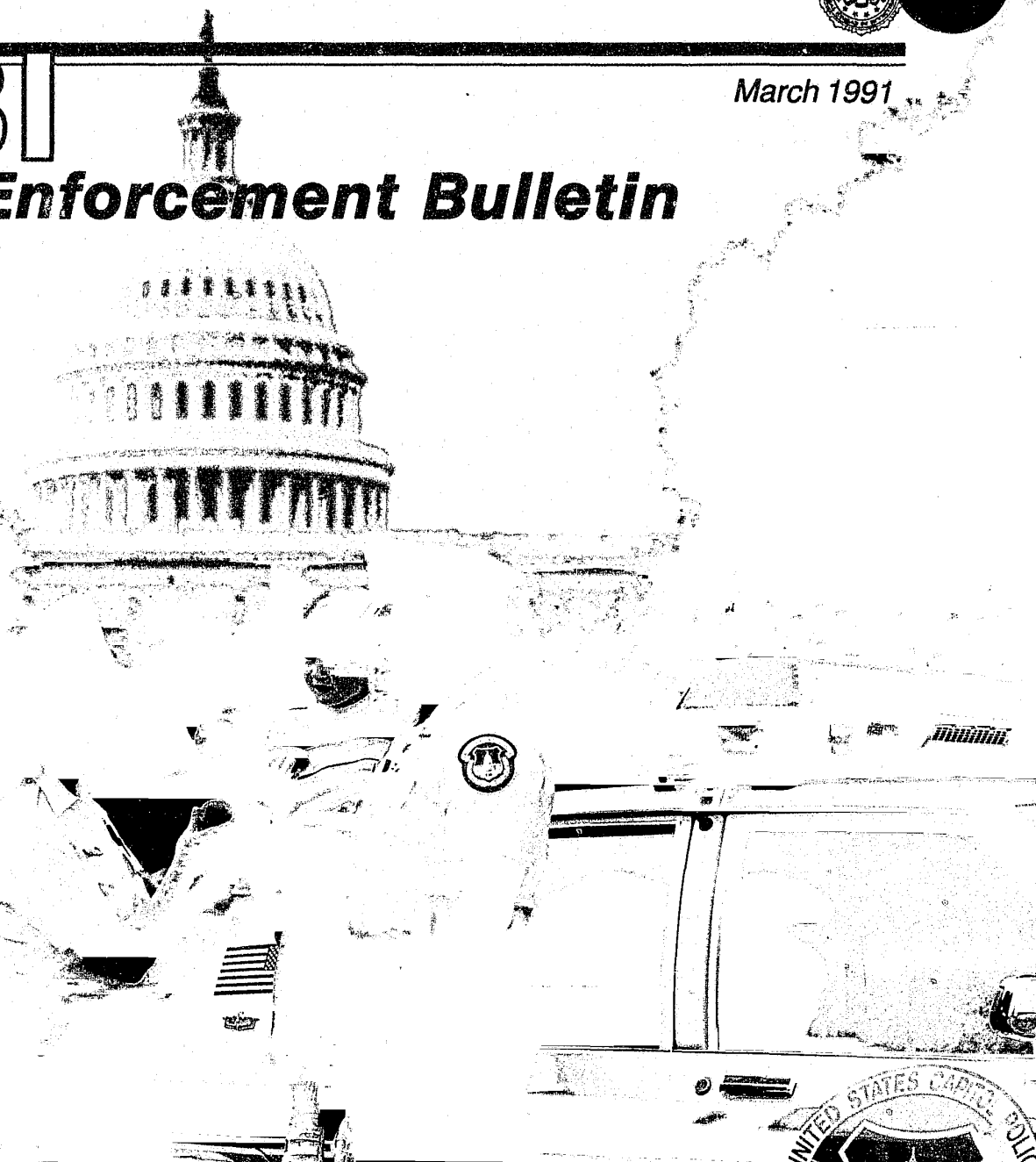




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William S. Sessions, Director

