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## THE SUPREME COURT, WARRANTLESS SEARCHES, AND EXIGENT CIRCUMSTANCES

RICHARD A. WILLIAMSON\*

Mr. Justice Powell recently wrote: "There is no more basic constitutional rule in the Fourth Amendment area than that which makes a warrantless search unreasonable except in a few 'jealously and carefully drawn' exceptional circumstances."<sup>1</sup> Expressions of agreement with Justice Powell's observation are not difficult to locate for almost every contemporary Justice.<sup>2</sup> It is somewhat anomalous, therefore, to find that once one moves beyond mere generalizations as to the meaning of the fourth amendment in respect to the significance of a search warrant, there has been very little agreement among the Justices as to the proper approach to the solution of warrantless search cases.<sup>3</sup> Indeed, one of the principal sources of difficulty with the Supreme Court's warrantless search cases has been the lack of a working majority espousing a consistent and logical approach to the solution of the various problems facing the courts and law enforcement officers.<sup>4</sup>

The basic area of disagreement among the Justices does not lie in the assertion that warrantless searches are presumptively invalid. Rather, the members of the Court have historically disagreed as to the factors that must exist in order to justify classifying the situation as sufficiently "exceptional" as to dispense with the need for a warrant. The controversy has,

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<sup>1</sup> *United States v. Watson*, 423 U.S. 411, 427 (1976) (concurring opinion).

<sup>2</sup> *United States v. Robinson*, 414 U.S. 218, 242 (1973) (Marshall, J., dissenting); *Cady v. Dombrowski*, 413 U.S. 433, 439, 451 (1973) (Rehnquist, J.) (Brennan, J., dissenting); *Katz v. United States*, 389 U.S. 347, 357 (1967) (Stewart, J.); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967) (White, J.), *quoted with approval in* *G.M. Leasing Corp. v. United States*, 429 U.S. 338, 352-53 (1977) (Blackmun, J.). *But see* the dissenting opinion of Justice Black in *Coolidge v. New Hampshire*, 403 U.S. 443, 509-10 (1971) (Black, J., concurring and dissenting): "The relevant test is...the reasonableness of the seizure under all the circumstances. The test of reasonableness cannot be fixed by *per se* rules; each case must be decided on its own facts."

<sup>3</sup> See notes 10-15 *infra* and accompanying text.

<sup>4</sup> *Cf.* Dworkin, *Fact Style Adjudication and the Fourth Amendment: The Limits of Lawyering*, 48 IND. L.J. 329 (1973). ("[T]he fourth amendment cases are a mess.") The state of the Court's warrantless search cases might be compared with the Court's "political question" doctrine as it existed at the time *Baker v. Carr*, 369 U.S. 186 (1962), was decided. In attempting to expose the attributes of the doctrine in *Baker*, Justice Brennan described the Court's prior political question cases as involving "attributes which, in various settings, diverge, combine, appear and disappear in seeming disorderliness." *Id.* at 210.

for the most part, involved the two major exceptions to the warrant requirement—search incident to arrest and the so-called “automobile exception.”<sup>5</sup> In the case of each exception, perceived exigencies—fear for the safety of the arresting officer and possible loss or destruction of evidence in the case of search incident to arrest,<sup>6</sup> and preservation of evidence in the case of the search of an automobile<sup>7</sup> (given the mobility of the item to be searched)—have been articulated as the justifications for dispensing with the need for a warrant prior to the search. The utilization of such a standard has led to a number of cases in which defendants have challenged the finding of the existence of exigent circumstances in their particular cases, even though they involved a search incident to arrest or an automobile search. In the cases involving a search incident to arrest, the defendants have attempted to show, as a matter of fact, that the exigencies of fear for the safety of the arresting officer and/or fear of possible destruction or loss of evidence were not present.<sup>8</sup> In the automobile search cases the same type of argument has been made: that is, even though an automobile was searched, possible loss or destruction of evidence was not a realistic fear in fact sufficient to dispense with the need for a warrant.<sup>9</sup>

On one side, which apparently includes a majority of the current members of the Supreme Court,<sup>10</sup> are those who accept the view that the exceptions to the warrant requirement are based generally upon the supposed existence of “exigencies” necessitating the need for prompt action, *i.e.*, a warrantless search. However, they would refuse to permit an inquiry in an individual case concerning the existence, in fact, of “exigencies” so

<sup>5</sup> Other so-called “exceptions” to the warrant requirement would include (1) hot pursuit, (2) plain view, (3) emergency situations, and (4) consent. *See* *United States v. Mapp*, 476 F.2d 67, 76 (2d Cir. 1973).

<sup>6</sup> *Chimel v. California*, 395 U.S. 752, 763 (1969). For a discussion of the right to search incident to arrest, *see* Aaronson & Wallace, *A Reconsideration of the Fourth Amendment Doctrine of Search Incident to Arrest*, 64 GEO.L.J. 53 (1975).

<sup>7</sup> *Chambers v. Maroney*, 399 U.S. 42, 51 (1970). There are, however, two additional grounds upon which searches of automobiles have been justified. One relates to the inherent difference between automobiles and other constitutionally protected areas. *See* text accompanying note 130 *infra*. The other justification relates to the frequency of police contact with automobiles. *See* text accompanying note 124, *infra*. For a discussion of the subject of warrantless automobile searches, *see* Note, *Warrantless Searches and Seizures of Automobiles*, 87 HARV. L. REV. 835 (1974).

<sup>8</sup> *See, e.g.*, *United States v. Robinson*, 414 U.S. 218 (1973), and text accompanying notes 74-84 *infra*.

<sup>9</sup> *See, e.g.*, *Chambers v. Maroney*, 399 U.S. 42 (1970), and text accompanying notes 94-102 *infra*.

<sup>10</sup> *See* Weinreb, *Generalities of the Fourth Amendment*, 42 U. CHI. L. REV. 47, 77 (1974) (“All one can say is that, for the moment, the see-saw between the two clauses of the [fourth] amendment is tilted away from the warrant clause.”) *See generally* *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States v. Edwards*, 415 U.S. 800 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970).

long as the facts generally supported the inclusion of the case within one of the exceptions.<sup>11</sup> Although this side has not launched an all-out attack on the fundamental concept requiring the need for "exceptions" in the first instance (that is, that warrantless searches are presumptively invalid), there is some reason to believe that argument over the significance of exigencies and exceptions is simply a prelude to the coming of a conflict of greater importance—an attempt to break off from the long-standing presumption that warrantless searches are per se invalid in favor of a practice of judging each warrantless search by a general "reasonableness" standard.<sup>12</sup>

On the other side there has been a substantial minority<sup>13</sup> on the Supreme Court who view the per se rule and the application of exceptions (based on the existence of exigent circumstances) as requiring a two-step inquiry in each case. They accept the premise, as do their counterparts, that circumstances may justify warrantless searches. They also accept the premise that the circumstances justifying warrantless searches tend to be recurring and create general categories of cases which make possible a definitional categorization of exceptions. However, once the facts bring a case into one of the general categories of exceptions, they would permit a further inquiry into the question of whether the circumstances (exigencies) in fact existed in the particular case under consideration.<sup>14</sup> Unlike their counterparts, they express no basic disagreement with the fundamental concept that warrantless searches are per se invalid.<sup>15</sup>

The disagreement involves, in part, a difference of opinion among members of the Court concerning the proper weight to be given the value of providing clearly defined guidelines for law enforcement officials in fourth amendment decisions. In one sense, those who advocate a restricted view of the significance of exigent circumstances and who would refuse a case-by-case analysis of circumstances justifying warrantless searches have

<sup>11</sup> See, e.g., *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States v. Edwards*, 415 U.S. 800 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>12</sup> *Id.* See also text accompanying notes 81-82 *infra*.

<sup>13</sup> Justices Brennan, Stewart, and Marshall have consistently been at odds with the majority in a number of recent warrantless search cases. See generally *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *United States v. Edwards*, 415 U.S. 800 (1974); *Chambers v. Maroney*, 399 U.S. 42 (1970).

<sup>14</sup> Perhaps the clearest articulation of the position of Justices Brennan, Stewart, and Marshall is contained in Justice Stewart's plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 473-84 (1970).

<sup>15</sup> *United States v. Edwards*, 415 U.S. 800, 811 (1975) (Stewart, J., dissenting); "The [majority] says that the relevant question is 'not whether it was unreasonable to procure a search warrant, but whether the search itself was reasonable.' Precisely such a view, however, was explicitly rejected in [*Chime*], where the Court characterized the argument as 'founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct'...."

adopted what appears to be a contradictory position. They argue that a case-by-case analysis of the existence of exigent circumstances would require law enforcement officials to make difficult, on-the-spot decisions.<sup>16</sup> The chances of error in judgment would be ever present, thus the possibility of exclusion of evidence seized increased in a number of cases. However, to the extent they appear to be moving toward a "reasonableness" approach to decision making, they create an even greater possibility for error at the law enforcement level. Under the *per se* rule, law enforcement officials were relatively certain that a warrantless search would run into difficulty unless falling within one of the exceptions. Without a *per se* rule, more warrantless searches may be sustained in the Supreme Court, but the negative certainty of the *per se* rule will be absent.

Those who stand by the *per se* rule and who advocate a case-by-case approach to warrantless search issues deal with the "need for clarity" argument in two ways. First, they reject the contention that definitive guidelines for law enforcement officials are a value of overriding concern.<sup>17</sup> Second, they contend that the clarity the majority seeks, which is apparently in part responsible for the rejection of a case-by-case analysis approach, is illusory. Uncertainty will continue to exist, they argue, in such fundamental areas as the factual determination of whether, for example, a custodial arrest for a traffic offense was effectuated for legitimate reasons or, rather, as a pretext for searching the arrestee.<sup>18</sup>

This article will focus on a critical examination of the system of analysis of fourth amendment warrant issues that turns on the existence or nonexistence of exigent circumstances. The inherent weaknesses of the system will be identified with reference to recent Supreme Court decisions. The proposition will be advanced that the use of exigent circumstances as the touchstone for resolution of fourth amendment warrant issues should be discarded, except for a very narrow class of cases. Finally, several alternative theories of analysis will be proposed which attempt to balance the realistic needs of law enforcement officials with the fundamental value at the heart of the fourth amendment—protection of the privacy interest of the individual.

Before proceeding to an analysis of the cases, it is instructive to explore briefly the justification and development of the concept underlying the need for "exceptions" in the first instance: that fourth amendment

<sup>16</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>17</sup> *United States v. Robinson*, 414 U.S. 218, 242 (1973) (Marshall, J., dissenting); "The majority's fear of overruling the 'quick *ad hoc* judgment' of the police officer is...inconsistent with the very function of the Amendment—to ensure that the quick *ad hoc* judgments of the police officers are subject to review and control by the judiciary."

<sup>18</sup> *Id.*

values are best preserved by a system that presumptively requires the utilization of search warrants except where a good excuse can be found.

