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White Paper:
The Fourth Amendment – Implications for Radiological and Nuclear Detection

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White Paper: The Fourth Amendment – Implications for Radiological and Nuclear Detection

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Abstract

The need to improve the radiation detection architecture has given rise to increased concern over the potential of equipment or procedures to violate the Fourth Amendment. Protecting the rights guaranteed by the Constitution is a foremost value of every government agency. However, protecting U.S. residents and assets from potentially catastrophic threats is also a crucial role of government. In the absence of clear precedent, the fear of potentially violating rights could lead to the rejection of effective and reasonable means that could reduce risks, possibly savings lives and assets. The goal of this document is not to apply case law to determine what the precedent may be if it exists, but rather provide a detailed outline that defines searches and seizures, identifies what precedent exists and what precedent doesn't exist, and explore what the existing (and non-existing) precedent means for the use of radiation detection used inside the nation's borders.

CONTENTS

NOMENCLATURE

Abbreviations and Acronyms

BP	Border Patrol
CONOPS	concept of operations
DEA	Drug Enforcement Administration
DHS	Department of Homeland Security
DNDO	Domestic Nuclear Detection Office
DUI	driving under the influence
LEO	government law enforcement officer
NonPOE	non-port of entry
OBP	Office of Border Patrol
POE	port of entry
SNL	Sandia National Laboratories

Definitions

Case Law	The law established by the outcome of former cases
Curtilage	An area attached to a house and forming on enclosure with it
Exigent	pressing, demanding
Supreme Court	United States Federal Supreme Court

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1. INTRODUCTION

On April 15th, 2005, the Domestic Nuclear Detection Office (DNDO) was formed within the Department of Homeland Security (DHS) to "Improve the Nation's capability to detect and report unauthorized attempts to import, possess, store, develop, or transport nuclear or radiological material for use against the Nation, and to further enhance this capability over time."[1]

Numerous departments within DNDO carry out specific aspects of this mission. One of these departments, Systems Architecture Directorate, is charged to ". . . determine gaps and vulnerabilities in the existing global nuclear detection architecture then formulate recommendations and plans to develop an enhanced architecture."[1] In part, Systems Architecture Directorate achieves this objective by working closely with the U.S. Border Patrol (BP) to identify:

- The ideal equipment within their concept of operations (CONOPS)
- Any CONOPS changes that may be required to enhance BP's radiation detection capabilities

Sandia National Laboratories (SNL) has been tasked to perform this analysis for BP stations, checkpoints, and roving patrol.

The need to improve the radiation detection architecture has given rise to increased concern over the potential of equipment or procedures to violate the Fourth Amendment, which protects against unreasonable search and seizure. In many cases, concern over potential violations leads to dismissal of an improvement that could significantly enhance detection and by extension, fortify protection against radiological and nuclear threats. In particular, one reason the community has resisted introduction of any radiation detection equipment beyond the radiation pagers commonly in use is the fear of creating a Fourth Amendment violation.

The border protection community generally acknowledges that no Supreme Court precedent exists for radiation detection. In facing this ambiguity, radiation detection is not alone: lack of precedent also exists for many other forms of advanced detection, such as chemical, biological, and explosives detection.

Thus, the issue of Fourth Amendment implications of radiation detection is critical. Protecting the rights guaranteed by the Constitution is a foremost value of every government agency. However, protecting U.S. residents and assets from potentially catastrophic threats is also a crucial role of government. In the absence of clear precedent, the fear of potentially violating rights could lead to the rejection of effective and reasonable means of search and seizure that could reduce risks, possibly savings lives and assets.

[1] dhs.gov
[1] Op. cit.

This white paper is a first attempt to address the implications of the Fourth Amendment for radiation detection. The goal of this document is not to apply case law to determine what the precedent may be if and when it exists, but rather provide a detailed outline that:

- Defines searches and seizures
- Identifies what precedent exists and what precedent doesn't exist
- Explore what the existing (and non-existing) precedent means for radiation detection, and particularly for the use of radiation detection used inside the nation's borders

In so doing, this white paper hopes to open an informed discussion on this issue, and possibly facilitate the selection and use of radiation detection CONOPS and equipment of particular value to preserving our national security.

2. THE FOURTH AMENDMENT

A first step in understanding the Fourth Amendment is gained by reading the actual words from the Constitution.

> *"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."*

This one sentence is very powerful and, at first glance, very clear. However, when viewed from the perspective of enforcing constitutional law, numerous ambiguities emerge. For example, the terms unreasonable search or seizure have come under considerable scrutiny. What exactly is search and seizure? And what does unreasonable search and seizure mean? To frame a definition of these words, the Supreme Court rules on cases of potential Fourth Amendment violations. Their majority or plurality opinion sets precedent that creates the context for the nuances of the definition. While this precedent may not always appear logical to the average person, judges in all courts must follow this precedent when making a decision on the cases they are presented with.