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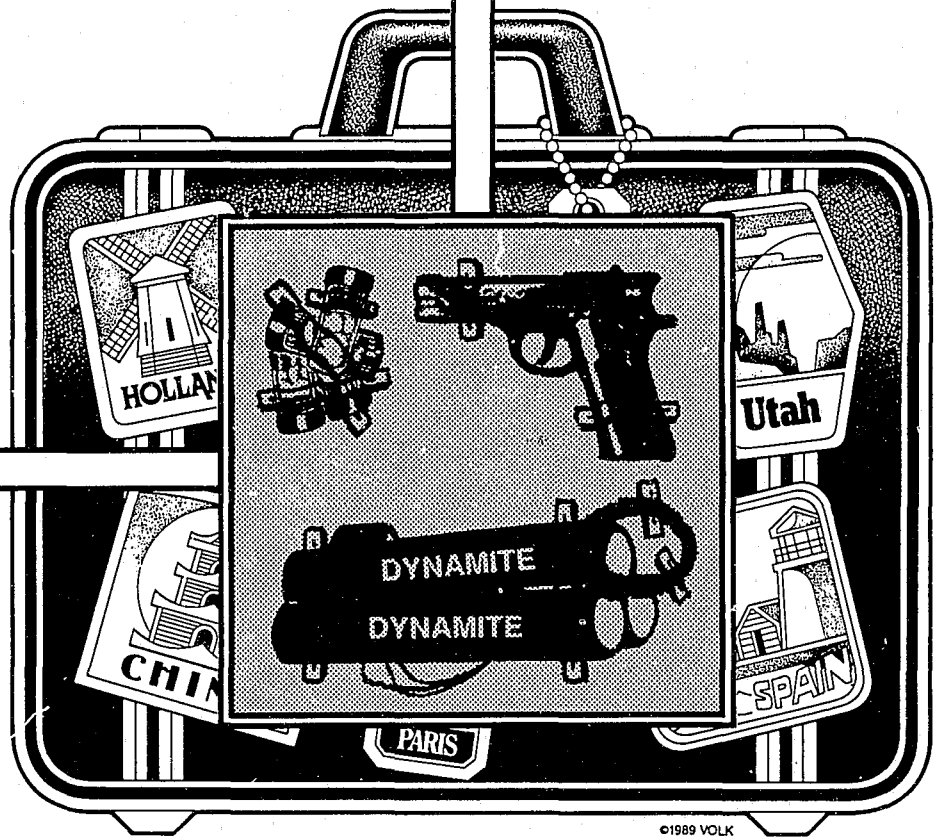
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Emergency Searches of Effects

By
JOHN GALES SAULS



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A police department receives an anonymous tip that a bomb is concealed in a package addressed to a foreign embassy located in its jurisdiction. The package has been sent via a package delivery service. The police contact the delivery service, which has five packages addressed to the embassy. The police converge on the delivery service, immediately subject each package to X-ray examination, and seize one package that appears to contain explosives. This package is then taken to a safe disposal area,

where it is opened, and the explosive device is disarmed. No warrant is obtained for the X-ray examination, the seizure, or the search performed when the package is opened.

Other officers of the department receive a tip that a package arriving by bus contains a large quantity of cocaine. The tipster provides a description of the package, including the name of the addressee. Officers locate the package at the bus station and detain it for several minutes until a trained drug

detection dog is able to sniff it.¹ The dog alerts, and the police maintain a surveillance until a man comes to claim the package. The man is held while the police open the package, discovering the cocaine. The man is then arrested. No warrant was obtained for the search of the package or the man's arrest.

In each of these situations, officers have made on-the-spot decisions to conduct searches and seizures without warrants. In the prosecutions that follow, the defendants will likely challenge

the admissibility of the seized evidence, claiming it was obtained in violation of their constitutional rights. Because the searches and seizures were performed without warrants, the burden of establishing their legality will rest upon the government.²

What emergency circumstances justify an officer searching or seizing, without a warrant, items of personal property—effects?³ This article seeks to answer that crucial question through an exploration of the “emergency” or “exigent circumstances” exception to the fourth amendment warrant requirement.⁴

Courts commonly recognize three threats as providing justification for emergency warrantless action—danger to life, danger of escape, and danger of destruction or removal of evidence. The presence of any one of these threats may provide justification for a warrantless search or seizure of personal property. There are different legal standards for emergency action based upon danger to life and that involving the danger of escape or destruction of evidence. Awareness of the type of emergency present in a particular situation is the key to correct on-the-spot decisions.

