Search by Consent

This is the first part of a seven-part article which will appear in consecutive issues of the Bulletin.

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"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." United States Constitution, amendment IV.

Introduction

Nowhere has the law experienced more growth in the past decade than in the area of criminal procedure. In 1968, the FBI Law Enforcement Bulletin published a series of articles concerning one aspect of procedural law—consent searches. The articles, entitled "Search of Premises by Consent," were reprinted in 73 Dick. L. Rev. 44 (1968). Since that time, several Supreme Court decisions discussed hereinafter have addressed problems involving consent searches, and lower courts have likewise added to this important body of law. This training document revises and updates the prior publication.

Search by consent is an investigative technique frequently used by law enforcement officers where premises are protected against unreasonable search by the fourth amendment to the Constitution of the United States. Properly made, such searches are deemed reasonable, and therefore, in full accord with constitutional requirements. The utility of this technique and the subtle distinctions which determine its legality require that all investigators at least be familiar with its basic elements.

The starting point for a good understanding of consent searches is the fact that although the law consistently approves of this method, when legal prerequisites are satisfied, it does not favor it. The law prefers those searches made with a search warrant, for the intervention of a magistrate provides the greatest assurance the officers acted in observance of the rights protected by the fourth amendment. The warrant, lawfully issued only upon a finding of probable cause by a neutral and detached magistrate, describes the premises to be searched, shows when they may be entered, and specifies the things that may be sought. Such limitations are not as obvious in a search by consent; consequently, the tendency of the courts is to require the searching officer to present convincing proof that his conduct was reasonable throughout.

The judicial preference for search warrants has led the Supreme Court to observe that searches conducted without prior approval of a judge or magistrate are "per se unreasonable under the Fourth Amendment." *Coolidge* v. *New Hampshire*, 403 U.S. 443, 454 (1971); *Katz* v. *United States*, 389 U.S. 347, 357 (1967). Yet, while the emphasis on warrants remains strong, the Court has held consistently that a warrantless search undertaken with permission of a party authorized to consent is lawful. *Vale* v. *Louisiana*, 399 U.S. 30, 35 (1970); *Davis* v. *United States*, 328 U.S. 582 (1946). A consent search thus is an *exception to the search warrant requirement.*

Effect of *Schneckloth* v. *Bustamonte* (1973)

Prior to 1973, consent to search was also generally described as a "waiver" of the constitutional right against unreasonable search and seizure. A person from whom consent was sought had a right to refuse (and still does), a right to insist that an officer obtain a search warrant before entering his premises. Such a person was free to give up this protection, i.e., "waive" his right, but the prosecution bore a heavy burden to prove the waiver was knowing and voluntary.

In *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973), Justice Stewart, speaking for a majority of six, made plain that a consent to search is not a waiver of a constitutional right as that phrase has been frequently used by the Court. He drew a careful distinction between a right guaranteed by the Constitution, which promotes "the fair ascertainment of truth at a criminal trial," such as the right to counsel and the right against compulsory self-incrimination, and the guarantee of the fourth amendment, which protects the right of privacy, but has little to do with the integrity of the factfinding process or the fairness of trial.

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As to the former rights, the Court has held that the prosecution must demonstrate an "intentional relinquishment or abandonment of a known right or privilege" in order to prove a waiver. *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Moreover, every reasonable presumption is indulged against voluntary waiver. But consent to search is of a different order. The State need not show an "intentional relinquishment of a known right" to prove consent, and every reasonable presumption is *not* against voluntary relinquishment. *Schneckloth* v. *Bustamonte*, *supra*, at 243. Hence, consent is not a constitutional waiver in the traditional sense.

Some courts continue to characterize a consent to search as a waiver of rights. See, e.g., *United States* v. *Heisman*, 503 F. 2d 1284 (8th Cir. 1974); *People* v. *Hancock*, 525 P. 2d 435 (Colo. 1974). Such a choice of terms is not significant so long as one distinguishes, as did the Supreme Court in *Schneckloth*, between a waiver of rights going to the fairness of trial and the foregoing of a right against unreasonable search. In the following text, a consent is occasionally referred to as a waiver, but in the post-*Schneckloth* sense.

Impact of *Chimel* v. *California* (1969)

In 1969, the Supreme Court reduced the permissible scope of search made incidental to an arrest inside premises. The Court held that a search incident must be restricted to the person of the arrestee and the area under his immediate control, defining that area as one from which he could seize a weapon or destructible evidence. *Chimel* v. *California*, 395 U.S. 752 (1969).