### *The Warrant Requirement—Foundation*

The underlying basis for the preference for warrants appears to be twofold. The first justification relies on a functional interpretation of the language of the fourth amendment.<sup>19</sup> The amendment proscribes "unreasonable searches and seizures" in one clause and sets forth the prerequisites for a valid warrant in the second clause. Those who support the position favoring use of warrants contend that if all warrantless searches and seizures were judged solely with reference to their "reasonableness," there would be no incentive to make use of the warrant procedure. Such an interpretation of the fourth amendment, the argument concludes, would reduce the warrant clause to surplusage.<sup>20</sup> The second argument urged in support of the justification for the preference for warrants is really but a corollary of the first. It relates to the function of the warrant process itself. The argument assumes that the insertion of an independent authority,<sup>21</sup> not responsible for ferreting out the criminal element, who must pass on the constitutional justification for a search (probable cause), will operate as a limitation on the natural temptation for law enforcement officials to exceed the scope of their authority.<sup>22</sup> To this extent, a system of warrants, which places the independent magistrate in a

<sup>19</sup> U.S. CONST. amend. IV 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, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

For a discussion of the relationship between the two clauses, see Player, *Warrantless Searches and Seizures*, 6 GA. L. REV. 269 (1971).

<sup>20</sup> White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 172. See *Weeks v. United States*, 232 U.S. 383, 393-94 (1914).

<sup>21</sup> In *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), the Court held that the "issuing magistrate must meet two tests. He must be neutral and detached, and he must be capable of determining whether probable cause exists for the requested arrest or search." *Id.* at 350. The Court went on to hold that the requisite detachment would be met so long as the magistrate "is removed from the prosecutor or police and works within the judicial branch subject to supervision of the... judge." *Id.* at 351. In a subsequent case, the Court invalidated a warrant process that paid a justice of the peace five dollars for each warrant issued, finding such a system to be at odds with the requirement that warrants be issued by a "neutral judicial officer." *Connally v. Georgia*, 429 U.S. 245 (1977). Earlier, the Court had invalidated a search warrant issued by the State Attorney General (who was in charge of the investigation and later prosecuted the case) because he was "not the neutral and detached magistrate required by the Constitution." *Coolidge v. New Hampshire*, 403 U.S. 443, 452 (1970).

<sup>22</sup> *Johnson v. United States*, 333 U.S. 10, 13-14 (1948) (Jackson, J.): "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law en-

position of halting an intrusion before the fact, provides maximum protection for fourth amendment values. This argument assumes that the exclusionary rule<sup>23</sup> is not an adequate safeguard to an individual whose privacy has been disturbed without sufficient justification. Because there is no satisfactory way to restore the status quo once the intrusion has occurred (the exclusionary rule prohibiting only the use of items or information unlawfully obtained), every precaution must be taken before the fact to assure that sufficient lawful justification for the search exists.

The dual justification for the preference for warrants is subject to at least three valid criticisms. The first relates to a proper interpretation of constitutional history. According to Professor Telford Taylor, those "who have viewed the Fourth Amendment primarily as a requirement that searches be pursuant to warrants have stood the amendment on its head."<sup>24</sup> Professor Taylor argues that the Framers were concerned with general warrants and writs of assistance—overreaching warrants—not about warrantless searches.<sup>25</sup> A strict interpretation of constitutional history, he argues, leads to the conclusion that warrantless searches should be governed by a "reasonableness" standard. The second valid criticism of the preference for warrants relates to its embodiment in all-inclusive form—that warrantless searches are per se improper, subject to narrowly drawn exceptions based upon the existence of exigent circumstances. There is an alternative to a per se rule that would preserve the concept of warrants as a limiting factor on police activities. The Court could adopt a position that the nonexistence of a warrant in situations where a warrant could have been obtained without jeopardizing the safety of the officers or others, or realistically risking the possible destruction or loss of the items sought, would be a persuasive (rather than conclusive) factor in a finding of "unreasonableness."<sup>26</sup> The final criticism of the preference for warrants is based upon a realistic appraisal of the role of the magistrate. The justification for encouraging the utilization of the warrant process assumes that the

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forcement the support of those usual inferences which reasonable men draw from evidence. Its protection consists in requiring that the 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." *But see* *United States v. Chadwick*, 433 U.S. 1 (1977): "Once a lawful search has begun, it is also far more likely that [the search] will not exceed proper bounds when it is done pursuant to a judicial authorization 'particularly describing the place to be searched and the persons or things to be seized.' Further, a warrant assures the individual whose property is searched or seized of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Id.* at 9.

<sup>23</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).

<sup>24</sup> T. TAYLOR, *TWO STUDIES IN CONSTITUTIONAL INTERPRETATION* 46-47 (1969).

<sup>25</sup> *Id.* at 24-41.

<sup>26</sup> *See* *Vale v. Louisiana*, 399 U.S. 30, 40 (1970) (Black, J., dissenting).

magistrate operates as a meaningful limitation, that is, one that will halt unjustified police intrusions before they occur. The limited empirical evidence that exists suggests that the independent magistrate does not effectively screen the unjustified searches at the warrant application stage.<sup>27</sup>

### *Historical Development of the Per Se Rule and Exceptions*

It is impossible to identify an individual case where the Supreme Court first accepted a definitive position that warrantless searches were per se invalid, subject to well-delineated, limited exceptions based on the existence of exigent circumstances. Mr. Justice Frankfurter, perhaps more than any other individual Justice, was responsible for the development of the concept of a per se position with respect to warrantless searches. He was also primarily responsible for the first clear articulation of the reasoning and logic supporting various exceptions to the per se rule. In his strong dissents in *Harris v. United States*<sup>28</sup> and *United States v. Rabinowitz*,<sup>29</sup> Justice Frankfurter laid the groundwork for the modern approach to warrantless search cases.

Prior to the emergence of the per se rule in the 1960's, and apart from the dissenting opinions of Justice Frankfurter, early fourth amendment cases involving warrantless searches appear to have been decided by the circuitous process of defining categories of cases based on the extrinsic factual setting of the search where a warrantless search would be viewed as presumptively valid. By a process of exclusion, having exhausted categories of cases where warrantless searches were permitted, the Court appears to have backed into the position that all other searches would be viewed as invalid when undertaken without warrant. It is somewhat

<sup>27</sup> Miller & Tiffeny, *Prosecutor Dominance of the Warrant Decision: A Study of Current Practices*, 1964 WASH. U.L.Q. 1. One commentator has stated: "What empirical studies are available suggest that the Court's oft-stated preference for warrants is based more upon myth than fact. Arrest warrants are commonly issued in the absence of any meaningful participation by a judicial officer." Lafave, *Warrantless Searches and the Supreme Court: Further Ventures into the "Quagmire"*, 8 CRIM. L. BULL. 9, 27 (1972).

A rejoinder suggested by another commentator would, nevertheless, support the warrant process because of the following factors: First, one desirable effect of the warrant process is to freeze the story of the affiant well ahead of the search or arrest. Second, it is by no means realistic to assume that magistrates are never "independent" and, to the extent they are, certain impermissible intrusions will be prevented. Third, to the extent the magistrate is committed to the police view of the criminal process, he still has a valid function to play: to advance the ultimate success of the intrusion by taking pains to see that the requirements of the warrant clause are met. Finally, to require the officer to have a warrant is to remain at least that symbolic step away from the police state. White, *The Fourth Amendment as a Way of Talking About People: A Study of Robinson and Matlock*, 1974 SUP. CT. REV. 165, 181 n.34.

<sup>28</sup> 331 U.S. 145, 155 (1947).

<sup>29</sup> 339 U.S. 56, 68 (1950).



strange that the Court did not initially adopt a posture which would justify this type of inquiry, that is, that the nonexistence of a warrant was a decisive factor in each case unless a valid excuse could be found. This process of viewing warrantless searches with regard to the extrinsic setting is probably attributable in part to the manner in which the first serious challenge to a warrantless search was decided by the Court—the case of *Weeks v. United States*.<sup>30</sup>

In *Weeks* there was little discussion concerning the proper relationship between the “reasonableness” clause of the fourth amendment and the amendment’s requirements regarding warrants. Instead, the Court viewed the case with reference to the extrinsic factual setting of the activity from the point of view of what kind of case it was, as well as what kind of case it was not. Thus Mr. Justice Day’s articulation of the issue in the following terms:

What, then, is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidence of crime....The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of the premises.<sup>31</sup>

The process of definitional categorization of cases based on the extrinsic setting in which the warrantless search took place was continued ten years later in *Carroll v. United States*.<sup>32</sup> *Carroll* involved the constitutionality of an act of Congress purporting to validate warrantless seizures of contraband liquor in the process of being transported by automobile or other means of conveyance. The Court phrased the issue in *Carroll* in terms of whether it was consistent with the fourth amendment for Congress to distinguish between the necessity of a warrant in the “searching of private dwellings and in that of automobiles and other road vehicles.”<sup>33</sup> Concluding that the fourth amendment prohibited only “unreasonable” searches and seizures, the Court went on to find a constitutional difference

between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a

<sup>30</sup> 232 U.S. 383 (1914).

<sup>31</sup> *Id.* at 392-93.

<sup>32</sup> 267 U.S. 132 (1925).

<sup>33</sup> *Id.* at 147.

ship, motor boat, wagon or automobile...where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.<sup>34</sup>

The status of the scope and meaning of the fourth amendment immediately following *Carroll* can be summarized as follows: Warrantless searches of the *person* following arrest were lawful. Support for this proposition was the right "always recognized" under English and American law. Warrantless searches of automobiles and other means of conveyance were also lawful, although the justification was somewhat unclear. It is not at all unreasonable to read *Carroll* as resting in part on a perceived difference of constitutional significance between the inherent values of the fourth amendment regarding the sanctity of a man's home as opposed to his automobile. This reasoning, which might in modern times be described as some inherent concept of a greater right of privacy in one's home, has recently played a significant role in automobile search cases, as will be more fully developed later.<sup>35</sup> However, it is also clear that the modern cases rely in part on the "mobility" aspects of the reasoning set forth in *Carroll* as the justification for permitting a warrantless search of an automobile.<sup>36</sup> Finally, after *Carroll* it was reasonable to assume that a warrantless search of a dwelling would be viewed as per se unlawful.

In 1925, the Court decided a case, *Agnello v. United States*,<sup>37</sup> which represented a major turning point in the development of search and seizure doctrine. In *Agnello*, the Court reaffirmed a principle first set forth in *Weeks*, namely, that standing alone, a warrantless search of a dwelling would be presumptively unlawful. More importantly, however, the Court in *Agnello* made three other significant points. First, the Court recognized an exception to the general proposition that a dwelling may not be lawfully searched without a warrant. The Court stated: "[I]t has always been assumed that one's house cannot lawfully be searched without a search warrant, *except* as an incident to a lawful arrest therein."<sup>38</sup>

The second major point set forth in *Agnello* related to the practical justification for the right to search incident to arrest: "to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody...."<sup>39</sup> The final point made in *Agnello* was that the right to search incident to arrest had a temporal and/or geographic limitation.<sup>40</sup> The exact

<sup>34</sup> *Id.* at 153.

<sup>35</sup> See text accompanying note 130 *infra*.

<sup>36</sup> See text accompanying note 141 *infra*.

<sup>37</sup> 269 U.S. 20 (1925).