The following sections will introduce how these words are defined, what these words mean, their implications, and why the Supreme Court defined them the way they did.

Legal Definitions of Seizure and Search

Seizure

Generally, the courts define seizure as any restraint of an individual's freedom. The reasonableness of a seizure was defined in 1968 from the outcome of Terry v. Ohio. In this case, a police officer working streets he knew well noticed a suspicious individual, later identified as Terry. The officer observed Terry walking past a particular corner many times in a manner the officer considered suspicious. The officer approached Terry and asked him his name. Immediately upon Terry's mumbled response, the officer grabbed Terry and started to frisk the outside of his clothing. From this external inspection, he determined that Terry was carrying a weapon and proceeded to search two men accompanying Terry. At no time before beginning the invasive frisk-style search (now typically called a Stop and Frisk or Terry Stop) did the officer have any hard evidence of wrongdoing. Rather, he acted on his hunch and experience of similar situations.

The Supreme Court majority opinion was that both the seizure of Terry (the stop) and the search (the frisk) were reasonable under the Fourth Amendment. The deciding factor in this case was the officer's focus on his personal safety and the safety of the public when he made the decision to stop Terry. The following quote from the opinion helps to illustrate this:

"Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime . . ."

The major precedent set from this case defined reasonable seizure under the Fourth Amendment. It was ruled that:

"Whenever a police officer accosts an individual and restrains his freedom to walk away, he has "seized" that person within the meaning of the Fourth Amendment."

When an officer stops someone on the street for a few seconds for questioning or performs a traffic stop on the road for an extended period of time, it is considered a form of a seizure under the Fourth Amendment. What must be determined in each case is whether sufficient probable cause or concern for safety exists to make the seizure reasonable. An unusual and interesting additional outcome of this case is that determining the reasonableness of a seizure or search is situation-dependent. The opinion stated:

"Each case of this sort will, of course, have to be decided on its own facts."

Thus, no two situations are alike when it comes to seizing and searching an individual and no rule-of-thumb exists. When a question arises over a possible violation of the Fourth Amendment rights of an individual, a court must determine the reasonableness of the seizure or search that occurred.

Search
Only a year before the Terry v. Ohio case, the precedent for a reasonable search was determined by the case Katz v. United States, 1967. (For details, see Appendix A) This case ruled that a two-part test should be used to determine the reasonableness of a search:

1. The individual has exhibited an actual (subjective) expectation of privacy
2. Society is prepared to recognize that this expectation is (objectively) reasonable

So, although a person may go to great lengths to ensure privacy in a situation, a search is not unreasonable under the Fourth Amendment if society does not objectively recognize this situation to be private. The Supreme Court defines this principle as Reasonable Expectation of Privacy.

Reasonable Expectation of Privacy

The case *California v. Greenwood, 1988,* which examined a search of Greenwood's garbage that was placed outside his home, offers a good example of reasonable expectation of privacy. The Supreme Court ruled that while Greenwood might expect the contents of his garbage to be private, society would not. Society considers it reasonable to expect that items willingly discarded into the public domain (the outside garbage can) might be searched by a garbage

collector, a government law-enforcement officer (LEO), or anyone else. As defined by the Supreme Court, in the question of garbage, society does not recognize a reasonable expectation of privacy.

Reasonable expectation of privacy can be related to reasonableness of a search. In addition to defining search, the Katz case determined that privacy protects a person, not a place, although a person's expectation of privacy may in part be determined by that person's location and surroundings. For example, a person's home—specifically, the home the person currently lives in, and not someone else's home the person might be visiting—has special protection under the Fourth Amendment. In *Silverman v. United States, 1961,* it was stated:

> *"A man can still control a small part of his environment, his house; he can retreat thence from outsiders, secure in the knowledge that they cannot get at him without disobeying the Constitution. That is still a sizable hunk of liberty worth protecting from encroachment. A sane, decent, civilized society must provide some such oasis, some shelter from public scrutiny, some insulated enclosure, some enclave, some inviolate place which is a man's castle."*

A lower expectation of privacy exists for a person visiting someone else's home. For example, if individual A visited individual B while an LEO was listening to phone conversations in B's house under permission from a search warrant, A would not expect that his or her phone calls placed from within B's house would not be recorded.

An even lower expectation of privacy exists in a vehicle. Therefore, only probable cause, and not a warrant, is needed to search or seize a vehicle. This principle assumes that a vehicle typically does not serve as a residence or as a repository of personal effects and is mobile.

A public place or field is typically not viewed as a place where an individual can have a reasonable expectation of privacy from searches. Nonetheless, rulings have demonstrated that this is not always the case. The Fourth Amendment protects a person, not a place; of significance is not whether a person is in a public place, but rather the effort that person expended to make their actions within that place private. For example, covering one's mouth and whispering during a phone conversation in a public shopping mall may be considered an effort that would raise one's reasonable expectation of privacy. This principle also holds true for enclosed locations, such as a phone booth (which nonetheless imparts a different expectation of privacy than does a shopping mall.)

