They took my laptop!

The Fourth Amendment explained

Disclaimer

- It is vitally important for you to understand that while I am an attorney, I am not your attorney.
- In no way, shape, or form is this presentation intended to provide you with legal advice.
- Before relying or acting upon any information learned from this presentation you should consult a licensed attorney in your State.

Introduction

Overview

- The Constitution
- Intro to the Fourth
  - Suspicion Standards
  - Exceptions
- They took my laptop!
  - Hypothetical applications
  - Modern case overviews
- Question & Answer Period

The Constitution

Pop Quiz Hot Shots

The Constitution Quiz

- Q: How many Articles does the constitution contain?
- A: 7 + Preamble, Signatures

The Constitution Quiz

- Q: How many amendments are there?
- A: 27

The Constitution Quiz

- Q: The first ten amendments are called?

- A: The bill of rights

The Constitution Quiz

- Q: Which article applied most of the bill of rights to the states?

- A: 14th Amendment.

The Constitution Quiz

- Q: Which article or amendment contains the section on privacy?
- A: None. It's a judicial fiction.

The Constitution Quiz

- Q: When was the last amendment to the constitution ratified?
- A: May 7th, 1992

The Constitution Quiz

- Q: When was it proposed?

- A: September 25th, 1789 - James Madison

The Constitution Quiz

- Q: President Barack Obama was a professor of ____ law?
- A: Constitutional Law

Back to the point...

Introduction to 'The Fourth'

The Fourth Amendment

- "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 the things to be seized."

Amendment IV

Two separate clauses

- 'Reasonableness' Clause
  - "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated..."
- 'Warrant' Clause
  - "... 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 the things to be seized."

Search and Seizure Separate

- Examples:
  - Person Seized and Searched
    - Car pulled over, Driver Frisked
  - Person Seized but not Searched
    - Traffic Citation
  - Person Searched but not Seized
    - Thermal Scans, X-Rays, etc.
    - Brain Scans..?

Search / Seizure Defined

- Search
  - Expectation of Privacy
- Seizure
  - Individual - when a person believes he is not free to ignore the government's presence
  - Property - Meaningful interference with an individual's possessory interest

Suspicion Standards

- Mere Suspicion
  - A hunch or feeling
- Reasonable Suspicion
  - Premised upon articulable facts and circumstances
- Probable Cause
  - Search
    - Reasonable believe that evidence / contraband will be found
  - Arrest
    - Facts and circumstances indicate that a person had committed or was committing a crime

Exceptions to the Rule

- Border
- Plain view
- Open Fields
- Exigent Circumstances
- Search incident to arrest
- Civil search
- Motor Vehicle (reduced)
- Public Schools (reduced)
- Consent

The Fifth Amendment

- … nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; …"

Amendment V

When does it apply?

- The fifth amendment applies when a statement or act is:
  - compelled;
    - Cannot be voluntary
  - testimonial; and
    - Says or doesn't say something
    - Authenticates existence, ownership, etc.
  - Incriminating
    - Subjects to criminal responsibility
    - Applies equally in civil / criminal settings

Contents

- "Although the contents of a document may not be privileged, the act of producing the document may be." United States v. Doe, (1984)

Exceptions to the Rule

- Physical evidence is not testimony
  - Fingerprints
  - Blood Samples
  - Hair
  - Voice Samples
  - Etc.
- "Foregone Conclusions"
  - If they know it exists and can prove it by other means
  - Requires a grant of immunity

The Lock vs. The Safe

- A lock is physical evidence
  - Not a product of the mind
  - Subject to subpoena
- The combination to a safe is not physical evidence
  - Is a product of the mind
  - Not subject to a subpoena, unless…

Use / Derivative Use Immunity

- If the government promises not to use the 'production' of the evidence against the defendant; and
- Can independently verify the existence of the evidence; then
- the 5th Amendment doesn't apply

18 U.S.C. § 6002

- Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to:

  (1) a court or grand jury of the United States...

- [If ordered], the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case...

They took my laptop!

Resident Aliens

(really quickly)

Resident Aliens

- Generally - aliens treated the same under the U.S. Constitution as Citizens
- Wong Wing v. U.S. (U.S. 1896) - Established that an an alien subject to criminal proceedings is entitled to the same constitutional protections available to citizens
- Rasul v. Bush (U.S. 2004) - Degree of control over Gitmo is sufficient to trigger habeas corpus rights

Resident Aliens

- Wong Wing v. U.S. (U.S. 1896) - The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard **WITH PAIN** on the argument at the bar -- in face of the great constitutional amendment which declares that no state shall deny to any person within its jurisdiction the equal protection of the laws.

Resident Aliens

- Hamdi v. Rumsfeld (U.S. 2004) - "a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens."

Lets try to make this fun

The Rules

- All scenarios Warrantless, unless stated otherwise
- It is the current date

Hypotheticals



- Name: SkyDog
- Age: Really Old
- Occupation:
  - Hacker Consortium Godfather
- Prisoner #: 42

Not real SkyDog actions, I hope. only using his name.