This article will first examine U.S. Supreme Court and lower court decisions considering the legality of warrantless searches of effects based upon suspected threats to life. It will focus on the legal standard for such emergency searches and the circumstances courts commonly deem sufficient for establishing a threat to life and the allowable scope of action for dealing with that threat. The article will then examine cases involving warrantless searches of

effects based upon emergency threats of destruction or removal of evidence.

THE EMERGENCY EXCEPTION TO THE WARRANT REQUIREMENT DEFINED

The fourth amendment protects persons in the United States from “unreasonable” searches or seizures of their effects.⁵ The U.S. Supreme Court, in determining what government intrusions are reasonable under the fourth amendment, has expressed an emphatic preference for searches and seizures made pursuant to judicially issued warrants.⁶ As the Court has stated, the “Constitution requires that the deliberate, impartial judgment of a judicial officer be interposed between the citizen and the police... [and] searches conducted outside the judicial process, without prior

approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment—subject to a few specifically established and well-delineated exceptions.”⁷

In most situations then, a “reasonable” search or seizure is one performed with a valid warrant. Consequently, for fourth amendment purposes, “reasonable” is a legal term with a meaning different from that attached to the word as it is commonly used. There are exceptions to the warrant requirement—“reasonable” warrantless searches and seizures—but these exceptions are created not by what a police officer might believe to be reasonable but by a court’s assessment of necessity. The “exceptions are ‘jealously and carefully drawn,’ and there must be ‘a showing by those who seek exemption [from the warrant requirement]...that the exigencies of the situation made that

“
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Special Agent Sauls is a legal instructor at the FBI Academy in Quantico, Virginia.

course imperative' ''(citations omitted).⁸ The Court has recognized the need to provide for emergency situations "...where the societal costs of obtaining a warrant, such as danger to law officers or the risk of loss or destruction of evidence, outweigh the reasons for prior recourse to a neutral magistrate,"⁹ but the government bears the burden of showing the warrantless action was necessary.¹⁰

DANGER TO LIFE EMERGENCY

Because of the high value our society places on life, a circumstance that has a profound impact on the reasonableness of a warrantless search or seizure is whether such action is taken to neutralize a suspected threat to human life. The U.S. Supreme Court has stated that "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."¹¹ In fact, the Court has approved a lower standard of proof—reasonable suspicion—for justifying warrantless searches based upon a perceived danger to life, so long as the action taken is no greater than necessary to eliminate the danger.¹² Therefore, where a warrantless search or seizure is made in response to a perceived threat to life, the government must be prepared to show that at the time of the action: 1) Facts were known that would cause a reasonable person to suspect that prompt action was necessary to protect human life; and 2) that the action taken was no more intrusive than necessary to eliminate the suspected threat.

Suspected Presence of Dangerous Instrumentalities

In *Michigan v. Long*,¹³ two officers patrolling a country road late at night saw a car being driven erratically and at excessive speed. Before they could stop the car, it turned onto a side road and swerved

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into a ditch.¹⁴ Mr. Long, the sole occupant of the car, met the officers at its rear. The driver's door was left open. After two requests, Long produced his driver's license, and after a second request for the vehicle's registration, he started walking toward the open driver's door. The officers followed, and before Long could enter the car, they saw a large hunting knife on the car's floorboard. Now suspecting that Long might have weapons on his person, the officers stopped him and performed a patdown search.¹⁵ This search revealed no weapons. Suspecting that there might be other weapons in the car, one officer shined his flashlight into the interior, saw a pouch protruding from beneath the center armrest, and entered the car and raised the

armrest to examine it. The pouch was open and contained marijuana. This discovery prompted Long's arrest.

In assessing the reasonableness of this warrantless entry and limited search of Long's car, the Supreme Court approved the officers' actions, noting both the factual justification for suspecting the presence of weapons and the circumscribed nature of their search.¹⁶ The Court held that where officers reasonably suspect the presence of *readily accessible* deadly weapons in a lawfully stopped vehicle, they may make a limited search of the vehicle's interior for the purpose of locating and controlling the weapons.¹⁷ In performing such a search, officers must restrict their examination to those places where readily accessible weapons might be concealed.¹⁸