<sup>38</sup> *Id.* at 32 (emphasis added).

<sup>39</sup> *Id.* at 30.

<sup>40</sup> *Id.* at 30-31.

nature of the limitation was unclear in *Agnello* because the search in question was not of the dwelling where the arrest took place and was effectuated at a time when "the conspiracy was ended and the defendants were under arrest and in custody elsewhere."<sup>41</sup> The Court did not purport to link the articulated justification for the right to search incident to arrest to the limitation announced. Thus, following *Agnello*, it was uncertain as to the basis for the geographic and/or temporal limitation of the right to search incident to arrest. One possible explanation for the limitation would be that the right to search a dwelling without a warrant incident to arrest was tied directly to a lawful entry in the first instance. If the police had a right to enter without a warrant to effectuate an arrest, a further intrusion in the nature of a search of the dwelling was simply not of constitutional significance. When the arrest did not take place in a dwelling, there was no lawful justification for entry in the first instance. The limitation in *Agnello* can also be explained with reference to the justification for the right to search incident to arrest, namely, that exigencies in the nature of an immediate need to search for weapons and evidence dispense with the need for a warrant. Those exigencies do not exist with respect to locations far removed from the place where the arrest takes place nor do they exist at a time following arrest when the accused is safely in custody. Thus, the justification for the right to search also operated to limit the temporal and geographic scope of the right.

Beginning in 1947, under the leadership of Justice Frankfurter, the Court began the final step toward the articulation of a per se rule. In *Harris v. United States*,<sup>42</sup> a 5-4 majority of the Court upheld the warrantless search of a four-room dwelling under the rationale that the officers, having properly arrested the defendant on the premises, were entitled to search the entire premises under the defendant's control.<sup>43</sup> *Harris*, of course, represented the high-water mark of the scope and intensity of the search incident to arrest exception.<sup>44</sup> The majority opinion contributed little to the direction of fourth amendment decisions other than an expansive reading of the scope of the right to search incident to arrest. The *Harris* decision was significant, however, because of the strong dissent of Justice Frankfurter. After tracing the constitutional history leading to the passage of the fourth amendment, Frankfurter concluded that the "unreasonableness" prohibition of the amendment was not enacted to provide a standard under which particular searches were to be judged.<sup>45</sup> In-

<sup>41</sup> *Id.* at 31.

<sup>42</sup> 331 U.S. 145 (1947).

<sup>43</sup> *Id.* at 151.

<sup>44</sup> See text accompanying note 73 *infra*.

<sup>45</sup> *Harris v. United States*, 331 U.S. 145, 162 (1947).

stead, he argued that “unreasonableness” had to be viewed in the context of the “reason” for the adoption of the amendment, namely, “with minor and severely confined exceptions, inferentially a part of the Amendment, *every search and seizure is unreasonable when made without a magistrate’s authority expressed through a validly issued warrant.*”<sup>46</sup> Later in his dissenting opinion, Justice Frankfurter expounded on the nature of those “minor and severely confined exceptions”:

The only exceptions to the safeguard of a warrant...are those which the common law recognized as inherent limitations of the policy which found expression in the Fourth Amendment—where circumstances preclude the obtaining of a warrant (as in the case of movable vehicles), and where the warrant for the arrest of a person carries with it authority to seize all that is on the person, or is in such open and immediate physical relation to him as to be in a fair sense, a projection of his person.<sup>47</sup>

The nature of Frankfurter’s dissent is significant. He apparently viewed the search in *Harris* as unlawful *not* because the particular search extended in scope and intensity beyond the limits of any *exigency* inherent in the circumstances of lawful arrest, but because of a more general philosophy that search incident to arrest unlimited in scope and intensity would effectively eliminate any protection afforded by the warrant process. Lawful entry in the first instance, he argued, could not be used as a predicate for further unrestrained rummaging through private papers and effects.<sup>48</sup> At this point, Frankfurter had not articulated any specific justification of the right to the search incident to arrest. No mention was made in the dissent of the exigency of the need to search for weapons or to search for evidence within immediate control of the accused so as to prevent its destruction. On the other hand, Frankfurter’s one reference to the lawfulness of a warrantless automobile search is obviously based on the urgency of the situation.

Frankfurter further expanded on this theory, dissenting three years later in *United States v. Rabinowitz*.<sup>49</sup> In *Rabinowitz*, Frankfurter for the first time made it clear that his view of the right to search incident to arrest was an exception based upon necessity. The necessity, according to Justice Frankfurter, was twofold: “[F]irst, in order to protect the arresting officer

<sup>46</sup> *Id.* (emphasis added).

<sup>47</sup> *Id.* at 168.

<sup>48</sup> *Id.* at 164.

<sup>49</sup> 339 U.S. 56 (1950). In *Rabinowitz*, the defendant was arrested at his place of business pursuant to a valid arrest warrant. Following the arrest, the officers searched the one-room office for about an hour and a half. In upholding the search as valid because incident to the arrest, the majority held that it was not “unreasonable” for officers to search the entire premises under the control of the person arrested. *Id.* at 61.

and to deprive the prisoner of potential means of escape...and, secondly, to avoid destruction of evidence by the arrested person.”<sup>50</sup> Justice Frankfurter went on to use the necessity justifying the right to limit the intensity and scope of the right—only the person and “those immediate physical surroundings which may fairly be deemed to be an extension of his person” could be lawfully searched without a warrant.<sup>51</sup>

On the more general right to search without a warrant, Justice Frankfurter was even more emphatic in arguing that warrants were required except when there was “good excuse” for not getting one.<sup>52</sup> The existence of an opportunity to obtain a warrant was a relevant factor in every case, according to Frankfurter.<sup>53</sup> Frankfurter’s reference in *Rabinowitz* to the relevance of police “opportunity to secure a warrant” was, of course, directly rejected by the majority opinion.<sup>54</sup>

It is instructive at this point to examine a series of three cases decided by the Court during the time span between *Harris* in 1947 and *Rabinowitz* in 1950. The three cases emphasize the struggle within the Court during this period to develop consistency with respect to fourth amendment warrant principles.

In *Johnson v. United States*,<sup>55</sup> a 5-4 majority invalidated the warrantless search of a dwelling in an opinion in which Mr. Justice Jackson indicated that only “exceptional circumstances” would suffice to dispense with the need for a warrant.<sup>56</sup> Without any detailed explanation or authority, Justice Jackson identified three situations that would meet such a standard: (1) a suspect fleeing or likely to take flight; (2) the search of a movable vehicle; and (3) when the items sought were threatened with removal or destruction.<sup>57</sup> Later the same year Mr. Justice Douglas, writing the majority opinion in *McDonald v. United States*,<sup>58</sup> invalidated a warrantless search of a dwelling, reiterating the holding in *Johnson* that “exceptional circumstances” were the only basis for by-passing the warrant

<sup>50</sup> *Id.* at 72.

<sup>51</sup> *Id.* at 72-73.

<sup>52</sup> *Id.* at 83.

<sup>53</sup> *Id.* at 84.

<sup>54</sup> *Id.* at 65-66.

<sup>55</sup> 333 U.S. 10 (1948). In *Johnson*, the police made a warrantless entry into the defendant’s room. Although the majority opinion acknowledged that the police might have had information sufficient to support the issuance of a search warrant, they nevertheless invalidated the search on grounds that no reason was offered for not obtaining a warrant except the inconvenience to the officers and the slight delay necessary to prepare the papers and present the evidence to a magistrate. *Id.* at 12-15.

<sup>56</sup> *Id.* at 14-15.

<sup>57</sup> *Id.* at 15.

<sup>58</sup> 335 U.S. 451 (1948).

process.<sup>59</sup> The majority opinion added nothing to Justice Jackson's vague articulation of the kind of cases that would fit within such a definition. Justice Douglas' opinion in *McDonald* did, however, touch on one point of significance, a point raised by Justice Frankfurter's earlier dissent in *Harris*. In support of the Court's holding that "exceptional circumstances" were not present, Justice Douglas specifically referred to the absence of facts in the record showing that the delay inherent in use of the warrant process would have jeopardized the efficacy of the search.<sup>60</sup>

The point raised by Justice Douglas in *McDonald* was obvious. If the validity of warrantless searches was to be determined with reference to concepts of necessity and urgency, the Court had to define the time frame that would be examined in deciding whether such circumstances existed in any particular case. It is obvious that in every case the instant immediately preceding the search could be viewed by reasonable men to justify a sense of urgency given the fact that suspects or occupants of the premises or vehicles to be searched are alerted to the presence and intent of the police. In many cases, however, the police might have had an opportunity to secure a warrant without necessarily jeopardizing the efficacy of the search, in which case, the necessity or urgency at the instant immediately preceding the search would be a police-created emergency.

It was on this point that the Court had, prior to *McDonald*, decided the much maligned case of *Trupiano v. United States*.<sup>61</sup> Although *Trupiano* was quickly overruled by *Rabinowitz*,<sup>62</sup> it did raise and decide the very point (albeit in different form) which was to continue to plague the Court for the next twenty-five years. It is significant to recall that at the time *Trupiano* was decided there had only been vague reference in prior cases to the concept that warrantless searches were per se improper absent exceptional circumstances.<sup>63</sup> In addition, the search incident to arrest concept at the time of *Trupiano* had been given a very expansive reading in *Harris* with respect to the geographic scope of the search right.<sup>64</sup> The Court in *Trupiano* faced squarely the issue of the relationship between what was later to be specifically defined as the foundation for the right to search incident to arrest—the need for prompt action—and the factual reality in the individual case under consideration by the Court. For in *Trupiano* it was clear that the police had ample opportunity to secure a search warrant

<sup>59</sup> *Id.* at 454.

<sup>60</sup> *Id.* at 455.

<sup>61</sup> 334 U.S. 699 (1948).

<sup>62</sup> *United States v. Rabinowitz*, 339 U.S. 56 (1950). "To the extent [*Trupiano*] requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled." *Id.* at 66.

<sup>63</sup> See text accompanying notes 53-57 *supra*.

<sup>64</sup> See text accompanying note 42 *supra*.

prior to entry for purposes of effectuating the arrest.<sup>65</sup> The Court in *Trupiano* concluded that even though the entry for the purpose of making a warrantless arrest was lawful, the entry for such purpose could not serve as the basis for a subsequent search incident to arrest when it was practicable to secure a search warrant beforehand.<sup>66</sup> The significance of *Trupiano* was that such limitation applied, even though the scope of the search was within spatial limits, as then defined, of the right to search incident to arrest.<sup>67</sup> The issue of factual reality versus perceived generalizations concerning the need for haste had been faced in *Trupiano* and resolved in favor of the accused.

