
ESSAY

SEARCH AND SEIZURE IN A POST-9/11 WORLD

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My topic for today is how 9/11¹ has changed the calculus for determining proper searches and seizures. In my mind, the proper issue was never: how difficult do we want it to be to catch criminals? Rather, the issue always was (or should have been), how can we balance the rights of innocent citizens to be free from criminals, on the one hand, and police on the other? If we make it too easy for police to search, innocent citizens are going to be subject to unheralded police invasion. On the other hand, if we make it too difficult to conduct searches and seizures, innocent citizens fall victim to criminals. As the late Chief Justice Rehnquist once said: “The function of the Supreme Court is, indeed, to hold the balance true”²

Today, I want to explore some of the changes in the way we look at search and seizure, especially since 9/11. Obviously, one change has occurred in airports. Pre-9/11, we might have expected to walk through a magnetometer, as indeed, we did when we entered certain public buildings. But we would not have expected to remove our shoes, have our carry-ons vastly restricted, and be told to not lock our checked suitcase so that it won’t have to be broken if somebody decides to search it.

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¹ September 11, 2001; on this morning, terrorists hijacked commercial airliners and launched coordinated attacks on both of the World Trade Center towers in New York City, and the Pentagon in Washington, D.C.

² WILLIAM H. REHNQUIST, *THE SUPREME COURT: HOW IT WAS, HOW IT IS* 318 (1987).

Indeed, a few years ago, when flying from Melbourne to Brisbane for the ISRCL³ conference, I was told that I had been randomly selected for a frisk. I asked what my options were and I was told that I could not enter the plane without submitting to a frisk. Obviously needing to get to Brisbane, I told the airline officials that while I would not consent to a frisk, I would not interfere with what they believed was their legal obligation. The good news was that the frisk was performed in the least intrusive possible way.

Basically, airports today have become the functional equivalent of borders, except that border officials frequently choose to be less intrusive than airport officials. Well, is this a good thing or a bad thing? In one sense it is good. Nobody wants to be blown up (or worried about being blown up) while flying on a plane. On the other hand, all of this additional security frequently leads me to think that the terrorists have won. They've made our system look more like theirs. Or put differently, they have deprived us of freedom of movement in a big way.

Of course, there seems to be no principled reason to not apply airport security to trains and busses. After all, both England and Spain have suffered major train attacks in the last decade. So, if planes can be made more secure by more intrusive searches, why not trains, subways, or busses? If the answer is "yes," (which it probably is) then surely even more freedom has been, or could be, lost by virtue of the terrorist attacks.

I now turn to the United States Supreme Court and its seeming reaction to 9/11. Candidly, it's hard to tell how much its pro-police/anti-citizen rhetoric is motivated by 9/11. Just prior to 9/11, the Court engaged in a series of such decisions, the most significant of which (*Atwater*)⁴ upheld a policeman's right to arbitrarily subject a citizen to a full custody arrest for the "crime" of failing to wear a seatbelt. It mattered not that such a procedure was almost unheard of (except in this case, which involved an ill-tempered, vindictive policeman) and was totally unnecessary. Rather, the Court's principal concern was making sure that policemen had a clear rule, letting them know that if a crime had been committed, arrest was an available option.⁵ The concept of requiring the policeman to use judgment as to when to make an arrest was thought to be systemically too burdensome.

³ International Society for the Reform of Criminal Law.

⁴ *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001).

⁵ *Id.* at 322.