Communications

- SkyDog has just attended OuterzOne '09 and decides to tell his friends, all 2 of them, how amazing it was.
- He calls, writes a letter to, and emails his friend Wrench (in Nashville) and Bush (in Iraq)…

SkyDog's Friends



Wrench



Bush

Communications

- Mail
  - U.S. v. Seljan (9th Cir., 2008) (Ok to read foreign letters without suspicion)
  - U.S. v. Ramsey (U.S., 1977) (Reasonable Suspicion req'd)
- FISA Court Approval of Warrantless Wiretapping
  - One party believed to be outside the U.S.
  - Does not apply to pre protect america act (PAA) wiretapping
- Email
  - On personal machine - Warrant or exception
  - On remote server - available by subponea
  - Account Information - Court order

Private Search

- After OuterzOne '09, SkyDog returns to Nashville only to find he's been evicted and his laptop was stolen by some Asshats.
- One of the Asshats turned on the laptop, found all of SkyDog's Hacker Consortium files, freaked out, and called the police. The police have Scott Moulton run EnCase on Sky's machine…

Private Search

- U.S. v. Runyan (5th, 2002)
  - Examining part of a system does not open all parts
- U.S. v. Crist (M. Dist. Pa, 2008)
  - Using EnCase to hash files is a 'search'

Private Search

- SkyDog gets back his laptop from the police and boots up Windows Millennium. The machine is hacked into by a Turkish citizen on the hunt for terrorist hackers.
- After finding SkyDog's Hacker Consortium documents, the man quickly reports SkyDog to the FBI...

Private Search

- Unknownuser Cases
  - U.S. v. Steiger (11th Cir. 2003)
  - U.S. v. Jarrett (E.D. Va, 2002)
- Private Search Factors
  - Government encouraged/initiated the search; or aware/acquiesced to the search?
  - And did the private actor intend to help law enforcement?

Border Crossing

- SkyDog is stressed out and takes a vacation to Mexico and engages in some serious drinking. While returning, he has a feeling is going to be searched and not being quite in his right mind, SkyDog swallows his cellphone. He also attempts to 'hide' his laptop but is unable to fit it …
- SkyDog was selected for a search…

What this might look like



Border Crossing

- U.S. v Arnold (9th Cir, 2007) - Laptops no different from closed containers which are subject to suspicionless searches
- Routine
  - Allowed by fact that you're crossing the border
- Non-Routine Searches
  - Requires reasonable suspicion

Border Crossing

- While searching his laptop the officers find a drive named 'My Illegal Files' and proceed to open a document containing what appears to be a listing of credit card numbers. They confiscate the laptop but upon turning it back on they find the drive has been encrypted…

Border Crossing

- In Re Boucher (M.D. Vt, 2008) - Encryption keys are products of the mind and are not subject to disclosure under the 5th amendment
- In Re Boucher (M.D. Vt, 2009) - Wait, never mind it was a foregone conclusion.
- The vault code v. key to a lock debate

Border Crossing

- Because of the heavy drinking SkyDog's eyes are red, his skin is pale (more so than usual), and he has the shakes…

Strip Search

- Non-Routine, so it requires more.
- Usually part of an inventory search, so not 'criminal' in nature
- Recent Cases (non-border)
  - Subjecting a 13 year old student to a strip search unreasonable when looking for IB Profin 800mg.
  - Subjecting a female motorist to a strip search after arrest for a misdemeanor marijuana possession, unreasonable. Especially, while it watched by male officers over the closed circuit t.v. system.

Border Crossing

- During the strip-search, the examining officer noticed a lump in SkyDogs throat…

Bodily Intrusion

- Non-Routine
- A lot of crossover with the other amendments
- May require a warrant depending on the level of urgency required, even at the border
- Let's just say SkyDog would be sore in the morning…

Arrested

- Because of all the odd behavior and suspicious actions SkyDog is arrested on suspicion of Smuggling -something. During the booking SkyDog's Phone Rings...

Answering Cellphone

- U.S. v. De La Paz (S.D. NY, 1999) - Agents had probable cause to believe that a cell phone, a common tool in the drug trade, would provide further evidence. Due to the temporal nature of a phone call, it was not unreasonable for police to answer the call.

The beat down

- After some investigation SkyDog is released. He returns home to his neighbor being beaten by a masked man who runs through his house. Police arrive and SkyDog consents to a search of his house.
- the police notice a 'Stolen Credit Cards' folder on his desktop. They begin search through his computer...

The beat down

- U.S. v. Turner (1st Cir, 1999) - Even though consent to a search was given, the consent did not extend beyond evidence of the assault. The initial evidence, however, would be available under plain view exception.

Military Invasion

- It turns out that the 'Stolen Credit Cards' folder was actually just his al & tigger porno, all 25 tbs, so he is released again.
- Unfortunately, those emails/letters SkyDog sent to Bush looked like terrorist documents. The President orders a raid, by the military, of both SkyDog's and Bush's houses...

SkyDog Porn Sample



Military Invasion

- Bush Memo (2003) - "... our Office recently concluded that the Fourth Amendment had no application to domestic military operations"
- In Re: Terrorist Bombings (2nd Cir, 2009) - "The Fourth Amendment's requirement of reasonableness – but not the Warrant Clause – applies to extraterritorial searches and seizures of U.S. citizens"

So what can I do about it?

- Don't keep sensitive data, memorize everything and eat the evidence
- Only travel with 'clean' equipment
  - Format, download data over secured channels upon arrival
- Encrypt Liberally
  - Never physically store the key
  - Ideally have a physical / non-physical key
- Shutdown equipment long before crossing
- Use bios passwords
- Never travel with something you can't afford to lose.

Miscellaneous. Recent Cases

- Herring v. U.S. (U.S., 2009) - Exclusionary rule does not apply "when police mistakes are the result of negligence such as that described here."
- State v. Stephenson (Minn. App, 2009) - Defendant excluded from home by court order had no reasonable expectation of privacy.
- Wisconsin v. Sveum (Wi. App, 2009) - Warrantless GPS tracking OK.
- People v. Weaver (Ny., 2009) - Warrantless GPS tracking not OK.

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The End