When performing a search an additional consideration must be made for the object of the search itself. The location where a search takes place must be reasonable for the object in question. In *United States v. Ross, 1982*, it was stated:

> *"The scope of the search is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the object of the search and the places in which there is probable cause to believe that it may be found. For example, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase."*

The case *United States v. Karo, 1984,* presents the final piece of the framework governing the reasonableness of searches and seizures under the Fourth Amendment. In the Supreme Court opinion, a justice stated the following in response to the argument that private aspects of a situation can be filtered from pertinent information:

> *"I find little comfort in the court's notion that no invasion of privacy occurs until a listener obtains some significant information by the use of the device [in reference to Katz v. United States, 1967]."*

The ruling maintained that the intent of the LEO in gathering information is irrelevant. As soon as any information that an individual believes to be private is obtained—or when the ability to obtain private information exists without actually obtaining it from the search—the whole search is considered unreasonable.

The Exclusionary Rule

The Supreme Court enacted the Exclusionary Rule to ensure all LEO respect the Fourth Amendment rights of all individuals in society. The rule, determined during *Weeks v. United States, 1914* and *Mapp v. Ohio, 1961,* is summarized in the following:

> *All evidence whose recovery stemmed from the illegal action—this evidence is known as "fruit of the poisonous tree"—can be thrown out from a jury (or be grounds for a mistrial if too much information has been irrevocably revealed).*

In any Fourth Amendment case where the exclusionary rule is applied, the rule pertains not only to information derived from the search and/or seizure in question, but also to any further search and/or seizure made possible only as a result of the original violation. For example, if the seizure of a vehicle that was later searched were ruled unreasonable, then all information obtained through the search would also be deemed inadmissible in court.

The exclusionary rule protects immigrants (legal and illegal) and visitors within the United States, as well as U.S. citizens—and allows for the reprimand, removal from active duty, and/or civil prosecution of any LEO who violates those rights, intentionally or unintentionally.

Exigent Circumstances

The previous discussion has clarified the need for LEO to obtain permission, probable cause, or a warrant before performing any search or seizure. However, it's clear that some searches or seizures do not meet any of these constraints. A justifiable basis for searches or seizures that are unwarranted and occur without probable cause and permission is exigent circumstances, defined as:

> *"An emergency situation requiring swift action to prevent danger to life, or serious damage to property, or to forestall the imminent escape of a suspect, or destruction of evidence.*

There is no ready litmus test for determining whether such circumstances exist, and in each case the extraordinary situation must be measured by the facts known by officials."

Under any combination of these four factors cited above, an LEO may search or seize an individual without reason or permission, provided the exigent circumstance is considered probable cause in court. The exigent circumstance simply acts as a special extension of the common probable cause rules. While it is clear that these situations do arise, an LEO cannot plan for them. For example, an LEO cannot justify routinely performing a search considered unreasonable based on the belief that an exigent situation may at some time exist.

Consent

Consent is the trump card of search and seizure. When an individual provides specific consent, the LEO has full rights to seize or search to its fullest extent. The specificity of the consent is an important factor. For example, if the owner of a vehicle consents to a search of the interior of the car but not the trunk, the LEO will need to obtain probable cause before searching the trunk. This said, anything pertinent found during that consensual interior search can be used as probable cause to search the trunk.

The authority of the person providing consent is another limiting factor: a person of authority on the matter must provide the consent. For example, the driver or owner of a vehicle may give consent to an LEO; a child in the car may not give the permission.

Interim Summary

Seizure and Search
A seizure is any restraint of an individual's freedom, even for less than a second. A two-part test is used to determine the reasonableness of a search: a subjective expectation of privacy for the individual must exist and an objective expectation of privacy that society recognizes must also exist. No concrete answer can determine if a seizure or search is reasonable; each instance must be decided by the specific facts of that situation.

Reasonable Expectation of Privacy
The reasonable expectation of privacy protects a person, not a place. An individual's reasonable expectation of privacy is not consistent in all situations but changes depending on where an individual is and the extent to which the individual made the situation private.

The Exclusionary Rule
Any evidence related to an unreasonable search or seizure is inadmissible in court and possibly grounds for a mistrial. Any search or seizure that follows a search or seizure ruled unreasonable must also be excluded from a case.

Exigent Circumstances
Exigent circumstances are unplanned emergency situations in which commonly unreasonable searches or seizures may become reasonable. Nonetheless, the presence of exigent circumstances does not give an LEO full license to act. Exigent circumstance merely provides a probable cause

for the search or seizure and therefore is only an extension of the more common search and seizure rules.

Consent
Consent gives LEO the right to search or seize at will a venue, object, or person specified in that consent. A person of authority of the situation must be the one to give consent.