I'd like to focus my remaining time on three post-9/11 cases that either singly, or taken together, show a disturbing trend towards supporting police convenience over citizens' rights. The cases are *Hudson v. Michigan*,⁶ *Hübel v. Sixth Jud. Dist. Ct. of Nevada*,⁷ and *Scott v. Harris*.⁸ Although I do not see any of these cases as heralding in the regime that American Justice Robert Jackson saw in his role as the Nuremberg prosecutor, where upon his return to the United States, he opined that:

Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and [the] dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.⁹

I do, however, see these cases, and indeed *Atwater*,¹⁰ as moving us dangerously closer to that paradigm, and do hope that we will soon see some decisions that come closer to "hold[ing] the balance true[.]"¹¹

HUDSON

*Hudson*¹² involved an American (and I suspect international) rule that requires a police officer to knock at the door when serving a warrant, and to give the homeowner a reasonable amount of time to answer the door before the police officer kicks the door in, thereby surprising the homeowner. There are lots of good reasons for this rule. In the usual case, it significantly protects privacy. In addition, it protects the police from being shot at as potential burglars. In regard to this latter point, it must be remembered that not all people whose homes are subject to search are in fact guilty. Consequently, the risk of an unnecessary adverse police/citizen contact is particularly great when a police officer with a warrant breaks into the home of someone who is in fact innocent.

⁶ *Hudson v. Michigan*, 547 U.S. 586 (2006).

⁷ *Hübel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

⁸ *Scott v. Harris*, 550 U.S. 372 (2007).

⁹ *Brinegar v. United States*, 338 U.S. 160, 180-81 (1949) (Jackson, J., joined by Frankfurter and Murphy, JJ., dissenting).

¹⁰ *Atwater*, 532 U.S. at 318.

¹¹ REHNQUIST, *supra* note 2, at 318.

¹² *Hudson*, 547 U.S. at 586.

None of this applied to Booker Hudson, however. His home was loaded with drugs and guns, including a fully loaded one, right next to him in his chair, that could have been used to shoot the police if only he had been given the time.¹³ In fact the police broke in with only five seconds of warning, thereby denying Hudson the opportunity to either shoot them or destroy his drugs.¹⁴ If the Court had simply upheld that as a valid exception to the “knock and announce” rule, I would have no quarrel with the decision. Indeed, the case would have been a mainstream search and seizure decision, allowing the police the obvious opportunity to preserve life and minimize damage. In short, *Hudson* should have been decided in favor of the Government as an exception to the knock and announce rule.

Unfortunately, Michigan conceded (quite unnecessarily, and in my view, wrongly) that it did violate Hudson’s knock and announce rights.¹⁵ Consequently, it was at risk of having all of the evidence excluded. To prevent this, Michigan argued that even though Hudson’s constitutional rights were violated by the manner in which the evidence was obtained, the evidence should nevertheless be introduced.¹⁶ On this point, Michigan prevailed by a 5–4 vote of the Supreme Court.¹⁷

It might be worth a moment’s digression to discuss the rationale for excluding unlawfully seized evidence in the first place. The rationale, as I understand it, is to create a disincentive for the police to attempt to violate search and seizure rights.¹⁸ That is, the police know that if they violate the Constitution, it will do them no good because they will not be able to use the evidence so obtained. Because of this, an unknown number of innocent people are benefitted by not being searched due to the policeman’s fear of not being able to use the evidence anyway.

What bothers me most about *Hudson*¹⁹ was the Court’s actual concern that the exclusionary rule would do what it was meant to do, namely deter the police. The rule says that unless the police have reasonable suspicion (a standard lower than probable cause) to believe

¹³ *Id.* at 588.

¹⁴ *Id.*

¹⁵ *Id.* at 590.

¹⁶ *Id.* at 589.

¹⁷ *Id.* at 604.

¹⁸ *Mapp v. Ohio*, 367 U.S. 643 (1961).

¹⁹ *Hudson*, 547 U.S. at 586.

that knocking and announcing would be dangerous or futile, the knock must take place.²⁰ The Court's response to this was: "If the consequences of running afoul of the rule were so massive, officers would be inclined to wait longer than the law requires—producing preventable violence against officers in some cases, and the destruction of evidence in many others."²¹

Basically, what this says is that the Court fears the exclusionary rule precisely because it will cause officers to err on the side of the Constitution. Apparently, the Court believes that it would be better for officers to err on the side of unlawful searches lest they lose the opportunity to conduct a constitutional one. Surely, this is a perverse reading of the Constitution. The rule already allows the police to dispense with knock and announce on mere reasonable suspicion. If the police are being instructed not to take that reasonable suspicion limitation seriously, how many innocent people are going to have their doors broken down without a knock because the police know that they have little to lose by resolving any doubt (or even no doubt) against a citizen?