The immediate effect of *Chimel* is apparent. It is a greatly narrowed zone of search following arrest. The indirect effect of the decision, however, may be far more important. It means that an officer who desires to search throughout premises following an arrest can no longer rely on the broad power he enjoyed prior to 1969. Today, any search pursuant to an arrest made within premises and beyond the immediate vicinity of the arrestee, absent an emergency, must be made under authority of a search warrant or with consent of a party empowered to give such consent.

Law enforcement officers of other than Federal jurisdiction who are interested in any legal issue discussed 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.

It is likely that in the years following *Chimel* more search warrants were issued and executed than ever before. While statistics are not readily available, it is probably accurate to conclude that there also has been an increase in consent searches. Where an officer has grounds to make an arrest but insufficient facts to justify issuance of a search warrant, lack of probable cause precludes a warrant search. *Chimel* bars the search incidental to arrest. The only avenue open to the officer is a consent search.

Consent—A Systematic Approach

Careful judicial scrutiny of consent searches does not call for a pessimistic approach to undertaking them. This method of search is upheld frequently where there is inquiry into all the circumstances and an effort made to mediate fairly between the interest of society in effective law enforcement and the right of the defendant to his privacy. An officer preparing to search under this authority must take four separate steps, each of which is summarized below and discussed at greater length in the material that follows. The four steps and the order in which they should be taken are:

1. Determine whether the premises are protected by the fourth amendment. Some areas, such as open fields, public places, and abandoned property, can be searched lawfully without consent, search warrant, or a contemporaneous arrest therein, and any incriminating evidence thus uncovered may be collected and used by the prosecution.
2. If the premises do enjoy the constitutional protection against unreasonable searches, identify the person then lawfully entitled to possession. The privacy guaranteed by the fourth amendment is found in the right of possession, not in the legal title to the premises.
3. Obtain from the person in possession a voluntary relinquishment of the constitutional right declared in the fourth amendment. This consent should specify the scope and intensity of the contemplated search.
4. Conduct the search within the limitations expressed or implied in the consent.

Scope of Fourth Amendment Protection

Basis of Protection—*Katz* v. *United States* (1967)

The traditional view of fourth amendment analysis was closely tied to concepts of property and tort law. Courts spoke in terms of "places" safeguarded by the Constitution. Words such as "trespass," "protected areas," and "curtilage" were frequently used to delineate the scope of protection. It could be said that the guarantee went to places, not people, and

the courts' job was to determine if the *place* was entitled to constitutional protection. This approach underwent a dramatic change in 1967.

In *Katz* v. *United States*, 389 U.S. 347 (1967), the Supreme Court held that the fourth amendment protects "people, not places." It observed:

> ". . . the premise that property interests control the right of the Government to search and seize has been discredited. . . . [I]t becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure." *Id.* at 353 (quoting from *Warden* v. *Hayden*, 387 U.S. 294, 1967).

Katz concludes that the key to constitutional protection is whether a person harbors a reasonable expectation of privacy which is infringed by police. Such an expectation applies to intangible and tangible interests, to words as well as houses, suitcases, automobiles, etc. If a person intends that a conversation, an area, or an item of personal property is private, and he does so under circumstances which make plain he means to exclude the public, the fourth amendment will protect this zone of privacy.

Katz dealt with warrantless monitoring of a private telephone conversation. But the holding of the Court goes beyond the electronic eavesdropping problem of that case. The precise scope of protection turns on whether police conduct intruded on a reasonably relied-upon privacy interest. And the difficulty, of course, is applying the concept "reasonable expectation of privacy" to a concrete, specific fact pattern. Post-*Katz* cases suggest that a practical application of that decision has been achieved by careful scrutiny of the place or area which was entered or searched by police. So while *Katz* sought to eliminate places as the principal fourth amendment consideration, it appears that subsequent court decisions either have returned to or never abandoned the analysis of "protected areas." Today, protected area translates as one in which an individual has a reasonable expectation of privacy.

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To summarize, the *Katz* decision fashioned a new and broader approach to the question of what interests are protected by the fourth amendment. Traditionally protected areas continue to enjoy the cloak of constitutional protection because individuals possess an expectation of privacy therein. But *Katz* would allow the protection to be extended even beyond such areas under the proper circumstances, i.e., where courts feel an important privacy interest should be secured.