The holding of *Trupiano*, of course, has never been revived.<sup>68</sup> However, the impact of the Court's rejection of the reasoning of the *Trupiano* majority, together with the acceptance of a per se rule (with exceptions based upon the existence of exigent circumstances), has led, in part, to the difficulty the Court faces today in attempting to achieve a consistent (and logical) approach to warrantless search issues. The Court has come to accept the premise that warrantless searches are per se unlawful unless occurring in circumstances (defined with reference to the factual setting of the search) in which the need for prompt action is present. The key to a consistent and logical solution to cases under such an approach is obvious: the exigency must exist in fact and should not be an exigency created by the action (or inaction) of the government. However, the Court continues to reject relevant factual considerations essential to sound analysis. The Court has refused to inquire into whether the police, prior to the search, could have obtained a warrant without realistically jeopardizing the safety of the officers or others or without risking the loss or destruction of evidence. The Court has further undermined the logic of the cases by refusing a case-by-case analysis of one additional important factual consideration. Without regard to whether the police, prior to the search, could have obtained a warrant, a majority of the current Court also has refused to examine whether the circumstances at the time of the search in fact justified the need for prompt action. Thus, the concept of "exigent circumstances" is totally without meaning—neither the conduct of the police prior to the search nor the facts at the time of the search are relevant. The following analysis of the recent cases demonstrates the intellectual weakness of the current approach to warrantless search issues.

<sup>65</sup> *Trupiano v. United States*, 334 U.S. 699, 703 (1948).

<sup>66</sup> *Id.* at 709.

<sup>67</sup> *Id.* at 707-708.

<sup>68</sup> See *Coolidge v. New Hampshire*, 403 U.S. 443, 482 (1970).

*The Modern Approach**Search Incident to Arrest*

The difficulty with the modern approach to cases began with the case of *Chimel v. California*.<sup>69</sup> *Chimel* was a critical case in the development of current fourth amendment principles because of what it had to say concerning the foundation (and limitation) of the right to search incident to arrest. For the first time, a majority of the Court clearly and unequivocally linked the search incident to arrest exception to something other than "the right...always recognized under English and American law...."<sup>70</sup> In *Chimel*, the Court took the position that the right to search incident to arrest was grounded in the more general philosophy that the police must, "whenever practicable, obtain advance judicial approval" for the search.<sup>71</sup> In addition, the Court limited the scope of the right to "the circumstances which rendered its initiation permissible."<sup>72</sup> In the case of a search incident to arrest, *Chimel* held that it was reasonable for the arresting officer, without a warrant, to search the person of the accused and the area within his immediate control in order "to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape," and to prevent "concealment or destruction" of evidence.<sup>73</sup>

The questions left unanswered by the *Chimel* decision were obvious. How was the Court going to deal with cases involving arrests for offenses not involving evidence that could be concealed on or about the person of the accused or arrests for minor offenses not normally involving any realistic fear for the safety of the arresting officer? In addition, how strictly was the Court going to construe the temporal limitation of *Chimel*? If a search of the person was based upon the existence of exigent circumstances, would a search of the person of the accused (or the area within his immediate control at the time of his arrest) long after the arrest be valid when undertaken without a warrant?

The 1973-74 term of the Court produced answers to the questions, but in a manner that is difficult to reconcile with a theory which gives meaningful content to a system of exigent circumstances as the justification for a warrantless search incident to arrest. In *United States v.*

<sup>69</sup> 395 U.S. 752 (1969).

<sup>70</sup> *Weeks v. United States* 232 U.S. 383, 392 (1914). See text accompanying note 31 *supra*.

<sup>71</sup> *Chimel v. California*, 395 U.S. 752, 762 (1969), *quoting* *Terry v. Ohio*, 392 U.S. 1 (1968).

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 763.



*Robinson*<sup>74</sup> and its companion case of *Gustafson v. Florida*,<sup>75</sup> the Court was presented with the issue of the scope of the search incident to arrest exception in the context of arrests for traffic offenses. Given the *Chimel* justification for warrantless searches incident to arrest, the District of Columbia Court of Appeals in *Robinson* held that a limited form of intrusion, similar to the "frisk" type of search permitted in *Terry v. Ohio*,<sup>76</sup> was the only form of intrusion consistent with the limited exigent circumstances presented in the case of a custodial arrest for a traffic offense. The position of the court of appeals was predicated on the assumption that traffic offenses do not involve tangible evidence of the type that would be located on or about the person of the accused; therefore, *a fortiori*, there would be no legitimate exigency in the nature of probable destruction of evidence when the custodial arrest took place. However, *Chimel* also justified the warrantless search incident to arrest on the grounds of the need to discover weapons on or about the person of the accused which might be used against the arresting officer. It would not have been implausible for the court of appeals to have held that a fear of weapons in the case of routine traffic arrest was simply an exaggerated fear, insufficient to support an unlimited search right in all such cases. However, the court of appeals in *Robinson* instead held that a limited form of intrusion in the nature of a *Terry* type of "frisk" would have been sufficient to discover weapons,<sup>77</sup> representing a reasonable compromise between the legitimate needs of law enforcement officials and the privacy of the individual.

The majority opinion in *Robinson* rejected the reasoning of the court of appeals and permitted a full search of the person in any case involving a "lawful custodial arrest."<sup>78</sup> Unfortunately, the basis of the majority opinion is less than clear. The majority in *Robinson* apparently found three primary faults with the arguments advanced. First, on a general level, they rejected the proposition that a defendant should be permitted to argue "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."<sup>79</sup> According to the majority, neither the constitutional history of the right to search incident to arrest, nor a realistic appraisal of the situation facing a police officer at the time of arrest could support such a position.<sup>80</sup> Second,

<sup>74</sup> 414 U.S. 218 (1973). For a discussion of many of the problems raised by the *Robinson* decision, see La Fave, "Case-by-Case Adjudication" versus "Standardized Procedure," 1974 SUP. CT. REV. 127.

<sup>75</sup> 414 U.S. 260 (1973).

<sup>76</sup> 392 U.S. 1 (1968).

<sup>77</sup> *United States v. Robinson*, 414 U.S. 218, 227 (1973).

<sup>78</sup> *Id.* at 238; 414 U.S. 260, 266 (1973).

<sup>79</sup> *United States v. Robinson*, 414 U.S. 218, 235 (1973).

<sup>80</sup> *Id.*

the majority in *Robinson* apparently retreated somewhat from the position taken in *Chimel* with respect to the justification for the right to search incident to arrest. Although they did not reject outright the holding in *Chimel* that a warrantless search incident to arrest was an "exception" to the general per se rule, it did make it clear that the reasoning supporting the right was not solely one of the existence of "exigent circumstances."<sup>81</sup> According to the majority, "[a] custodial arrest of a suspect based on probable cause is a *reasonable intrusion* under the Fourth Amendment," that is, it "is not only an exception to the warrant requirement...but is also a reasonable search under that Amendment."<sup>82</sup> Finally, the majority rejected any implication that the nature of the offense for which the defendant is arrested should govern the right to search or the scope thereof. Specifically, dealing with that aspect of *Chimel* which dealt with the need to disarm the defendant, the majority rejected as "speculative" the argument that persons arrested for minor, unspecified offenses, are unlikely to be armed.<sup>83</sup> In addition, the Court rejected the argument that a "Terry" frisk would serve to protect the officer in such cases. The limited intrusion in the nature of a frisk, said the Court, was based on the absence of probable cause to arrest and would not be applied to situations where a custodial arrest had occurred.<sup>84</sup>

Thus, the majority in *Robinson* took a significant step in the direction of condemning the significance of exigent circumstances in the context of searches incident to arrest. Not only did they justify the right on alternative grounds (a "reasonable" warrantless intrusion), but they also rejected any attempt to limit the extent of the right commensurate with the exigencies facing the arresting officer in any particular case.

Later the same term, the Court decided the case of *United States v. Edwards*.<sup>85</sup> *Edwards* involved the warrantless seizure of clothing worn by the defendant at the time of his arrest. The seizure of the clothing took place ten hours after the arrest at a time when the administrative processing of the arrest had been completed and the defendant was in full custody of the police.<sup>86</sup> The defendant argued that to support the seizure as one incident to arrest would be in direct conflict with prior holdings of the Court fixing a temporal limitation on the right. Although *Chimel* did not deal directly with the extent of a temporal limitation, an earlier case, *Stoner v.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* (emphasis added).

<sup>83</sup> *Id.* at 234.

<sup>84</sup> *Id.* at 227, 234-35.

<sup>85</sup> 415 U.S. 800 (1974).

<sup>86</sup> *Id.* at 801-802.

*California*,<sup>87</sup> had held that a search incident to arrest had to be, as to timing, "substantially contemporaneous with the arrest."<sup>88</sup> The Court, in a 6-3 decision, rejected the contentions of the defendant in *Edwards* and upheld the seizure.

The majority opinion in *Edwards*, written by Mr. Justice White, focused on the "reasonableness" of the police actions. In essence, the majority argued that the seizure ten hours following arrest was simply a reasonable extension of what might have occurred at the time of arrest. To the extent there was an intrusion into the personal effects of the defendant, it was no greater than that which could have lawfully taken place at the time of arrest.<sup>89</sup>

Four members of the Court dissented in *Edwards*.<sup>90</sup> Three, Justices Douglas, Brennan, and Marshall, also dissented in *Robinson* and *Gustafson*. They were joined by Mr. Justice Stewart who wrote the dissenting opinion. The dissenters in *Edwards* disagreed with the majority in two respects. First, they argued that the ten-hour delay negated any claim that the seizure of the clothing was incident to arrest. According to Justice Stewart, "the police had ample time to seek a warrant, and no exigent circumstances were present to excuse their failure to do so."<sup>91</sup>

Second, on a more general level, the dissenters rejected the majority's alternate ground in upholding the search on the finding of "reasonableness." Such an approach, said the dissenting opinion, was explicitly rejected in *Chimel* where the Court characterized the argument as "founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to fourth amendment interests."<sup>92</sup>

The *Edwards* decision takes on special significance when viewed in conjunction with the decisions in *Robinson* and *Gustafson*. In *Robinson* and *Gustafson*, the defendants challenged the existence of exigencies at the time of arrest. There was no allegation that the police might have first secured a warrant without jeopardizing the efficacy of the search.<sup>93</sup>

<sup>87</sup> 376 U.S. 483 (1964). In *Stoner* the police entered the defendant's hotel room during his absence, having obtained purported "consent" for the entry from the hotel clerk. *Id.* at 484-85. Incriminating evidence was seized and the defendant was arrested two days later in another state. The Court rejected the lower court's finding that the search was lawful as incident to arrest, the lower court having extended the right to search incident to arrest to include instances where police made entry into premises to effectuate an arrest (even though the person sought was not found).

<sup>88</sup> *Id.* at 486.

<sup>89</sup> *United States v. Edwards*, 415 U.S. 800, 805 (1974).

<sup>90</sup> *Id.* at 809.

<sup>91</sup> *Id.* at 811.

<sup>92</sup> *Id.*

<sup>93</sup> See notes 74-77 *supra* and accompanying text.

*Edwards*, on the other hand, involved a case where the exigency of possible destruction of evidence was real, as an abstract proposition, but the actions of the police in delaying the seizure for ten hours following the arrest dissipated any claim of urgency. In addition, the ten-hour delay could have been used to secure a warrant. To the extent an exigency still existed at the time of the seizure ten hours following the arrest, it was one created by the police by their failure to secure a warrant.