3. COMMON AND ADVANCED SEARCHES; TECHNOLOGY MONITORING

Many different forms of searches are considered reasonable. For instance, a simple visual inspection of the interior of a car from outside though the windows is considered reasonable. Any information that an individual willingly gives to a third party—such as a pen register (a device used to track the numbers dialed for both incoming and outgoing calls) for a particular phone number—is generally not considered private and therefore reasonable to search. Other searches that may seem reasonable are not. One such search is lightly squeezing a person's luggage during a bus inspection for illegal immigrants.

Other forms of search use methods exceeding the capabilities of the average human. The Supreme Court places these forms of searches into three distinct categories: electronic surveillance, technology monitoring, and dog sniffs. The reasonableness surrounding technology monitoring is far from black and white. Dean Linda F. Harrison wrote in The Encyclopedia of American Civil Liberties 2006 about technology monitoring:

> *". . . the government can use different methods of technology monitoring without a warrant as long as the means do not intrude on a person's reasonable expectation of privacy that society objectively recognizes and as long as the technology means does not intrude on a protected area with technology that is not commonly available by the public."*[2]

Just as with the text of the Fourth Amendment, this explanation seems to be clear. Yet certain terms—such as reasonable expectation of privacy and technology not commonly publicly available by the public—are not well defined.

Other factors that may influence the Supreme Court's opinion of what reasonable expectation of privacy exists in certain situations include:

- Public and officer safety: "… balancing the need to search [or seize] against the invasion which the search [or seizure] entails." – *Camara v. Municipal Court, 1967*. Referenced in *Terry v. Ohio, 1968.*
- Burden on the public to perform the search
- Ratio of times that contraband is found from the search compared to the total number of searches performed

[2] The Encyclopedia of American Civil Liberties, 2006

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4. REVIEW OF FOURTH AMENDMENT SEARCH RULINGS

This section contains brief reviews of a number of Supreme Court cases that rule on Fourth Amendment advanced searches. A more detailed summary of each case, as well as interesting applicable Supreme Court justice quotations from the opinions of the case, can be found Appendix A: Further Details on Cases Reviewed. This section does not seek to use these cases to infer how the Supreme Court may pass judgment on cases involving radiation, chemical, biological, or explosives detection. Rather, it is intended to create a better understanding of the considerations addressed when ruling on a case and how precedent is set.

Many cases involving forms of electronic surveillance, technology monitoring, and dog sniffs exist. The following seven cases were chosen based on current understanding of LEO CONOPS and how these cases help to illustrate precedent that may affect them. These cases were also chosen to illustrate the specificity of the rulings and their lack of cross-applicability. For example, United States v. Place frames the original precedent for Dog Sniffs. However, this precedent cannot be directly applied to any other form of detection.

Overview of Cases

Silverman v. United States, 1961
Ruling: Unreasonable Search. The case involved the intrusion of only a few inches of a listening device into Silverman's home. Any unwarranted physical entry, no matter how small, into a location someone expects to be private is unreasonable under the Fourth Amendment. The ruling includes physical entry of people, as well as of the devices LEO might use to accomplish a search.

Katz v. United States, 1967
Ruling: Unreasonable Search. LEO used a device outside a public phone booth to listen to Katz, suspected of using the phone to convey information used for illegal gambling. A reasonable expectation of privacy exists for Katz's conversations in the phone booth. Electronic surveillance, albeit outside the physical space of the phone booth, constituted a violation of Katz's Fourth Amendment rights.

California v. Ciraolo, 1985
Ruling: Reasonable search. Contraband in Ciraolo's backyard was identified by LEO from a plane. The observation to identify contraband required no special equipment other than an airplane, which is a device commonly available to the public. The area flown over is in clear view to anyone flying over the house, and therefore no objective expectation of privacy exists.

Dow Chemical Co. v. United States, 1986
Ruling: Reasonable Search. A camera from a plane flying over a manufacturing plant was used by the EPA. It was ruled that the camera used, albeit precise, was one commonly available to the public for use in mapmaking. It was also determined that a manufacturing plant is more like a field than a home and therefore has a much lower expectation of privacy.

Danny Lee Kyllo v. United States, 2001
Ruling: Unreasonable Search. LEO detected undue heat in the home using infrared sensors outside the home—and felt results were probable cause to obtain a warrant for a search. While the United States (speaking for the LEO) claimed that its monitoring focused on the heat outside—and not inside—Kyllo's house, the monitoring was ruled to be a violation of Kyllo's privacy. The Supreme Court stated that no difference exists between "off-the-wall" and "through-the-wall" surveillance, regardless of the resolution of the surveillance device. It was determined that high resolution is not required to obtain intimate information and therefore the claimed low resolution of the infrared camera was not deemed relevant.

United States v. Place, 1983
Ruling: Reasonable Search, Unreasonable Seizure. Drug enforcement agents used drug-sniffing dogs to search the luggage of a known drug smuggler. The luggage was confiscated from Place for a period of 90 minutes. It was ruled that the dog sniff is not an unreasonable search under the Fourth Amendment for a variety of reasons. These reasons include the following:

- The dog only reveals contraband information.
- The sniff is considered non-invasive.
- No other investigative procedure is so limited in scope.