Protected Interests—When Consent Is Required

If an officer has no search warrant and lacks authority to make a lawful entry and arrest to which a very limited search of the premises could be incident, a reasonable search for evidence requires consent if the place is one in which the possessor has a reasonable expectation of privacy, i.e., a place protected by the fourth amendment. The amendment speaks of "houses," but this word is broadly defined to include any enclosure used as a habitation, as a place of business, or as a place to store personal effects. Houses thus include:

Private Dwellings—*Wyman* v. *James*, 400 U.S. 309 (1971); *Vale* v. *Louisiana*, 399 U.S. 30 (1970); *Lewis* v. *United States*, 385 U.S. 206 (1966); *Amos* v. *United States*, 255 U.S. 313 (1921). The protection extends to adjacent grounds (curtilage), *Fixel* v. *Wainwright*, 492 F. 2d 480 (5th Cir. 1974); *United States* v. *Wolfe*, 375 F. Supp. 949 (E.D. Pa. 1974); and to buildings and structures within the curtilage, *United States* v. *King*, 305 F. Supp. 630 (N.D. Miss. 1969); *Hunsucker* v. *State*, 475 P. 2d 618 (Okla. Crim. App. 1970).

Apartments—*Camara* v. *Municipal Court*, 387 U.S. 523 (1967); *United States* v. *Trevino*, 62 F. R. D. 74 (S.D. Tex. 1974).

Hotel and Motel Rooms—*Hoffa* v. *United States*, 385 U.S. 293 (1966); *Stoner* v. *California*, 376 U.S. 483 (1964); *United States* v. *McKinney*, 477 F. 2d 1184 (D.C. Cir. 1973); *United States* v. *Fisch*, 474 F. 2d 1071 (9th Cir. 1973), cert. denied 412 U.S. 921 (1973).

Boardinghouse Rooms—*McDonald* v. *United States*, 335 U.S. 451 (1948); *Shuler* v. *Wainwright*, 341 F. Supp. 1061 (M.D. Fla. 1972), modified 491 F. 2d 1213 (5th Cir. 1974); *Smyth* v. *Lubbers*, 398 F. Supp. 777 (W.D. Mich. 1975) (college dormitory room); *City of Athens* v. *Wolf*, 313 N.E. 2d 405 (Ohio 1974) (dormitory room).

Guest rooms—*Jones* v. *United States*, 362 U.S. 257 (1960); *Burge* v. *United States*, 342 F. 2d 408 (9th Cir. 1965), cert. denied 382 U.S. 829 (1965); *Dupont* v. *United States*, 259 A. 2d 355 (D.C. App. 1969); *State* v. *Matias*, 451 P. 2d 257 (Hawaii 1969).

Offices—*Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *United States* v. *Nasser*, 476 F. 2d 1111 (7th Cir. 1973) (government office); *United States* v. *Ehrlichman*, 376 F. Supp. 29 (D.C. 1974) (doctor's office).

Business Buildings—*See* v. *City of Seattle*, 387 U.S. 541 (1967); *United States* v. *Heisman*, 503 F. 2d 1284 (8th Cir. 1974); *Youghiogheny and Ohio Coal Co.* v. *Morton*, 364 F. Supp. 45 (S.D. Ohio 1973).

Miscellaneous—*United States* v.

Gargotto, 510 F. 2d 409 (6th Cir. 1974), cert. denied 421 U.S. 987 (1975) (premises destroyed by fire); *Steigler* v. *Anderson*, 496 F. 2d 793 (3d Cir. 1974) cert. denied 419 U.S. 1002 (1974) (burning home); *Simmons* v. *Bomar*, 349 F. 2d 365 (6th Cir. 1965) (housetrailer); *United States* v. *Blok*, 188 F. 2d 1019 (D.C. Cir. 1951) (desk used by employee); *Kroehler* v. *Scott*, 391 F. Supp. 1114 (E.D. Pa. 1975) (toilet stall in public restroom); *Klutz* v. *Beam*, 374 F. Supp. 1129 (W.D.N.C. 1973) (private boat used as home); *United States* v. *Rubin*, 343 F. Supp. 625 (E.D. Pa. 1972), vacated on other grounds, 474 F. 2d 262 (3d Cir. 1973) (home temporarily vacated for remodeling purposes); *United States* v. *Small*, 297 F. Supp. 582 (D. Mass. 1969) (rental locker in subway station); *Adair* v. *State*, 298 So. 2d 671 (Ala. Crim. App. 1974) (Locked storehouse beyond curtilage); *People* v. *Overton*, 249 N.E. 2d 366 (N.Y. 1969) (locker in public school).