Following the decisions in *Robinson*, *Gustafson*, and *Edwards*, the basis and scope of the search incident to arrest exception might be summarized as follows: In all cases involving a custodial arrest, the police may search (subject to the spatial limitations of *Chimel*) without a warrant. The basis of the right may be found in the nature of the exigencies facing the arresting officers (they may always presume that the accused is armed), as well as in the "reasonableness" of their actions. Once the custodial arrest takes place, no significant constitutional issue is presented if the search (at least of the person) takes place several hours later. Therefore, the existence of exigent circumstances affects, in fact, neither the existence of the right in the first instance, nor limitations on the temporal scope of the right (at least in the respect approved in *Edwards*).

### *Automobile Searches*

The automobile search cases follow the same general pattern as the search incident to arrest cases. The first contemporary automobile search case was decided in 1970, one year after *Chimel*. In *Chambers v. Maroney*,<sup>94</sup> Justice White, writing for the majority, held that prior cases of the Court had established that an automobile or other form of conveyance could be searched without a warrant, provided there was probable cause to believe that the automobile contained items subject to seizure.<sup>95</sup> It is clear from a reading of the prior cases that the "fleeting" nature of the target of the search served as the primary basis for upholding the warrantless search.<sup>96</sup> Although it is possible to read the Court's early opinions dealing with warrantless automobile searches as resting in part on the premise that an automobile is not given the same fourth amendment protection as is the case with one's home,<sup>97</sup> the Court had never, prior to *Chambers*, expressly held that the exception to the warrant requirement was grounded in such a philosophy.

<sup>94</sup> 399 U.S. 42 (1970).

<sup>95</sup> *Id.* at 48-49.

<sup>96</sup> See text accompanying note 34 *supra*. See also *Husty v. United States*, 282 U.S. 694 (1931).

<sup>97</sup> See text accompanying note 35 *supra*.

Given the fact that the “mobile” nature of the target of the search served as the practical rationalization for exception, it would not have been implausible for the defendants in *Chambers* to have argued that the search was invalid because the factual basis for the exception was lacking in their particular case. The defendants in *Chambers* had been arrested while in the automobile alleged to have been used as the get-away car.<sup>98</sup> The automobile was seized and taken to the police station. In the course of a search of the automobile at the station, “sometime after the arrest,” incriminating evidence was seized.<sup>99</sup> The defendants might have realistically contended that the automobile, being in the possession of the police, was no longer a “fleeting” target and thus there was no justification for bypassing the magistrate on the question of probable cause to search. One of the difficulties with such an argument would be, of course, that it would require the Court to separate the police activity into two separate transactions: the seizure of the automobile from the open road (clearly a fourth amendment activity) followed by a search of the automobile (also clearly a fourth amendment activity). Justice White’s response to such an argument was as follows:

Arguably, because of the preference for a magistrate’s judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the “lesser” intrusion is permissible until the magistrate authorizes the “greater.” But which is the “greater” and which is the “lesser” intrusion is itself a debatable question....For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to the magistrate and on the other hand carrying out an immediate search without a warrant.<sup>100</sup>

Left unanswered by Justice White’s opinion in *Chambers* was whether there were any circumstances in which an automobile would not be a “fleeting” target. Although he specifically mentioned the possibility that there might be such cases,<sup>101</sup> he gave no insight into what circumstances would call for the use of the traditional warrant requirement in cases involving the search of an automobile. The only possible alternative to an immediate search without a warrant, following the automobile until a warrant was obtained, was discounted by Justice White as impracticable and raising the distinct possibility of destruction of evidence.<sup>102</sup>

<sup>98</sup> *Chambers v. Maroney*, 399 U.S. 42, 44 (1970).

<sup>99</sup> *Id.* at 47.

<sup>100</sup> *Id.* at 51-52.

<sup>101</sup> *Id.* at 50. (“Neither [*Carroll*] nor other cases in the Court require or suggest that in every conceivable circumstance the search of an auto even with probable cause may be made without...a warrant....”)

<sup>102</sup> *Id.* at 51 n.9.

It is significant to view the decision in *Chambers* in the light of *Edwards*. The two cases are remarkably similar on the surface, even though they involve different exceptions to the warrant requirement. Both cases involve an attack on the exigencies inherent in the situation facing the police immediately preceding the challenged fourth amendment activity. In both cases, the defendants would have had difficulty in maintaining, given the current state of the law, that the activities of the police were invalid had they occurred at some prior point in time.<sup>103</sup> In *Chambers*, presumably the search of the automobile would have been valid had it taken place on the highway following arrest. In *Edwards*, the seizure of the clothing worn by the defendant would also have been valid had it occurred at the time of the arrest. However, in both cases, the police delayed the fourth amendment activity challenged and thus raised substantial doubt as to the validity of such actions. In *Chambers*, a majority of the members of the Court refused to limit the extent and nature of the intrusion consistent with the circumstances which gave rise to the need to proceed without a warrant, that is, to limit the warrantless activity to seizure (immobilization and protection) only. Instead, the majority in *Chambers* permitted a full warrantless search even though the exigency had been fully dissipated by subsequent events.

In *Edwards*, the same philosophy was used to validate seizure of the clothing. The majority argued that seizure of the clothing at the time of the arrest would have been valid pursuant to the authority granted under the search incident to arrest exception<sup>104</sup> (the exigency being satisfied, presumably, on the ground that the clothing could have been destroyed by the defendant). Because the seizure of the clothing at the time of the arrest would have been valid, no significant constitutional issue was presented by a delay of several hours.

The cases, however, involve two major subtle differences, and it is the Court's failure to analyze and resolve such differences that emphasizes the weakness of the single system of analysis of warrantless searches based on the existence of exigent circumstances. First, in *Chambers*, Justice White understandably had difficulty distinguishing, for purposes of the fourth amendment, between a warrantless "seizure" of the automobile pending the issuance of a search warrant and an immediate search on the scene. Unless one is willing to accept the proposition that the warrantless seizure of the automobile was justified, but that the subsequent warrantless search was not (on the theory that once control was obtained no genuine exigency existed to justify the further intrusion in the form of the search),

<sup>103</sup> See text accompanying note 73 *supra*.

<sup>104</sup> *United States v. Edwards*, 415 U.S. 800, 805 (1974).

then the argument previously advanced is without merit. Indeed, if the argument is accepted, all automobile search cases could be decided by similar reasoning. If the police have authority to make the warrantless seizure of the automobile and maintain custody pending issuance of a warrant, and if one views such activity as a "lesser" violation of the fourth amendment, under what theory could an immediate search on the highway ever be justified? In other words, most automobile cases involve a seizure followed by a search. In the theory advanced, exigencies might justify warrantless seizures, but never could they justify warrantless searches.

The application of such reasoning to the situation in *Edwards* is possible, but only because of the uncommon nature of that case. Search incident to arrest cases by definition almost always involve a seizure of the person, followed by a search of the person, followed by a seizure of the items found. The warrantless seizure of the "thing" (a person) to be searched cannot be viewed as the equivalent of the warrantless seizure of an automobile because the Court has expressly held that the preference for warrants is not applicable to seizures of the person (arrests).<sup>105</sup> In addition, an automobile, unlike a human being, is not capable of destroying evidence, so that immobilization (seizure) of the thing (a person) does not, in itself, prevent the destruction of evidence.

In *Edwards*, however, there was a seizure of the person, followed by a seizure of clothing (not requiring an intrusion in the nature of a search), followed by an intrusion in the form of a microscopic examination of the item seized. The automobile search analysis previously set forth would be applicable at the stage where the police obtained control over the item (the clothing) to be "searched" and would require the police to submit to a magistrate the question of probable cause to believe the clothing contained evidence of criminal activity. In the normal search incident to arrest case there would have to be a search prior to the time the police could obtain "control" over the situation. Immobilization of the thing (a person) in the normal search incident to arrest case would not, therefore, serve as a possible alternative to achieve the objective of limiting the police to a "lesser" intrusion on fourth amendment values (seizure only) pending the determination of the magistrate of the grounds (probable cause) for the "greater" intrusion (the search). Because of the uncommon nature of the *Edwards* case, however, the "immobilization" theory could have been utilized.

The *Edwards* case is different in one other subtle respect. The defendant in *Edwards* had control over the item seized and searched for at least ten hours following arrest. If an exigency existed for the seizure, it is very

<sup>105</sup> *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

difficult to credit because of the delay. In *Chambers*, however, no equivalent delay occurred. In other words, in *Edwards*, unlike *Chambers*, negation of the exigency was created by police inaction from the time they came into contact with the item (when seizure, presumably, would have been valid).

The Court's next major case dealing with the extent and scope of the automobile exception, in 1971, was *Coolidge v. New Hampshire*.<sup>106</sup> Once again, the Court split on the significance of the exigencies present. In *Coolidge*, the defendant's automobile was seized from the driveway of his home after he had been taken into custody.<sup>107</sup> According to Justice Stewart, the police had known for several days prior to the arrest and seizure the probable role of the automobile in the crime and the fact that it might contain probative evidence.<sup>108</sup> The delay in effectuating the seizure of the automobile provided, according to Justice Stewart, ample opportunity for the defendant to have destroyed the evidence,<sup>109</sup> thus dissipating the government's argument of the need to act promptly.<sup>110</sup> In addition, the fact that the police had secured the premises (the defendant was in custody and his wife told that she had to leave) negated the theory that the automobile would be moved pending issuance of the warrant.<sup>111</sup>

The principal thesis of the plurality opinion was that unless an automobile is to be viewed a talisman "in whose presence the fourth amendment fades away,"<sup>112</sup> there were no circumstances present to turn this case into one where it was "not practicable to secure a warrant."<sup>113</sup> *Chambers* was distinguished by Justice Stewart as a case where the initial search "on the highway" would have been permitted; accordingly, there was little difference between the search on the highway and a later search at the station.<sup>114</sup> The *Coolidge* case was described by Justice Stewart as involving the question of whether the "initial" intrusion was permitted.<sup>115</sup> Ample prior opportunity to secure a warrant plus the absence of any compelling circumstances suggesting that the automobile might be moved led Justice Stewart to the conclusion that the warrantless seizure of the automobile could not be sustained.

Five members of the Court refused to accept Justice Stewart's restric-

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 448.

<sup>108</sup> *Id.* at 460.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 460-61.

<sup>112</sup> *Id.* at 461.

<sup>113</sup> *Id.* at 462, citing *Carroll v. United States*, 267 U.S. 132, 153 (1925).

<sup>114</sup> *Id.* at 463.

<sup>115</sup> *Id.* at 463 n.20.



tive reading of the automobile search exception. The respective dissenting opinions of Justices Black and White emphasize the current division of thinking on the Court concerning the proper role to be given the existence or nonexistence of exigent circumstances in any given case.

Justice Black's opinion rejected the reasoning of the plurality opinion as resting on two faulty assumptions. The first was that the police could have had the automobile "placed under guard and, thereby, rendered immobile."<sup>116</sup> Such reasoning, Justice Black argued, had been rejected in *Chambers*.<sup>117</sup> The second problem Justice Black had with the plurality opinion was that it was based on the fact that the defendant was in custody, and his wife told that she had to leave the scene and could not use the automobile. Justice Black rejected the reasoning as resting on the faulty assumption that the police could keep the wife under "house arrest" and the further unreasonable assumption that there was no one else with a motivation to alter or remove the automobile.<sup>118</sup> What Justice Black did not discuss was why the police might have rightly assumed that the evidence would be destroyed in this case, or why, more generally, the fear of destruction in the case of a proposed automobile search is greater than where the police propose to search a dwelling.