A final irony of *Hudson* is the Court's conclusion, quoting several sources,²² that the police are now more professional and that the exclusionary rule is no longer necessary. For that, the Court quoted several sources²³, who have written about the increased professionalism of the police since the adoption of the exclusionary rule. One of these sources excoriated²⁴ the Court for using his work in that manner, emphasizing that the reason that police were now more professional was because of the exclusionary rule. Thus, in his opinion (and I'm inclined to think that he's right), if the incentive for professionalism is removed, the professionalism itself might soon follow.

²⁰ *Id.* at 595-96.

²¹ *Id.* at 595.

²² *Id.* at 599.

²³ S. WALKER, TAMING THE SYSTEM: THE CONTROL OF DISCRETION IN CRIMINAL JUSTICE 1950-1990 51 (1993); D. WAKSMAN & D. GOODMAN, THE SEARCH AND SEIZURE HANDBOOK (2d ed. 2006); A. STONE & S. DELUCA, POLICE ADMINISTRATION: AN INTRODUCTION (2d ed. 1994); E. THIBAUT, L. LYNCH, & R. MCBRIDGE, PROACTIVE POLICE MANAGEMENT (4th ed. 1998).

²⁴ Samuel Walker, Op-Ed., *Thanks for nothing, Nino*, L.A. Times, June 25, 2006, at M-5 (in this editorial, Professor Walker discussed Justice Scalia's citation of his work, *Taming the System*, in *Hudson v. Michigan*: "[H]e twisted my main argument to reach a conclusion the exact opposite of what I spelled out in this and other studies.").

HIIBEL

*Hiibel*²⁵ was an extremely interesting case which is relevant to our topic today. The question before the Court was the obligation of one who had been stopped on reasonable suspicion to identify himself. The Court, in its pre-9/11 days, had clearly held that without reasonable suspicion, a person could not be required to identify himself.²⁶ It had also held that even with reasonable suspicion, a person could not be required to give credible and reliable identification because the term “credible and reliable” was too vague.²⁷ In *Hiibel*, the Court held that with reasonable suspicion, a person could be required to identify himself.²⁸

Although I have no major quarrel with the Court’s holding, I do have one with its application to the facts of the case as portrayed in the video that was before the Court. The facts were that the police did have reasonable suspicion to investigate a potential domestic assault.²⁹ Unfortunately, the facts, as I see them, also indicated that Dudley Hiibel was totally innocent and had no idea that the police had any reason to suspect him.

The videotape demonstrated that neither side understood what the other was seeking. As the Court emphasized, the officer asked Hiibel for his identification eleven times, and each time Hiibel refused to give it to him.³⁰ Unfortunately, when Hiibel asked the officer why he wanted his identification, the officer merely said he was “conducting an investigation and needed to see some identification.”³¹ Not knowing on what particular basis the officer wanted to see his identification, Hiibel refused to comply.³²

The problem with the Court’s holding is that it undercuts the right of innocent citizens to withhold identification.³³ Suppose, for example, that I am taking a walk in front of my home in Lubbock, Texas. A policeman stops me and says, “I need to see some identification.” I

²⁵ *Hiibel v. Sixth Jud. Dist. Ct. of Nev.*, 542 U.S. 177 (2004).

²⁶ *Id.* at 184, citing *Brown v. Texas*, 443 U.S. 47 (1979).

²⁷ *Id.* at 184, citing *Kolender v. Lawson*, 461 U.S. 352 (1983).

²⁸ *Id.* at 189.