It should be noted that a good many of the foregoing illustrative cases were decided in the years following *Katz*. They suggest that careful consideration of the "area" searched is an approach which has survived *Katz*. Indeed, it is the manner in which *Katz* has been implemented. Other concepts which predate *Katz* and seem to have survived are those of curtilage and open fields.

Curtilage and Open Fields—Still Viable Concepts?

Curtilage is defined as the area immediately surrounding a dwelling house, necessary and habitually used for family purposes and domestic pursuits, and includes buildings located therein. The traditional view extended the protection of the fourth amendment outside the house itself to the surrounding grounds. *Rosencranz* v. *United States*, 356 F. 2d 310 (1st Cir. 1966). A companion doctrine stated that open fields, i.e., areas beyond the curtilage, did not enjoy the protection of the fourth amendment. *Hester* v. *United States*, 265 U.S. 57 (1924). Both concepts, curtilage and open fields, grew out of the property approach to constitutional protection. See *Katz, supra*. The question is whether they have survived the *Katz* decision.

Current use of the terms curtilage and open fields by the courts suggests their continued viability. See, e.g., *United States* v. *Brown*, 473 F. 2d 952 (5th Cir. 1973) (open fields); *United States* v. *Cain*, 454 F. 2d 1285 (7th Cir. 1972) (open fields); *United States* v. *Romano*, 388 F. Supp. 101 (E.D. Pa. 1975) (curtilage); *United States* v. *Swann*, 377 F. Supp. 1305 (S.D. Ga. 1974) (open fields); *Everhart* v. *State*, 337 A. 2d 100 (Md. 1975) (curtilage).

Thus the doctrines have survived, albeit in a form somewhat different than before 1967. The notion that an invisible line surrounding premises dictates application of the fourth amendment has been discarded in favor of the reasonable expectation of privacy approach. However, the reasonable expectation rule is applied in the context of the traditional concepts of curtilage and open fields. What this means simply is that a lawful possessor generally maintains an expectation of privacy in the curtilage, whereas he possesses no such expectation in open fields. See *Patler* v. *Slayton*, 503 F. 2d 472, 478 (4th Cir. 1974) (". . . in considering what people can reasonably expect to maintain as private, we must inevitably speak in terms of places.") The Supreme Court of Colorado pointed out in 1975:

> "Courts have often looked to the common-law concept of curtilage to assist in the resolution of search and seizure issues. . . . The curtilage concept, properly understood, merely restates what the Supreme Court expressed in *Katz* as to a reasonable expectation of privacy." *People* v. *Becker*, 533 P. 2d 494, 496 (Colo. 1975).

An officer who today equates curtilage with the area wherein an individual possesses a reasonable expectation of privacy will be correct in his view in the vast majority of cases. Further, the curtilage is easily identifiable and generally offers no serious problem in urban communities, at least in connection with single family dwelling houses. It is the yard. Where curtilage is more difficult to handle is in rural or sparsely populated locations. And it is probably accurate to say that courts, when confronted with the question of where the curtilage ends and open fields begin, will turn to the older pre-*Katz* decisions for an answer. See, e.g., *United States* v. *Wolfe*, 375 F. Supp. 949 (E.D. Pa. 1974).

While the foregoing decisions suggest the holding of *Katz* is not necessarily incompatible with the earlier curtilage—open fields view, officers nevertheless should understand that a broad interpretation of *Katz* could occasionally render an entry onto open fields a fourth amendment violation. Where, for example, a possessor surrounds the land with a barbed wire fence and mounts "no trespassing" signs thereon, a court might conclude that not only did he intend to keep the land private, but such expectation was objectively reasonable. The same approach could be taken with respect to closed and locked outbuildings which are remote from the dwelling house.

Abandoned Dwellings

A longstanding doctrine of search and seizure law permits the taking of property which has been abandoned, so long as the abandonment has not been caused by prior illegal police conduct. By far, the majority

of cases dealing with the abandonment issue concerns personal property—automobiles, garbage, narcotics, gambling records, weapons, etc. But premises—homes, apartments, hotel rooms, places of business—can be abandoned as well. And the general rule is clear. Abandonment of premises deprives the former possessor of the right to assert that his rights were violated by police entry, search, or seizure. He has no "standing" to object. The effect is to lift the cloak of fourth amendment protection from the abandoned premises.