Justice White's dissenting opinion also focused on the plurality's attempt to distinguish the exigencies inherent in a situation where an automobile is parked and the occupants in custody from the situation when an automobile is stopped on the open highway. According to Justice White, such is a "metaphysical distinction without roots in the commonsense standard of reasonableness governing search and seizure cases."<sup>119</sup> He further suggested that in the interest of coherence and credibility, the Court should "either overrule...prior cases and treat automobiles precisely as we do houses or apply those cases to readily movable as well as moving vehicles...."<sup>120</sup>

The various opinions in *Coolidge* are significant in the sense that they represent the entire philosophical range of thinking regarding the significance of exigent circumstances as an integral part of the fourth amendment's warrant clause. Justice Stewart's opinion reflects a position that attempts a case-by-case analysis of whether the facts support a conclusion of the need for prompt action on the part of law enforcement officials. His analysis of the facts in *Coolidge* led to the conclusion that they

<sup>116</sup> *Id.* at 504.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 504-505.

<sup>119</sup> *Id.* at 527.

<sup>120</sup> *Id.* Mr. Justice White agreed that *Chambers* was inapposite given the fact that the search in *Coolidge* occurred many months following the seizure. 403 U.S. 443, 523 (1971).

were either not exceptional in fact or if they were, the need for prompt action was created by inaction on the part of law enforcement officials in not securing a warrant prior to the planned seizure.

Justice Black's opinion, on the other hand, does not seriously attempt to examine the circumstances of the seizure for the existence of exigencies necessitating the need for prompt action, except in terms of the need to act immediately once the police were committed to a course of action. There is no explanation of the relevance of the failure to secure a valid warrant prior to the seizure nor is there any explanation as to why maintenance of the status quo pending the issuance of a valid warrant would not have been a satisfactory course of action.

Finally, Justice White's opinion represents a moderating voice between the two opposing positions. The clear thrust of Justice White's opinion is one of practicality. His opinion, in effect, advances the position that Justice Stewart's analysis of the exigent nature of the circumstances involves drawing very questionable factual distinctions. Although he does not specifically argue that such distinctions would create a very difficult position for law enforcement officials, it is likely that he had the problem in mind. In the alternative, Justice White argued that if Justice Stewart's line-drawing philosophy were to be accepted, he saw little reason not to carry it to its logical conclusion and acknowledge that the entire premise of warrantless automobile searches (mobility) is one that simply cannot be supported.

The three major automobile search cases following *Coolidge* emphasize the continuing division on the Court concerning the basis and scope of the automobile search exception. The three cases also represent an attempt on the part of some members of the Court to seek a more satisfactory basis for upholding the validity of warrantless searches of automobiles.

The first case following *Coolidge* was *Cady v. Dombrowski*,<sup>121</sup> a case involving a warrantless search of the defendant's automobile following an accident. The automobile had been towed to a private, unguarded lot and the defendant, a Chicago police officer, had been taken into custody on a drunken driving charge. The police had reason to believe that the defendant had his service revolver in his possession at the time of the accident. Unable to find the revolver on the person of the accused, the police, under "standard procedure," returned to the vehicle three hours later and conducted an extensive search.<sup>122</sup>

Justice Rehnquist's majority opinion sustained the warrantless

<sup>121</sup> 413 U.S. 433 (1973).

<sup>122</sup> *Id.* at 436-37. The search in *Cady* included examining the contents of the trunk.

search, and, in the process, discussed the basis for the automobile search exception in some detail. One of the most significant aspects of the majority opinion is that it represents the first case in which a justification for a warrantless search of an automobile, other than mobility, is fully discussed. Justice Rehnquist's opinion recognized that warrantless searches of automobiles have traditionally been sustained because of the automobile's "vagrant and mobile nature."<sup>123</sup> He goes on, however, to hold that warrantless automobile search cases may be constitutionally distinguished from warrantless searches of homes and similar structures because of the "extensive, and often noncriminal contact with automobiles [that] will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of crime, or contraband."<sup>124</sup> In other words, the warrantless search of the defendant's automobile in *Cady*, where the defendant was in custody and there were no circumstances present to justify a reasonable belief that the automobile would be quickly moved out of the locality, was nevertheless sustained as not unreasonable within the meaning of the fourth amendment. The four dissenting Justices in *Cady*, in an opinion written by Justice Brennan, were not incorrect in observing that the basis of the majority opinion, "despite [its] asserted adherence to the principles of our prior decisions," rested "on a subjective view of what is deemed acceptable in the way of investigative functions performed by rural police officers."<sup>125</sup> The four dissenting Justices in *Cady*, not surprisingly, were the same four members concurring in the plurality opinion in *Coolidge*.

One year later, the Court decided *Cardwell v. Lewis*,<sup>126</sup> another warrantless automobile search case in which the Justices split along exactly the same lines as in *Cady*, with the exception of Justice Powell who concurred in the result on nonsubstantive grounds.<sup>127</sup> In *Cardwell*, the automobile was seized from a private parking lot and towed to the police impoundment lot at a time when the defendant was in custody. The next day tire impressions were taken, along with paint specimens from the vehicle's fender, which proved incriminating.<sup>128</sup> Justice Blackmun's opinion is unique because it discusses the police activities of seizing the automobile separate from the acts of making the tire impressions and taking the paint specimens. The first part of the opinion, devoted to the latter question, is

<sup>123</sup> *Id.* at 441. See text accompanying note 98 *supra*.

<sup>124</sup> *Id.* at 442.

<sup>125</sup> *Id.* at 453.

<sup>126</sup> 417 U.S. 583 (1974).

<sup>127</sup> *Id.* at 596. Mr. Justice Powell concurred on the ground that federal habeas corpus should not be available to state prisoners challenging fourth amendment issues, a position later sustained by the Court in *Stone v. Powell*, 428 U.S. 465 (1976).

<sup>128</sup> *Id.* at 587-88.

significant because of Justice Blackmun's articulation of the justification for the automobile search exception. Like Justice Rehnquist's opinion in *Cady*, Justice Blackmun gives specific recognition to the historical justification for the automobile search exception—the exigent circumstances that exist in connection with movable vehicles—in that “the opportunity to search is fleeting since a car is readily movable.”<sup>129</sup> He went on, however, like Justice Rehnquist in *Cady*, to justify the exception on alternate grounds. According to Justice Blackmun, the search of an automobile is far less intrusive on fourth amendment rights because “[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.”<sup>130</sup> This justification was particularly compelling in *Cardwell* as “nothing from the interior of the car and no personal effects...were searched or seized....”<sup>131</sup> According to Justice Blackmun, the expectation of privacy involved with respect to the tire imprints and paint specimens was “abstract and theoretical.”<sup>132</sup>

Justice Blackmun dealt with the initial seizure of the automobile as a separate and distinct problem. His opinion places principal reliance on the *Chambers* case to support the seizure. According to Justice Blackmun, because the “search” of the automobile could have been made “on the spot,” there was no constitutional significance to the prior seizure and impoundment of the vehicle.<sup>133</sup> The analysis first utilized in *Chambers*—refusing to draw constitutional distinction between a defensive seizure pending the issuance of a warrant and an immediate search—was reaffirmed. *Coolidge* was distinguished as involving the seizure from the defendant's driveway, requiring entry upon private property, as opposed to a seizure from a public place (a privately owned parking lot) where “access was not meaningfully restricted.”<sup>134</sup> Finally, Justice Blackmun summarily rejected an attempt to distinguish *Chambers* on grounds that probable cause to search the car in *Cardwell* existed for some time prior to the actual seizure and search, thus negating the supposed “exigency.” According to Justice Blackmun, there is “no case or principle that suggests that the right to search...under exigent circumstances [is] foreclosed if a warrant was not obtained at the first practicable moment.”<sup>135</sup>

<sup>129</sup> *Id.* at 590, quoting *Chambers v. Maroney*, 399 U.S. 42, 50-51 (1970).

<sup>130</sup> *Id.* at 590.

<sup>131</sup> *Id.* at 591.

<sup>132</sup> *Id.* at 592, quoting *Air Pollution Variance Bd. v. Western Alfalfa Corp.*, 416 U.S. 861, 865 (1974).

<sup>133</sup> *Id.* at 593.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 595.

The four dissenting Justices rejected Justice Blackmun's initial separate analysis of the search and seizure aspects of the case. The basis of Justice Stewart's dissenting opinion is very similar to the thesis of his *Coolidge* opinion: that the justification for warrantless automobile searches is based upon the exigency of mobility and where there is no reasonable likelihood that the automobile would or could be moved, the "exception" is inapplicable.<sup>136</sup> His analysis of the facts presented in *Cardwell*—the defendant and the keys to his automobile were securely within police custody—led to the conclusion that there was no likelihood that the defendant or others could have moved or meddled with the car during the time necessary to secure a warrant.<sup>137</sup>

The automobile search exception, following *Cardwell*, might be accurately summarized as follows: an automobile may be seized without a warrant on the open highway (or while on other public or quasi-public grounds) upon probable cause. The automobile may be searched on the spot or taken into police custody and "searched" at a later time (but not one year after the seizure).<sup>138</sup> The right to seize and search without a warrant is based on (1) the mobile nature of the item (presumably because some human being might move it); (2) the frequency of police contact with the item in the public sector; and (3) the nature of automobiles as means of transportation which seldom serve as a residence or as the repository of personal effects. Opportunity to secure a warrant prior to the seizure or search is not a relevant factor, nor is an examination of the likelihood of movement by the defendant (or others) if the seizure or search is delayed pending application for a warrant. Finally, temporary seizure and custody pending application for a warrant to search is not an adequate alternative because the fourth amendment does not distinguish between warrantless seizures, on the one hand, and warrantless searches on the other.

The Court's most recent automobile search case, *South Dakota v. Opperman*,<sup>139</sup> represents a distillation of the theories described above. In *Opperman*, the defendant's illegally parked automobile was towed to the police impoundment lot. Noticing valuables in plain view inside the automobile, the police gained entrance to the locked vehicle and in the process of taking an inventory of the contents according to "standard police procedures," discovered marijuana in the unlocked glove compartment.<sup>140</sup> Chief Justice Burger's majority opinion upholding the validity of the warrantless search described the Court's prior automobile search cases as

<sup>136</sup> *Id.* at 597-98. See text accompanying notes 111-114 *supra*.

<sup>137</sup> *Id.* at 598.

<sup>138</sup> See note 120 *supra*.

<sup>139</sup> 428 U.S. 364 (1976).