While the search was ruled reasonable, the seizure was ruled unreasonable not only due to the extended length of time of the seizure but also because LEO failed to keep Place informed about what was happening, how long he would be dispossessed, and what arrangements could be made to return his luggage to him.

Illinois v. Caballes, 2005
Ruling: Reasonable Search. The vehicle of Caballes—stopped by one officer for a traffic violation—was searched by a sniffing dog under the control of a second officer independent of the justification for the original stop. Although the dog sniff was an additional search from the original seizure, the dog sniff did not add any extra time to the original seizure and therefore the entire seizure, regardless of the original intent, was reasonable. Additionally, because a dog sniff is a reasonable search, there was no violation of any search or seizure Fourth Amendment rights.

Lack of Federal Precedent: GPS Vehicle Tracking

To date, no Supreme Court case law exists for GPS vehicle tracking. However, four GPS tracking cases have been elevated to state supreme courts. In all four cases, the LEO placed a GPS tracking device on a suspect's car to remotely track the suspect's movements.

Ruling: In two cases, one from Washington and one from New York this use of GPS tracking was ruled an unreasonable search. In Wisconsin and Massachusetts, it was ruled a reasonable search.

Implications of Current Precedent for Detection

The case law reviewed in this document represents only a small subset of the entire Fourth Amendment case law. The study of previous cases clearly elucidates what precedent exists. However, it's unclear how existing precedent might apply to cases that involve only minor changes.

For example, would the Dow Chemical Case have been considered reasonable if a telescope, rather than a camera, had been used? Would the Caballes case still have been considered reasonable if sniffing were done by a pig rather than a dog? And what might the precedent be for sniffing done by bees or an electronic drug sniffing device? Until federal precedent is set by the Supreme Court, any attempt to infer precedent from existing case law is inconclusive and ill-advised.

When federal precedent is lacking, the effect of precedent from local jurisdictions becomes a consideration. As the GPS cases demonstrate, different states may have different expectations of privacy for their citizens. Until federal precedent exists, the lower level courts will continue to make their own, sometimes contradictory, decisions.

Given the absence of federal precedent regarding radiation, chemical, biological, and explosives detection, there is no more reason to use or reject any piece of equipment on the grounds of a potential Fourth Amendment violation. From a Fourth Amendment perspective, no legal difference currently exists between:

- A tiny detector and a large one
- A detector on a person and one on a vehicle
- A detector that gathers identification information or one that collects gross counts
- A detector used to protect the public from radiation and one used to combat global terrorism

Without precedent, differences in detector characteristics, performance, and purpose are simply irrelevant.

Also unclear is the extent to which detection equipment can be legally used. For instance, would an alert on a detector be sufficient probable cause to further search or seize an individual? In the absence of federal precedent, there is no correct answer to this question, and therefore no more legal justification why an alert can establish probable cause than why it cannot, unless, of course, local jurisdictions have set legal precedent.

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5. CASE STUDY: RADIATION DETECTORS AND OBP

Building on the above exploration of the Fourth Amendment and related concepts, the sections below provide a framework for examining the relationship of the Fourth Amendment to Border Patrol operations.

Checkpoints and the Border

Because a checkpoint stops movement of people and vehicles—either very briefly or for an extended period—a checkpoint is a type of legal seizure without warrant, probable cause, or consent. Four primary types of legal checkpoints exist in the United States, and several other types may exist under special circumstances (an example would be an agriculture checkpoint at a border between two states). A brief summary of the major checkpoint types follows:

- A border checkpoint, sometimes referred to as a port of entry (POE) checkpoint, can be found at land borders, international airports, shipping ports, and other locations where U.S. Customs officials would typically work. Border checkpoints differ from any other checkpoint: at border checkpoints, Customs has the authority to seize an individual for extended periods of time and perform very invasive searches without probable cause. (However, probable cause or consent is needed to conduct ultra-invasive searches, such as an x-ray of a person or a strip or cavity search).
- A DUI checkpoint operates for the primary reason of ensuring public safety by checking drivers for intoxication.
- A license and registration checkpoint operates for the primary reason of ensuring public safety by validating that drivers and vehicles have been legally registered. The primary reason that LEO operate this type of checkpoint, as opposed to stopping cars solely to check for valid license and registration while on roving patrols, was established by a ruling from *Delaware v. Prouse, 197*9. This ruling found that an LEO on patrol that selectively stops a vehicle for the sole purpose of checking driver license and vehicle registration would be conducting an unreasonable seizure. In contrast, the ruling found that it is reasonable to set up a checkpoint to question drivers of all vehicles about driver and vehicle registration.
- An immigration checkpoint is commonly operated by BP at interior borders of the United States and can serve in a tactical or permanent capacity. At these checkpoints, vehicles are stopped for a few seconds to a few minutes for the primary reason of determining the citizenship and immigration status of vehicle occupants. The first stop, which typically lasts less than 15 seconds, occurs in a primary inspection area. At the officer's discretion, the vehicle may be sent to a secondary inspection area for further questioning that may last several minutes.