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Defining abandonment is not difficult, proving it is another matter. Abandonment in the constitutional sense means the intentional and voluntary relinquishment of the reasonable expectation of privacy in premises. *United States* v. *Kahan*, 350 F. Supp. 784 (S.D.N.Y. 1972), aff'd in part, rev'd in part 479 F. 2d 290 (2d Cir. 1973), rev'd on other grounds 415 U.S. 239 (1974). Note that proof of abandonment requires voluntary relinquishment of premises *and* intent to abandon. Mere absence is not abandonment, nor is involuntary absence due to arrest and incarceration. *United States* v. *Robinson*, 430 F. 2d 1141 (6th Cir. 1970). Similarly, verbal notice to vacate given to a tenant delinquent in rental payments does not necessarily establish abandonment. *United States* v. *Botelho*, 360 F. Supp. 620 (D. Hawaii 1973).

In order to prove abandonment, the prosecution must be prepared to show the intent of the former possessor at the time he abandoned. Courts apply a totality of circumstances test in resolving the problem. And because the relinquishing party seldom announces an intent to abandon, his state of mind must be proven circumstantially. Hence, any evidence bearing on the fact of relinquishment of the premises can be considered—present whereabouts of former possessor, circumstances of his departure, duration of his absence, condition of vacated premises, remarks made prior to or after departure, provisions of rental agreements, etc.

The leading Supreme Court decision concerning abandonment is *Abel* v. *United States*, 362 U.S. 217 (1960). While the Court discussed abandonment only in the context of personal property discarded in a wastepaper basket located in the defendant's hotel room, the following language of the opinion concerning the search of the room itself is noteworthy:

> "No pretense is made that this search by the F.B.I. was for any purpose other than to gather evidence of crime. . . . As such, however, it was entirely lawful, although undertaken without a warrant. This is so for the reason that at the time of the search petitioner had vacated the room. The hotel then had the exclusive right to its possession, and the hotel management freely gave its consent that the search be made." *Id.* at 241.

Other Federal courts have likewise concluded that premises can be abandoned. One of the leading cases is *Parman* v. *United States*, 399 F. 2d 559 (D.C. Cir. 1968), cert. denied 393 U.S. 858 (1968), where it was held that a murder defendant abandoned his apartment, as a matter of fact and of law, when he fled out of State, registered under an assumed name at a tourist home, went to a third State, adopted an alias, rented another apartment, sought new employment, and purchased furniture and clothing. Judge (now Chief Justice) Burger observed: ". . . a valid finding of abandonment deprives Appellant of standing to assert a claim that the items of evidence in question were improperly 'seized'." *Id.* at 565. He also rejected the argument that abandonment cannot be retroactively justified where officers at the time of entry have no reason to believe the premises abandoned, but such facts become apparent through later investigation.

More recently, in *United States* v. *Parizo*, 514 F. 2d 52 (2d Cir. 1975), it was held that when a motel guest's term of occupancy expires, the guest loses his exclusive right to privacy in the room, and the manager then has the right to enter and may consent to the search of the room. Lawful possession thus reverts to the owner or manager, and an officer seeking access to such a room should obtain consent from that party. See also *United States* v. *Croft*, 429 F. 2d 884 (10th Cir. 1970) (guest completely loses right of privacy in motel when rental period expires); *Hayes* v. *Cady*, 500 F. 2d 1212 (7th Cir. 1974), cert. denied 419 U.S. 1058 (1974) (reversion to landlady of right to consent); *State* v. *Maxfield*, 472 P. 2d 845 (Ore. App. 1970) (abandonment of rental house).

Several important points emerge from the preceding cases and discussion: (1) Abandoned premises are not protected by the Constitution as to the former possessor; (2) abandonment turns on the intent of the vacating party; (3) intent will be considered in light of all surrounding circumstances; (4) consent to enter or search need not be obtained from the abandoning party, though police would be well-advised to get such authority from one to whom lawful possession has reverted; and (5) where exigent circumstances do not exist, or where premises can be temporarily secured, a search warrant should be obtained prior to entry.

(Continued Next Month)

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