The officers in *Long* were able to protect themselves and the public with a cursory search of the car's interior. Different facts will support a search with a broader scope. For example, in *Cady v. Dombrowski*,¹⁹ the Supreme Court assessed the legality of a search of the trunk of an arrestee's car that had been impounded and stored at an unsecured private lot. The car's owner was arrested for murder, and after the car had been towed from the arrest scene, the police learned facts causing them to suspect that a handgun might be in the car. Officers went to the private lot where the car was located and found a revolver (which was later determined to be the murder weapon) in the car's trunk. In approving the reasonableness of this warrantless search, the Court cited its "...concern for the safety of the

general public who might be endangered if an intruder removed a revolver from the trunk of the [unsecured, unattended] vehicle.”²⁰

The interior of a suitcase,²¹ briefcase,²² handbag,²³ or package suspected to contain a dangerous instrumentality may also be searched without a warrant where necessary to protect persons. For example, in *United States v. Sarkissian*,²⁴ officers had reason to believe that explosives were concealed in luggage arriving on a commercial airline flight. Suitcases unloaded from the plane were sniffed by a dog trained in detecting explosives and examined by X-ray. A suitcase, appearing on X-ray to contain explosives, was opened and searched. These warrantless actions were held reasonable based upon the peril posed by unsecured explosives.

In *United States v. Miller*,²⁵ a limited search of the interior of a purse was approved as a reasonable protective measure. On a day Miller’s husband was to be arraigned for a felony, she entered the courtroom with a coat draped over her arm concealing a large handbag. She sat near the rear of the courtroom along the center aisle, where her husband, who was in custody, would soon be walking. She rested her hand upon her partly opened bag. A marshal, aware of these facts and having been informed that a report had been received that Miller’s husband might attempt an escape, opened Miller’s bag further, locating a firearm. In holding the marshal’s actions reasonable under the fourth amendment, the court noted that, coupled with the report that an escape might occur, “...Miller’s con-

cealment of her handbag upon entry, the strategic seat she selected, and the convenient placement of her open bag made reasonable the belief that she might be armed.”²⁶

Suspected Presence of Information Crucial to Preserving Life

Officers occasionally are confronted with facts that cause them to reasonably suspect that information necessary to preserve the life of a person is contained in an effect. For example, in *United States v. Dunavan*,²⁷ officers responded to a report of a disabled car that had set the grass beneath it on fire. In the driver’s seat, they found Dunavan, who was “foaming at the mouth and unable to talk.”²⁸ Dunavan was

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The goal of a temporary detention of an effect is the development of facts amounting to probable cause to search that item.
” ”

rushed to the hospital, and the officers then sought to determine the cause of his malady in the hope of providing information that would aid in his treatment. In the course of this effort, they opened two briefcases belonging to Dunavan, revealing evidence of crime. This action was held to be a reasonably limited

search responsive to the emergency at hand.

DANGER OF DESTRUCTION OR REMOVAL OF EVIDENCE EMERGENCY

In addition to danger to life, the U.S. Supreme Court has also recognized the danger of destruction or removal of evidence as embodying exigent circumstances sufficient to justify warrantless action.²⁹ In regard to effects, the action permissible to prevent the destruction or removal of evidence is substantially less than that allowed to protect life. Generally, only a warrantless seizure of an effect will be allowed to preserve evidence, not a warrantless search of the effect’s contents.

The factual justification required to support a warrantless seizure of an effect to prevent the destruction or removal of evidence depends on the extent of control exercised by the government over the item. The Supreme Court has recognized two distinct types of seizures of effects: 1) Temporary detention, which requires a showing of reasonable suspicion to believe the item contains evidence or contraband; and 2) a more absolute seizure, which must be justified through a showing of probable cause to search the interior of the item for evidence or contraband.

Temporary Detention of Effects

In *United States v. Place*,³⁰ the Supreme Court approved temporary detention by the police of luggage reasonably suspected³¹ to contain illegal drugs. Place was an airline traveler who aroused the suspicion of police based upon his ap-

pearance, travel itinerary, and conduct. Officers took Place's two suitcases from him, stating that they would seek a search warrant for the bags. They then transported the suitcases from New York's La Guardia Airport to Kennedy Airport, where they were sniffed by a trained drug detection dog 90 minutes after the seizure. Although the Court approved the initial seizure of Place's suitcases, it held the seizure ultimately involved too great an interference in Place's possessory interest in his property to be reasonable. Citing the length of time of the seizure as unnecessarily long, the Court also noted "...the failure of the agents to accurately inform [Place] of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for the return of the luggage if the investigation dispelled the suspicion."³² This holding is premised, in part, on the fact that luggage frequently contains necessities to which travelers need ready access. Less lengthy temporary seizures of luggage have been upheld as reasonable.³³