<sup>140</sup> *Id.* at 365-66.

based on two principal differences between automobiles and homes or offices. The first he described as based on the "inherent mobility of automobiles creat[ing] circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible."<sup>141</sup> The second basis for the distinction used by the Chief Justice combined the analysis first seen in *Cady* and *Cardwell* and is described as resting on the lesser "expectation of privacy with respect to one's automobile...than that relating to one's home or office."<sup>142</sup> The lesser expectation of privacy is more fully described as resting on the dual premise of the frequency of police contact with automobiles in community caretaking functions (the justification utilized in *Cady*), and the fact that automobiles seldom serve as repositories for personal effects and are frequently in plain view (the justification first utilized in *Cardwell*).<sup>143</sup> Given Chief Justice Burger's view of the foundation for the warrantless automobile search exception, it is not surprising that he found the procedure followed in *Opperman* as "reasonable" within the meaning of the fourth amendment.

Justice Powell's concurring opinion in *Opperman* is perhaps more significant than the majority opinion because it is based on the assertion that the Court's prior automobile search cases create *no* general automobile exception to the warrant requirement.<sup>144</sup> Rather, in the opinion of Justice Powell, the prior cases simply give recognition to the constitutional distinction "between houses and cars," a distinction that may in some cases, according to Justice Powell, justify a warrantless search.<sup>145</sup>

*Chadwick and G. M. Leasing Corp.: Two Recent Cases  
Otherwise Confusing the Issues?*

Two cases decided during the 1976-77 term of the Court provide continuing examples of the problems associated with the exigent circumstances doctrine. In *G. M. Leasing Corp. v. United States*,<sup>146</sup> the government had issued a jeopardy assessment against one George I. Norman for failure to pay federal income taxes over a two-year period. Agents of the Internal Revenue Service, without a warrant, entered the business office of the petitioner, G. M. Leasing Corp., under the belief that the petitioner was Norman's "alter ego" and a repository for at least some of his personal assets, and seized various furnishings, books, and records. Prior to the entry and

<sup>141</sup> *Id.* at 367.

<sup>142</sup> *Id.*

<sup>143</sup> *Id.* at 368. See text accompanying note 130 *supra*.

<sup>144</sup> *Id.* at 382.

<sup>145</sup> *Id.*

<sup>146</sup> 429 U.S. 338 (1977).

seizure the agents had visited the premises and left without incident. The offices were kept under observation and information was obtained that certain items were being moved. Two days later, the agents forcibly entered and conducted their warrantless search and seizure.<sup>147</sup> The Supreme Court assumed that the government possessed probable cause to believe that the assets held by petitioner were properly subject to seizure in satisfaction of the assessment against Norman, and limited its decision to the question of whether a warrant was required to validate the entry into and seizure of goods from the petitioner's office.<sup>148</sup> A unanimous Court, in an opinion written by Justice Blackmun, invalidated the warrantless search and seizure. Following an extensive discussion rejecting various claims by the government that the special problems associated with enforcement of the Internal Revenue Code justified the actions, the Court dealt with the government's claim that the facts of this case brought it "within the 'exigent circumstances' exception to the warrant requirement."<sup>149</sup> Justice Blackmun's rejection of the government's position was terse:

[T]he agents own actions, however, in their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, is sufficient to support the District Court's implicit finding that there were no exigent circumstances in this case.<sup>150</sup>

No authority was cited by Justice Blackmun for the assertion that government opportunity to secure a warrant at the earliest practicable time was a relevant consideration in warrantless search cases.

Chief Justice Burger wrote a short concurring opinion, also without citation of authority, describing the case as providing a "classic illustration" of the dividing line between an unlawful warrantless search and one permitted under the exigent circumstances exception to the warrant requirement.<sup>151</sup> He explained further that the "agents' *delay* after observing [these highly suspicious] events makes that exception to the warrant requirement unavailable....By failing to act at once, the exigency was dissipated...."<sup>152</sup>

In *United States v. Chadwick*,<sup>153</sup> the Court, in an opinion written by Chief Justice Burger, invalidated the warrantless search of a footlocker seized from the trunk of an automobile following the arrest of three defen-

<sup>147</sup> *Id.* at 345-46.

<sup>148</sup> *Id.* at 351.

<sup>149</sup> *Id.* at 358.

<sup>150</sup> *Id.* at 358-59.

<sup>151</sup> *Id.* at 361.

<sup>152</sup> *Id.*

<sup>153</sup> 433 U.S. 1 (1977).

dants suspected of possessing marijuana. The police had been alerted to the activities of the defendants by railroad officials who suspected the defendants of being drug traffickers. Federal agents, using a police dog trained to detect marijuana, concluded that the footlocker contained the contraband and watched while the defendants moved the locker from the train station to their automobile. When the locker was placed in the trunk, the defendants were arrested and the locker was seized. The testimony at trial established that from the moment of arrest the footlocker remained under the exclusive control of the law enforcement officers. After transporting the defendants and the footlocker to the federal building, approximately ninety minutes following the arrest, the footlocker was opened.<sup>154</sup>

The majority opinion accepted, and the defendants did not challenge, the findings of the First Circuit Court of Appeals upholding the seizure of the footlocker at the time of arrest. The sole question before the Court concerned the legality of the warrantless opening of the footlocker under circumstances where probable cause existed to believe that it contained contraband.<sup>155</sup>

All of the opinions, including those of the dissenting Justices, first rejected the argument advanced by the government that the fourth amendment warrant clause protects only interests identified with the home.<sup>156</sup> The government also advanced two other arguments to support the warrantless search. First, the government contended that although the seizure and search did not come directly under the automobile search exception to the warrant requirement, the reasoning and logic of the exception could be used by analogy to support their activities.<sup>157</sup> Second, the government argued that the law enforcement officials should be permitted to undertake a warrantless search upon probable cause of any property "in the possession" of a person arrested in public.<sup>158</sup>

Chief Justice Burger's majority opinion rejected the automobile search analogy because of two basic distinctions drawn from the underlying justification for the automobile search exception to the warrant requirement. First, the "mobility" justification for the automobile search exception was not present in the case of the footlocker because "[o]nce the federal agents had seized it...and had safely transferred it to the...federal building...there was not the slightest danger that [it] or its contents could have been removed before a valid search warrant could be obtained."<sup>159</sup>

<sup>154</sup> *Id.* at 4.

<sup>155</sup> *Id.* at 3.

<sup>156</sup> *Id.* at 7, 16-17. The government advanced the argument that the fourth amendment's warrant clause protection should be limited to dwellings and other "high privacy" areas. Justice Brennan, concurring, found such an argument "deeply distressing." *Id.* at 16. Justice Blackmun, dissenting, characterized the argument as an "extreme view" of the fourth amendment. *Id.* at 17.

<sup>157</sup> *Id.* at 11-12.

<sup>158</sup> *Id.* at 14.

<sup>159</sup> *Id.* at 13.



The automobile, on the other hand, was described by the Chief Justice as of a different character because adequate storage facilities may not be available and because their size and inherent mobility makes them susceptible to theft or intrusion by vandals.<sup>160</sup> Second, the “diminished expectation of privacy” justification for the automobile search exception did not apply to the search of a footlocker because its “contents are not open to public view, except as a condition to a border entry or common carrier travel; nor is [it] subject to regular inspections and official scrutiny on a continuing basis. Unlike an automobile, whose primary function is transportation, luggage is intended as a repository of personal effects.”<sup>161</sup>

The Chief Justice disposed of the government’s second argument in support of the warrantless search by stressing that search rights incident to arrest are based on the exigencies of the situation facing an officer at the time of a custodial arrest: the danger that the person arrested may seek to use a weapon or that evidence may be concealed or destroyed. Thus, warrantless searches of items within the “immediate control” are reasonable.<sup>162</sup> He concluded by holding that “[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control,... a search of that property is no longer an incident of the arrest.”<sup>163</sup>

Justice Blackmun’s dissenting opinion, joined by Justice Rehnquist, understandably had difficulty distinguishing the luggage search in *Chadwick* from the philosophy expressed in a number of prior warrantless search cases sustained by the Court. He pointed out that under the holding in *Edwards*,<sup>164</sup> a warrantless search of personal effects may be delayed a number of hours while the suspect remains in custody, and under a series of holdings dealing with warrantless automobile searches, the car may be impounded and, with probable cause, its contents (including locked compartments) subsequently examined.<sup>165</sup> Finally, he pointed out that once a car has been impounded for any reason, the police may inventory the contents without probable cause.<sup>166</sup>

Justice Blackmun also emphasized the “perverse” result reached due to the “fortuitous circumstances” of the present case.<sup>167</sup> He pointed out that either an earlier or later arrest of the defendants would have been sufficient to sustain the warrantless search of the footlocker under existing doctrines. For example, had the officers delayed the arrest until the defendants started to drive away, then the car could have been seized and its con-

<sup>160</sup> *Id.* at 13 n.7.

<sup>161</sup> *Id.* at 13.

<sup>162</sup> *Id.* at 14.

<sup>163</sup> *Id.* at 15.

<sup>164</sup> *United States v. Edwards*, 415 U.S. 800 (1974).

<sup>165</sup> 433 U.S. 1, 18-19 (1977).

<sup>166</sup> *Id.* at 19.

<sup>167</sup> *Id.* at 22.

tents, including luggage, searched without a warrant. Alternatively, the agents could have arrested the defendants in the railroad station while they were seated on the locker (and presumably, the locker would have been within the area of "immediate control") and conducted the search at that time.<sup>168</sup>

*G. M. Leasing Corp.* and *Chadwick* have created several anomalies in the law at a time when the Court appeared to be moving away from the artificial lines drawn by prior cases utilizing an exigent circumstances base of analysis. *Robinson*<sup>169</sup> and the trilogy of automobile search cases beginning with *Cady*<sup>170</sup> appeared to be moving the Court away from an exigent circumstances approach to warrantless search cases, presumably because, in part, the system was fraught with inconsistencies. *G. M. Leasing Corp.* and *Chadwick*, on the other hand, have created a great deal of uncertainty. First, it is clear that they were decided on the basis of an evaluation of the particular circumstances facing the law enforcement officials in each case. The Court made highly subjective judgments concerning the propriety of police activities. More important, the Court viewed the cases as turning on the existence or nonexistence of exigent circumstances warranting prompt action, *i.e.*, a warrantless search. Second, albeit without full discussion, the Court introduced a system of analysis which may provide the basis for reconsideration of a whole line of warrantless search cases which have been based on unrealistic and artificial judgments concerning the existence or nonexistence of exigent circumstances. *G. M. Leasing Corp.* may be properly viewed as approving the philosophy that law enforcement officials must secure a search warrant at the earliest practicable moment; failure to do so will invalidate a subsequent warrantless search. It is difficult not to view the case as a movement back to the *Trupiano* doctrine.<sup>171</sup> *Chadwick*, on the other hand, may be properly viewed as approving the concept that defensive maintenance of the status quo pending the issuance of a search warrant is required in certain circumstances. Unfortunately, neither case fully discussed the implications of accepting such doctrines as part of the body of the fourth amendment warrant clause.

### Conclusion

As the foregoing analysis of recent cases demonstrates, cogent arguments can be made that a system of analysis of the application of the fourth amendment's warrant clause that turns on the existence or nonexistence of supposed exigencies is largely responsible for the lack of consistency in the cases, as well as the absence of sound logic. One might per-

<sup>168</sup> *Id.* at 22-23.