United States v. Martinez-Fuerte, 1976, which set precedent for these types of checkpoints, was unusual in that it combined three separate cases into one ruling. In all three cases, illegal immigrants were found in vehicles passing through a checkpoint, and Martinez-Fuerte argued that their seizures violated their Fourth Amendment rights. The ruling determined that all of the seizures were reasonable, and the following four-part precedent from the syllabus of the case was set for immigration checkpoints:

1. “To require that such stops always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car necessary to identify it as a possible carrier of illegal aliens. Such a requirement also would largely eliminate any deterrent to the conduct of well disguised smuggling operations, even though smugglers are known to use these highways regularly.”
2. “While the need to make routine checkpoint stops is great, the consequent intrusion on Fourth Amendment interests is quite limited, the interference with legitimate traffic being minimal and checkpoint operations involving less discretionary enforcement activity than roving patrol stops.”
3. “Under the circumstances of these checkpoint stops, which do not involve searches, the Government or public interest in making such stops outweighs the constitutionally protected interest of the private citizen.”
4. “With respect to the checkpoint involved …, it is constitutional to refer motorists selectively to a secondary inspection area for limited inquiry on the basis of criteria that would not sustain a roving patrol stop, since the intrusion is sufficiently minimal that no particularized reason need exist to justify it.”

The precedent from this case not only determined that all seizures in the primary inspection area were reasonable, but also that “no particularized reason need exist” to send someone to secondary inspection. This precedent was derived from the following quote of the majority opinion of the case:

> *“We further believe that it is constitutional to refer motorists selectively to the secondary inspection area at the San Clemente checkpoint on the basis of criteria that would not sustain a roving patrol stop. Thus, even if it be assumed that such referrals are made largely on the basis of apparent Mexican ancestry, [Footnote 16] we perceive no constitutional violation. As the intrusion here is sufficiently minimal that no particularized reason need exist to justify it, we think it follows that the Border Patrol officers must have wide discretion in selecting the motorists to be diverted for the brief questioning involved.”*
>
> *[Footnote 16] “The Government suggests that trained Border Patrol agents rely on factors in addition to apparent Mexican ancestry when selectively diverting motorists.... [numerical data presented] ...This appears to refute any suggestion that the Border Patrol relies extensively on apparent Mexican ancestry standing alone in referring motorists to the secondary area.”*

Data presented in this case showed that, on average, vehicles were released within 3 to 5 minutes from the secondary inspection area. The Supreme Court felt that this amount of time was not an inconvenience to the passengers. In addition, it was estimated that about 1% of vehicles were sent to secondary inspection and these numbers validated the “no particularized reason” justification.

Roving Patrol and Warrantless Search

The Immigration and Nationality Act provides for warrantless searches "within a reasonable distance from external boundary of the United States." At one point, the Attorney General clarified the reasonable distance requirement in the Act to be within 100 air miles of the external boundary of the United States. The Supreme Court overruled this Act in *Almeida-Sanchez v. United States, 1973.* In this case, Almeida-Sanchez was stopped about 25 air miles from the border and was searched without probable cause or consent by LEO acting under the Immigration and Nationality Act. Because there was no probable cause to stop him, the search was ruled a violation of his Fourth Amendment rights, and the majority opinion stated:

> *"It is clear, of course, that no Act of Congress can authorize a violation of the Constitution.*

Further clarifying this situation, *United States v. Ortiz, 1975,* ruled that roving patrol acting on behalf of an immigration checkpoint (in other words, serving as the functional equivalent of the checkpoint) require probable cause or permission to perform searches. The Supreme Court stated:

> *"... at traffic checkpoints removed from the border and its functional equivalents, officers may not search private vehicles without consent or probable cause."*

No matter where BP officers are located or what their operation is, they always need at least probable cause to search.

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6. CONCLUSION

The Fourth Amendment is a simple concept that is very difficult to define. Many aspects of enforcing its purpose are not clear and very specific to the precedent set from previous rulings. Thus, it is difficult to draw specific conclusions about any situation outside of documented case law. This study has concluded that real precedent is non-existent on a federal level and at best very sparse at a local level.

Given the absence of precedent for radiation, chemical, biological, and explosives detection, it's difficult to make informed decisions about which detection methods are acceptable from a legal standpoint. Therefore, the question is not whether a certain detection method can be used, but rather whether there is a legal difference, from a Fourth Amendment perspective, between any of the methods.

The answer to that question is unequivocally no. Therefore, an organization selecting equipment has no legal reason to choose one piece of equipment over another. Equipment characteristics, such as size, identification abilities, and CONOPS considerations, carry no legal weight. If an organization has made the choice to use a form of detection equipment, no legal reason exists not to use the best type of equipment for their mission. Therefore, the equipment selection decision should focus primarily on whether a piece of equipment is the best tool for the mission and the operating environment.