Other types of effects may be detained for greater periods of time without the seizure becoming unreasonable. For example, in *United States v. Van Leeuwen*,³⁴ the Supreme Court upheld as reasonable a detention of a mailed package that lasted several hours. In *United States v. LaFrance*,³⁵ a 4-hour detention of a package shipped via Federal Express was approved. These decisions are founded on the premise that the sender or addressee of a package shipped or mailed has a substantially reduced expectation of ready access to that item.³⁶

Probable Cause Seizures

The goal of a temporary detention of an effect is the development of facts amounting to probable cause to search that item. This is accomplished through investigation performed during the period of temporary detention, and in drug cases, frequently includes the use of drug detection dogs. Once probable cause to search has been established, a more absolute seizure becomes reasonable.³⁷ Officers may take control of the effect to prevent the destruction or removal of evidence for a reasonable period

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while application is made for a search warrant.³⁸ This allows them to protect the evidence until judicial authorization may be obtained to open the item and examine its contents.

SUMMARY

Returning to the hypothetical situations presented at the beginning of this article, in each case, the officers were confronted with circumstances they believed required an immediate search. The officers

who reasonably suspected that a bomb was present in a package bound for an embassy needed to verify or dispel the suspicion as quickly as possible to prevent unnecessary danger to life. The warrantless actions they performed—the X-ray examinations followed by the opening of the package that appeared to contain explosives—were appropriate based upon reasonable suspicion and were reasonably limited to accomplish their purpose, that is, eliminating the threat posed by the explosives.

The officers investigating the suspected drug activity were also justified in performing certain prompt warrantless actions. Their initial seizure was lawful, based upon their reasonable suspicion that the package contained illegal drugs. The canine sniff was also lawful, since it was promptly accomplished. However, once probable cause to search was established, the emergency threat of removal or destruction of evidence could have been eliminated merely by taking control of the package pending issuance of a search warrant. Consequently, the examination of the contents of the package without a warrant was not a valid emergency search.³⁹

CONCLUSION

This article has set out requirements for emergency searches and seizures of effects based upon: (1) Threats to life; and (2) threats of destruction of evidence. Because the scope of warrantless action allowed under the fourth amendment differs depending upon the category of emergency threat involved, it is essential that officers considering the lawfulness of a proposed emergency search evaluate the type of

threat presented. Once that determination is made, the appropriate legal standard may be applied to the facts known. Where warrantless searches and seizures are necessary, clear awareness of the type and nature of the threat involved will also facilitate limitation of the scope of the warrantless action to only that which is necessary to eliminate the threat.

LEB

Footnotes

¹ For an excellent discussion of the legal issues associated with the use of drug detection dogs, see Kingston, "Hounding Drug Traffickers: The Use of Drug Detection Dogs," *FBI Law Enforcement Bulletin*, August 1989, pp. 26-32.

² *McDonald v. United States*, 335 U.S. 451 (1948); *Katz v. United States*, 389 U.S. 347 (1967).

³ The fourth amendment to the U.S. Constitution 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...." Effects include such personal property as packages, suitcases, handbags, etc., as well as vehicles.

⁴ For a discussion of emergency searches of premises, see Sauls, "Emergency Searches of Premises," *FBI Law Enforcement Bulletin*, Part I, March 1987, pp. 23-30, Conclusion, April 1987, pp. 24-30. For a discussion of emergency searches of persons, see Sauls, "Emergency Searches of Persons," *FBI Law Enforcement Bulletin*, January 1988, pp. 24-30.

⁵ See, e.g., *Arkansas v. Sanders*, 442 U.S. 753 (1979).

⁶ See *Katz v. United States*, *supra* note 2.

⁷ *Id.* at 357.

⁸ *Coolidge v. New Hampshire*, 403 U.S. 443, 445 (1971).

⁹ *Supra* note 5, at 759.

¹⁰ *Supra* note 2.

¹¹ *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967).

¹² *Maryland v. Buie*, 110 S.Ct. 1093 (1990); *Michigan v. Long*, 463 U.S. 1032 (1983); *Terry v. Ohio*, 392 U.S. 1 (1968). The U.S. Supreme Court has yet to decide whether reasonable suspicion is the standard by which the reasonableness of all danger to life emergency searches should be measured. The Court has stated, however, that probable cause is not always the standard by which the legality of a search should be measured, even where the search constitutes a substantial intrusion into a

person's privacy. See *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1984).