²⁹ *Id.*

³⁰ *Hiibel*, 547 U.S. at 181.

³¹ *Id.*

³² *Id.*

³³ *Hiibel* was prosecuted under NRS § 171.123, requiring only that a suspect disclose his name.

ask him why and he refuses to tell me, or he simply says, “Because.” I say to him: “Officer, the law says that I only need to identify myself if you have reasonable suspicion. Do you?” He says “I’m conducting an investigation,” (an answer given by the police in *Hiibel*).³⁴ What do I do? If I refuse to give him my name (and, unbeknownst to me, someone had described a man who looked like me as a bank robber), I could be convicted under a statute such as the one in Nevada. On the other hand, if he has no evidence against me, I am not required to identify myself.³⁵

I believe that my reaction as a risk-averse person would be to identify myself. Perhaps for many, that answer is no big deal. We do, however, have the right to anonymity, which for some of us is quite important. I do not believe that this right should have been lost simply because the United States Supreme Court, perhaps because of fear of 9/11, *sub silentio* refused to require an officer to explain his demand.³⁶

Furthermore, if identification (at least by name) really is required with reasonable suspicion, why shouldn’t it have to be credible or reliable? For example, consider the following hypothetical: A mid-Eastern looking man looks suspiciously like he is planning to blow up a building in the United States. A police officer stops and frisks him and finds nothing. He then asks the man his name. The man replies: “Bill Jones.” The officer then asks if he has any identification. The man says: “Not that I care to share with you.” Does anybody really believe that that would be the end of the encounter? I hardly think so.

In regard to that question, it is worth noting that although *Hiibel*’s conviction was upheld on the ground that he failed to identify himself by name, he was actually arrested because he refused to show the officer any identification.³⁷ I am convinced that the Court’s refusal to require an officer to explain his need for identification is partly predicated on the fear of 9/11. If so, I believe that should count as one more victory for the terrorists.

³⁴ *Hiibel*, 547 U.S. at 181.

³⁵ *Id.* at 184.

³⁶ *Id.* at 177.

³⁷ *Id.* at 180.

SCOTT v. HARRIS

*Scott v. Harris*³⁸ involved a high speed chase in which Scott, a police officer, intentionally bumped Harris's car, knocking him off the highway and causing him to become a paraplegic. The issue was whether the policeman used excessive force. More particularly, the issue was whether the jury should have been allowed to determine the excessiveness of the force. As in *Hiibel*, the police had the benefit of a video, and furthermore, the Court employed all inferences in favor of the police, even to the point of ruling in their favor on summary judgment as opposed to the usual practice of leaving the question to the jury.³⁹

The facts of *Scott*⁴⁰ should be contrasted to a pre-9/11 case called *Garner*.⁴¹ In *Garner*, an unarmed burglar ran away from a policeman, who then shot the burglar, killing him.⁴² The policeman claimed that if he had not shot, the burglar would have escaped and ultimately never been found.⁴³ Though not disagreeing with that assessment, the Court found the shooting unreasonable.⁴⁴ The Court thought that it was better that the apparently unarmed burglar escape and never be caught than that the burglar be killed or seriously injured.⁴⁵ Even though the burglar could have avoided that cruel choice by submitting to the policeman, the Court thought that he should not have had to pay with his life.⁴⁶

In *Scott*, the victim, Harris, was clocked at 73 mph in a 55 mph zone, surely a less serious offense than residential burglary.⁴⁷ Harris did, however, up the ante by refusing to stop for the policeman, and in fact increasing his speed to the point where his driving could fairly be described as reckless and dangerous.⁴⁸ Of course, one option the police had was to discontinue the chase. The Court had two responses to that. First, it thought it uncertain that Harris really would slow down, perhaps thinking that the police were merely strategically retreating,

³⁸ *Scott v. Harris*, 550 U.S. 372 (2007).

³⁹ *Hiibel*, 542 U.S. at 177.