Supreme Court precedent does not directly govern the equipment selection process and CONOPS, but rather it acts as a guide for an organization's policies. It is up to the decision makers in an organization to understand the legal precedent, analyze acceptable operational burdens, and balance their mission objectives when setting these policies. Each policy will then govern the actions of LEOs such that they do not violate the Fourth Amendment as it is interpreted.

Inevitably an organization will have to decide whether to use radiation detection equipment in their operations. There will always be a balance between an individual's Fourth Amendment rights and protecting the citizens and infrastructure of the United States. In the case of radiation detection, the primary objectives, as stated in the DNDO mission statement, are to "detect and report unauthorized attempts to import, possess, store, develop, or transport nuclear or radiological material for use against the Nation". Each organization will have to determine if the potential violation of an individual's Fourth Amendment rights outweighs the implications of failing to meet any of these objectives through the use of radiation detection equipment.

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7. DISCLAIMER AND REFERENCES

The results and opinions presented in this paper are from research performed by individuals who do not have a legal background. While discussions have taken place with legal professionals the results presented here have not formally been reviewed by any legal team.

There are no references listed for the case law reviewed in this document although all of it is fully available online at many of the supreme court legal websites, such as law.cornell.edu, oyez.org, or supreme.justia.com.

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APPENDIX A: FURTHER DETAILS ON CASES REVIEWED

Silverman v. United States, 1961

Silverman was suspected of operating an illegal gambling establishment at his residence. LEO obtained the permission of a neighbor in a bordering row house to use the row house as location to gather information about Silverman. To this end, LEO installed a device know as a dectaphone with a spike on one end to listen to conversations taking place in Silverman's residence. LEO inserted the spike a few inches into Silverman's residence, from the neighbor's residence, through common ductwork. The end of the spike touched the ductwork and acted as an audio amplifier.

Ruling: Unreasonable Search. Any unwarranted physical entry, no matter how small, into a location someone expects to be private is unreasonable under the Fourth Amendment. This ruling applies to people as well as to any devices LEO may use to accomplish the search.

The court stated:

> *"On the record in this case, the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by petitioners, which violated their rights under the Fourth Amendment. . . . The court was unwilling to believe that the respective rights are to be measured in fractions of inches."*

Katz v. United States, 1967

Katz was suspected of transmitting wagering information used for illegal gambling from a phone located in a public phone booth. Secretly, LEO installed a microphone device outside of the phone booth to listen to the conversations of the occupants inside the booth. In no way did the device enter phone booth. It simply amplified the audio signals to allow LEO to hear and record at least Katz's portion of his conversations.

Ruling: Unreasonable Search. A reasonable expectation of privacy exists for Katz's conversations in the phone booth. Electronic surveillance, albeit outside the physical space of the phone booth, constituted a violation of his Fourth Amendment rights.

The court stated:

> *"... an enclosed telephone booth is an area where, like a home, and unlike a field, a person has a constitutionally protected reasonable expectation of privacy; that electronic, as well as physical, intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment ... presumptively unreasonable in the absence of a search warrant."*

California v. Ciraolo, 1985

Ciraolo was suspected of growing marijuana in the backyard of his home. His backyard was shielded by a high fence that blocked LEO from viewing the marijuana from the street. Two

LEO experts on visually identifying marijuana were assigned to fly over Ciraolo's house in a plane at an altitude of about 1000 feet. The two experts were able to positively identify the contraband with their own eyes and said that they could not have made the same identification with the pictures that they took.

Ruling: Reasonable search. The observations made to identify the contraband, regardless of the expertise of the individuals making the observations, in the Ciraolo's backyard, within the curtilage of his home, were made with no special equipment other than an airplane, which is a device commonly available to the public. The area flown over is in clear view to anyone who flies over the house and therefore no objective expectation of privacy exists.

The court stated:

> *"The Fourth Amendment protection of the home has never been extended to require law enforcement officers to shield their eyes when passing by a home on public thoroughfares. Nor does the mere fact that an individual has taken measures to restrict some views of his activities preclude an officer's observations from a public vantage point where he has a right to be and which renders the activities clearly visible."*

Dow Chemical Co. v. United States, 1986

The EPA was monitoring Dow Chemical by using an airplane to fly over their manufacturing facility; observations were made using an advanced precise camera.

Ruling: Reasonable search. It was determined that the camera used, albeit precise, was commonly available to the public for use in mapmaking. It was also determined that a manufacturing plant is more like a field than a home and therefore has a much lower expectation of privacy.