¹³ 463 U.S. 1032 (1983).

¹⁴ For a discussion of the legal issues associated with vehicle stops, see Sauls, "Traffic Stops: Police Powers Under the Fourth Amendment," *FBI Law Enforcement Bulletin*, Part I, September 1989, pp. 26-31; Conclusion, October 1989, pp. 27-32.

¹⁵ For an excellent discussion of investigative detention and frisk searches, see Hall, "Investigative Detention: An Intermediate Response," *FBI Law Enforcement Bulletin*, Part I, November 1985, pp. 25-31; Part II, December 1985, pp. 18-23; Conclusion, January 1986, pp. 23-29.

¹⁶ *Supra* note 13, at 1051.

¹⁷ *Id.*

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”**

¹⁸ *Id.* The scope of such a search includes the interior of unlocked containers that might conceal deadly weapons. See *United States v. Williams*, 626 F.2d 697 (9th Cir. 1980), *cert. denied*, 449 U.S. 1020 (1980) (purse in suspected bank robber's car that was suspected to contain a bomb); *United States v. Glenna*, 878 F.2d 967 (7th Cir. 1989) (suitcase in van suspected to contain a bomb); *United States v. Longmire*, 761 F.2d 411 (7th Cir. 1985) (purse in car suspected to contain deadly weapons); *United States v. Williams*, 822 F.2d 1174 (D.C. Cir. 1987) (tactile examination of exterior of paper bag in car suspected to contain deadly weapons).

¹⁹ 413 U.S. 433 (1972).

²⁰ *Id.* at 447.

²¹ *United States v. Sarkissian*, 841 F.2d 959 (9th Cir. 1988). See also, *United States v. Pulido-Baguerizo*, 800 F.2d 899 (9th Cir. 1986).

²² *United States v. McClinnhan*, 660 F.2d 500 (D.C. Cir. 1981). *McClinnhan* is

noteworthy for its discussion of the dilemma faced by an officer who has reasonable suspicion that a dangerous instrumentality is contained in an effect, but who has no way of verifying or dispelling his suspicions other than an examination of the interior of the effect. Seizing the effect will not neutralize the dangerous instrumentality, and no warrant can be obtained since the suspicions do not rise to the level of probable cause to search. Consequently, a prompt examination of the effect's interior is the least intrusive measure to neutralize the threat.

²³ *United States v. Miller*, 468 F.2d 1041 (4th Cir. 1972), *cert. denied*, 410 U.S. 935 (1972).

²⁴ *Supra* note 21.

²⁵ *Supra* note 23.

²⁶ *Id.* at 1045.

²⁷ 485 F.2d 201 (6th Cir. 1973).

²⁸ *Id.* at 202.

²⁹ See *Schmerber v. California*, 384 U.S. 757 (1966); *Vale v. Louisiana*, 399 U.S. 30 (1970).

³⁰ 462 U.S. 696 (1983).

³¹ For examples of facts held to constitute reasonable suspicion that contraband is present, see *United States v. Sokolow*, 109 S.Ct. 1581 (1989); *United States v. Sharpe*, 105 S.Ct. 1568 (1985).

³² *Supra* note 30, at 710.

³³ See, e.g., *United States v. Pantazis*, 816 F.2d 361 (8th Cir. 1987); *United States v. Alpert*, 816 F.2d 958 (4th Cir. 1987).

³⁴ 397 U.S. 249 (1970).

³⁵ 879 F.2d 1 (1st Cir. 1989).

³⁶ See also, *United States v. Hillison*, 733 F.2d 692 (9th Cir. 1984), approving a 9-hour warrantless seizure of a mailed package.

³⁷ *United States v. Place*, *supra* note 30.

³⁸ Although considerable latitude is generally allowed, at least some diligence in promptly applying for a search warrant is required. See *United States v. Dass*, 849 F.2d 414 (9th Cir. 1988).

³⁹ Since the officers have acted without a warrant, as a practical matter, the officers and their prosecutor should consider the potential application of other exceptions to the warrant requirement, such as Search Incident to Arrest. These considerations, however, are beyond the scope of this article.

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal adviser. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.