<sup>169</sup> *United States v. Robinson*, 414 U.S. 218 (1973).

<sup>170</sup> *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Cardwell v. Lewis*, 417 U.S. 583 (1974); *Cady v. Dombrowski*, 413 U.S. 433 (1973).

<sup>171</sup> *Trupiano v. United States*, 334 U.S. 699 (1948). See text accompanying notes 61-67 *supra*.

suasively argue that the "system" was doomed to fail from the beginning because of the Supreme Court's failure to recognize and resolve two fundamental issues. First, the Court has never definitively reexamined the logic of its cases that refuse to consider the time frame immediately prior to the search in order to determine if the government could have secured a warrant without jeopardizing the efficacy of the search or the safety of officers. It is one thing to say that an automobile stopped on the open highway may be searched with probable cause without a warrant because it could be moved during the delay necessary to obtain the warrant. It is quite another matter to validate such activity if the facts giving rise to probable cause to search were known to the police long before the actual stop and search took place and no attempt was made to secure a warrant.

Four members of the Court in *Coolidge* recognized the weakness of a system that does not take into account police activity prior to the search. However, Justice Stewart did not attempt a complete modification of the system, but merely invalidated the warrantless seizure of an automobile from private property when the police had known for some time the probable role of the automobile in the crime. The reason Justice Stewart's opinion did not go further was obvious: it would have amounted to a reinstatement of the principles of the *Trupiano* decision. Prior to *Coolidge*, the Court's only major consideration of the question occurred in 1948 in *Rabinowitz* when *Trupiano* was overruled. The decision in *Rabinowitz* was at a time when neither the theory nor the specific application of "exceptions" to the warrant requirement were fully developed. The *G. M. Leasing Corp.* case, on the other hand, was decided adverse to the government on the basis of the failure of the police to obtain a warrant during the two-day delay between the time probable cause arose and the time of the search. However, the decision on *G. M. Leasing Corp.* is devoid of analysis and authority and various circumstances can be identified to limit the impact of the case.<sup>172</sup> If the Court chooses to adhere to the system of permitting warrantless searches only in exceptional cases, defined with reference to the existence of exigent circumstances, the theory of *Trupiano* must be thoroughly reconsidered. Reinstatement of *Trupiano*, of course, presents a wide range of difficult problems, theoretical as well as practical. The most difficult question presented by reinstatement of *Trupiano* would be its effect on the search incident to arrest exception. It seems almost inconceivable that the Court would be willing to deny the right to search incident to arrest if the police, prior to the arrest, could have obtained a search (or arrest) warrant.

<sup>172</sup> *G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977), involved a warrantless entry into a private office. Given the long history of viewing private homes and offices as providing the maximum protection from warrantless government intrusions, *G.M. Leasing Corp.* might be so limited and thus inapplicable to automobile searches. Also, *G.M. Leasing Corp.* involved enforcement of the Internal Revenue laws and, although the holding in the case apparently did not turn on such fact, it might be reasonably viewed as limited to that type of case.

Second, the Court has never definitively resolved the question of whether a limited maintenance of the status quo with probable cause, pending application for a warrant, is permissible procedure. If the government is permitted, for example, to seal off a dwelling or seize an automobile pending the issuance of a warrant for a search, there would be very few cases that would involve the need for an immediate, full-scale warrantless search. The trouble with such a procedure, however, was discussed in *Chambers* by Justices White and Harlan. The fourth amendment protects against warrantless seizures as well as searches. It is difficult to maintain that a defensive seizure or sealing-off of property pending issuance of a warrant is any less a violation of the fourth amendment than a warrantless search itself. However, as Justice Harlan argued in *Chambers*, viewed from the perspective of the individual who is the subject of the government action it is easy to view the protection of the possessory interest at stake when the question is seizure of property as a less valued right than the privacy interest at the heart of the fourth amendment's search restrictions.<sup>173</sup> In addition, as Justice Harlan argued, the individual who is concerned by the disruption of the possessory interest when property is temporarily seized may always consent to an immediate warrantless search in order to promptly regain full control over the property.<sup>174</sup> There is one additional problem with so-called defensive seizures. If such activity is viewed as implicating the fourth amendment warrant clause, why should the police be permitted to make a warrantless seizure to maintain the status quo if they had opportunity to secure a warrant prior to the defensive seizure? In at least one case involving the search of a dwelling, a majority of the Court implicitly recognized defensive seizures pending issuance of a warrant as a basis for rejecting the government's claim that exigent circumstances necessitated a warrantless search of the dwelling.<sup>175</sup> More

<sup>173</sup> *Chambers v. Maroney*, 399 U.S. 42, 64 (1970) (Harlan, J. concurring and dissenting).

<sup>174</sup> *Id.*

<sup>175</sup> *Vale v. Louisiana*, 399 U.S. 30 (1970). In *Vale* the Court invalidated the warrantless search of the defendant's dwelling. The defendant had been observed consummating a narcotic transaction in front of his home and was arrested on the front steps thereof. The officers entered the dwelling and made a "cursory inspection" of the home to ascertain if anyone else was present. Moments later, the defendant's mother and brother arrived. The police then searched the dwelling and seized a quantity of narcotics. *Id.* at 32-33. Rejecting the holding of the Louisiana Supreme Court validating the warrantless search on grounds that the police did not know whether anyone else was present who might destroy the evidence, the Court stated that, "Such a rationale could not apply to the present case, since by their own account the arresting officers satisfied themselves that no one else was in the house when they first entered the premises." *Id.* at 34. The majority opinion did not discuss the constitutional basis for the initial "protective sweep" nor did it discuss why it was unreasonable for the officers to assume that the mother and brother, alerted to the fact of the defendant's arrest, would destroy whatever evidence was inside the home if the police left the premises to secure a warrant. If the majority opinion assumed that the officers could lawfully remain at the scene pending issuance of a warrant to protect against possible destruction of evidence (there was no specific mention of the question in the majority opinion), the basis of the assumption was not articulated.

recently, in *Chadwick*, the Court invalidated the warrantless search of a suitcase (lawfully seized without a warrant) because of the absence of exigent circumstances once the police had obtained complete control over the item.

Further consideration of constitutional validation of defensive seizures with probable cause presents the most appealing alternative to the present system of analysis. Although Justice White is certainly on firm ground in asserting that the fourth amendment protection extends to seizures as well as searches, it is also true that the Court has, in other contexts, emphasized that individual privacy, not the possessory interest, is the paramount value at the heart of the fourth amendment.<sup>176</sup> It would be consistent with existing fourth amendment values, therefore, to recognize that while warrantless seizures of property with probable cause, including within that concept the act of sealing off or denying access to property, are within the reach of the fourth amendment, such actions are presumptively reasonable so long as prompt action is taken to validate such action if a search is contemplated. Such a system of analysis, of course, would have no application to the search incident to arrest situation, except when items are seized from an individual without the necessity of a search and a further intrusion is contemplated. *Edwards* and *Chadwick* provide examples of the application of such a procedure in search incident to arrest cases.

Regardless of the nature of the analysis used, it should be clear that one of the problems with the Court's current position is the long-standing assumption that fourth amendment warrant issues can be solved with reference to the factual findings regarding the existence or nonexistence of exigent circumstances. The so-called "automobile exception" is the best example of the weakness of a single analytical system. It is one thing to say that a search of an automobile, as compared to a search of a dwelling, presents an exigent circumstance because the automobile is inherently mobile and could be moved out of the jurisdiction if the search is delayed pending issuance of a warrant. It is quite another matter, however, to assume also that there is any less chance that the object of the search within a dwelling will not be moved or destroyed pending the issuance of warrant. The point is not the lack of logic in the assumptions regarding human behavior in the foregoing example. Instead, the lack of sound analysis lies in the assumption that we should treat automobile searches in the same fashion as we treat dwelling house searches, or even that all automobile searches should be treated under a single analytical system. During the past three years there has been a movement by certain members of the Court away from a single approach to all fourth amendment warrant issues. *Robinson*, for example, emphasized that warrantless searches incident to arrest were constitutionally permissible because they were "reasonable,"

<sup>176</sup> *Katz v. United States*, 389 U.S. 347 (1967). See generally Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 377-409 (1974).

as well as because they always involve the existence of exigent circumstances. In addition, *Cady*, *Caldwell*, and more important, *Opperman*, involve a recognition that warrantless automobile "searches" may be justified on sound grounds and not necessarily solely because of the exigencies involved. Such decisions represent a partial step in the direction of restoring sound analysis and consistency in fourth amendment warrant cases.

In the final analysis, the state of disarray in the Supreme Court warrantless search cases can be overcome by utilization of several alternative theories. The Court could eliminate the system of analysis which is based on the existence or nonexistence of exigent circumstances, except in situations such as those facing the police in *Warden v. Hayden*<sup>177</sup> and *Schmerber v. California*.<sup>178</sup> In the alternative, the Court could take a more realistic approach to the system of analysis based upon the existence or nonexistence of exigent circumstances by instituting a policy which would favor defensive seizures pending the issuance of a search warrant or which would take into account police opportunity to secure a warrant prior to the search. Either approach would enable the Court to move away from consideration of the artificial issues which have dominated warrantless search cases and permit the constitutional issue to be clearly framed: Given the nature of the individual interest protected by the warrant process, were the actions of the government in undertaking a warrantless search or seizure

<sup>177</sup> 387 U.S. 294 (1967). *Warden* is often cited as an example of the "hot pursuit" exception to the warrant requirement. See note 5, *supra*. In *Warden*, the police received information from two eyewitnesses to a robbery that the armed perpetrator escaping from the scene had entered a specified dwelling. The police arrived at the dwelling minutes later, entered, and conducted a search for the defendant and his weapons. During the course of the search for the defendant and his weapons, the police searched a washing machine and found clothing of the type the fleeing suspect was said to have worn. The Court sustained the search, holding that the police "acted reasonably when they entered the house and began to search for [the defendant] and for weapons which he had used...." *Id.* at 298. The Court went on to hold that the 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." *Id.* at 298-99. *Warden* was recently reaffirmed in *United States v. Santana*, 427 U.S. 38 (1976).

<sup>178</sup> 384 U.S. 757 (1966). *Schmerber* is often cited as an example of an "emergency" search. See note 5, *supra*. In *Schmerber*, the defendant had been arrested for driving while under the influence of alcohol. The police, possessing probable cause to believe that the defendant was intoxicated, had a physician obtain a blood sample, over the objection of the defendant. In upholding the warrantless "search" of the defendant's person, the Court rejected utilization of the search incident to arrest exception as having "little applicability with respect to searches involving intrusions beyond the body's surface." *Id.* at 769. However, the Court went on to sustain the search on the ground that the officer "might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant...threatened the destruction of evidence." *Id.* at 770. The Court specifically noted that the "percentage of alcohol in the blood begins to diminish shortly after drinking stops...." *Id.* It is difficult to contend that a true "emergency" did not exist in *Schmerber* in the sense that the likelihood of destruction of evidence apparently was a scientific fact and not the mere hypothesis of law enforcement officials.

(or both) reasonable *and* limited in scope sufficient to assure that legitimate law enforcement goals would not be thwarted due to delay inherent in the warrant process.