⁴⁰ *Scott*, 550 U.S. at 372.

⁴¹ *Tennessee v. Garner*, 471 U.S. 1 (1985).

⁴² *Garner*, 471 U.S. at 4.

⁴³ *Id.*

⁴⁴ *Id.* at 11.

⁴⁵ *Id.*

⁴⁶ *Id.* at 21.

⁴⁷ *Scott*, 550 U.S. at 374.

⁴⁸ *Id.*

rather than withdrawing.⁴⁹ But secondly, and frankly I think tellingly, the Court was concerned that allowing reckless drivers to terminate a chase by their recklessness would encourage more reckless driving.⁵⁰

It is interesting to contrast that approach to *Garner*.⁵¹ Obviously, disallowing police deadly force encourages future “Garners” to out run the police. Surely, this is not the kind of message of disrespect that the Court wishes to send. Nevertheless, the Court thought that it was worth the candle to save a life. Fast forward now to *Scott*.⁵² Unlike the situation in *Garner*, the police knew Harris’s license number.⁵³ Consequently, unlike in *Garner*, the police could have arrested him for his wild and crazy driving without putting either the public or Harris at any further risk.

I firmly believe that 9/11 contributed to this result in *Scott v. Harris*. The thought of some punk kid (Harris was 19) forcing the end of a police chase in a post 9/11 world was more than the Court could take. While respect for police is very important, and Harris should have been punished severely for demonstrating the lack of it, I do not think rendering him a teenage quadriplegic was the appropriate penalty. He should have been allowed to escape, been arrested at his home, and have received some jail time for his outrageous behavior. But I do not think that bad citizen behavior justifies bad police behavior.

CONCLUDING THOUGHTS

Perhaps things may not be as bleak as I fear. There have been some recent decisions which are protective of search and seizure rights.⁵⁴ In 2006, the Court refused to allow a search against a homeowner who refused to consent to the search, even though his wife had consented.⁵⁵ And in 2007, the Court heard a case where the police unlawfully stopped a car with a driver and a passenger in it.⁵⁶ In that case, the State of California contended that only the driver was seized and therefore any evidence found against the passenger was admissi-

⁴⁹ *Id.* at 385.

⁵⁰ *Id.*

⁵¹ *Garner*, 471 U.S. at 1.

⁵² *Scott*, 550 U.S. at 372.

⁵³ *Id.* at 375.

⁵⁴ *Georgia v. Randolph*, 547 U.S. 103 (2006); *Brendlin v. California*, 551 U.S. 249 (2007).

⁵⁵ *Randolph*, 547 U.S. at 106.

⁵⁶ *Brendlin*, 551 U.S. at 252.

ble.⁵⁷ Ultimately, the Court rejected that argument and held that both the driver and passenger were seized and consequently, the passenger had the right to contest the constitutionality of the stop.⁵⁸ Thus, it appears that there is still some balance remaining on the Court.

Notwithstanding these cases, I do think that *Hudson*, *Hiibel*, and *Scott*⁵⁹ represent a disturbing trend towards balancing police convenience above citizens' needs. While I value my safety as much as most others, I am not willing to trade my fear of terrorist excesses in for fear of police excesses. I fear the United States may be doing that, and a recent announcement by Tony Blair⁶⁰ indicates that England may soon be following suit. I sincerely hope that I'm wrong.

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⁵⁷ *Id.* at 261.

⁵⁸ *Id.* at 263.

⁵⁹ *Hudson*, 547 U.S. at 586; *Hiibel*, 542 U.S. at 177; *Scott*, 550 U.S. at 372.

⁶⁰ Tony Blair, Op-Ed., *Shackled in war on terror*, Sunday Times, May 27, 2007, at 19 (in this editorial, (former) British Prime Minister Tony Blair stated that he believes that putting the civil liberties of terrorist suspects "first" is "misguided and wrong" and "a dangerous misjudgment.").