The court stated:

> *"The Court notes that EPA did not use "some unique sensory device that, for example, could penetrate the walls of buildings and record conversations." Nor did EPA use "satellite technology" or another type of "equipment not generally available to the public." Instead, as the Court states, the surveillance was accomplished by using "a conventional, albeit precise, commercial camera commonly used in mapmaking.""*

Danny Lee Kyllo v. United States, 2001

Kyllo was suspected of growing marijuana in his home. To obtain a search warrant, LEO used three reasons to justify probable cause. One of the reasons were results obtained from infrared monitoring of Kyllo's house that revealed the presence of a large amount of heat, more than that of an average home. It was assumed that this heat was sourced from heat lamps commonly used to grow marijuana.

Ruling: Unreasonable Search. While the United States claimed that they were not monitoring the heat in the house, just the heat on the outside of the house, it was ruled that the monitoring was still a violation of Kyllo's privacy. There is no difference between "off-the-wall" and "through-the-wall" surveillance, regardless of the resolution of the surveillance device. The excuse that the infrared camera was a crude camera was not accepted, and it was determined that high resolution is not required to obtain intimate information.

The court stated:

> *"The Government [United States] maintains, however, that the thermal imaging must be upheld because it detected "only heat radiating from the external surface of the house." The dissent makes this its leading point, contending that there is a fundamental difference between what it calls "off-the-wall" observations and "through-the-wall surveillance." But just as a thermal imager captures only heat emanating from a house, so also a powerful directional microphone picks up only sound emanating from a house and a satellite capable of scanning from many miles away would pick up only visible light emanating from a house. We rejected such a mechanical interpretation of the Fourth Amendment."*

United States v. Place, 1983

Place was a known drug smuggler, and the Drug Enforcement Administration (DEA) determined that he would be flying from one airport to LaGuardia airport in New York. The DEA was not able to stop Place before take off, so they called DEA in LaGuardia to stop him once he landed. Before Place could exit the LaGuardia airport, DEA officials stopped him and seized his luggage for a period of 90 minutes. During this time, a narcotics dog was brought onsite to sniff Place's luggage in an undisclosed location. When the dog alerted on one piece of luggage, LEO opened that luggage and found contraband.

Ruling one: Reasonable Search. It was ruled that the dog sniff is not a search under the Fourth Amendment for a variety of reasons including, but not limited to, that a dog only reveals contraband information, the sniff is considered non-invasive, and it is believed that no other investigative procedure is so limited in scope.

The court stated:

> *"We have affirmed that a person possesses a privacy interest in the contents of personal luggage that is protected by the Fourth Amendment. A "canine sniff" by a well-trained narcotics detection dog, however, does not require opening the luggage. It does not expose noncontraband items that otherwise would remain hidden from public view, as does, for example, an officer's rummaging through the contents of the luggage. Thus, the manner in which information is obtained through this investigative technique is much less intrusive than a typical search. Moreover, the sniff discloses only the presence or absence of narcotics, a contraband item. Thus, despite the fact that the sniff tells the authorities something about the contents of the luggage, the information obtained is limited. This limited disclosure also ensures that the owner of the property is not subjected to the embarrassment and inconvenience entailed in less discriminate and more intrusive investigative methods.*

In these respects, the canine sniff is sui generis [unique]. We are aware of no other investigative procedure that is so limited both in the manner in which the information is obtained and in the content of the information revealed by the procedure. Therefore, we conclude that the particular course of investigation that the agents intended to pursue here—exposure of respondent's luggage, which was located in a public place, to a trained canine—did not constitute a "search" within the meaning of the Fourth Amendment."

Ruling two: Unreasonable Seizure. While the United States contended that Place was able to leave at any time, it was ruled that his departure was tied to the luggage and therefore he was also seized. Further, LEO did not properly inform him of what was going on and this only exacerbated the violation of his Fourth Amendment rights.

The court stated:

"Although the 90-minute detention of respondent's luggage is sufficient to render the seizure unreasonable, the violation was exacerbated by the failure of the agents to accurately inform respondent of the place to which they were transporting his luggage, of the length of time he might be dispossessed, and of what arrangements would be made for return of the luggage if the investigation dispelled the suspicion."

Illinois v. Caballes, 2005

Caballes was stopped by police for a routine speeding violation and another officer, who happened to be a narcotics officer, heard about the stop over the radio. While the first officer was writing Caballes a warning, the narcotics officer arrived to the scene with a drug-sniffing dog and proceeded to walk the dog around Caballes' car. The dog alerted on the trunk, and the officers used that information as probable cause to search the trunk. They found contraband, and Caballes was arrested. Caballes argued that it was not a reasonable search because there was no probable cause for the dog sniff.

Ruling: Reasonable search. Although the dog sniff was an additional search from the original seizure, the dog sniff did not add any extra time to the original seizure and therefore the entire seizure, regardless of the original intent, was reasonable. Additionally, because a dog sniff is a reasonable search, there was no violation of any search or seizure Fourth Amendment rights.

The court stated:

"In our view, conducting a dog sniff would not change the character of a traffic stop that is lawful at its inception and otherwise executed in a reasonable manner, unless the dog sniff itself infringed respondent's constitutionally protected interest in privacy. Our cases hold that it did not."

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