

REHNQUIST’S FOURTH AMENDMENT: PROTECTING THOSE WHO SERVE

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William H. Rehnquist was sworn in as an Associate Justice of the United States on January 7, 1972. Fourteen years later, President Reagan nominated him to be the Chief Justice, and he assumed that office on September 26, 1986. “The Chief,” as he was affectionately known by his staff, died in office on September 3, 2005.

During his more than thirty-three years as a Supreme Court Justice, Rehnquist authored 458 opinions for the Court. Although Rehnquist wrote opinions that shaped and contributed to every area of the Court’s jurisprudence, he recognized that it was often the opinions issued without fanfare that would have the greatest impact on the day-to-day practice of law. In comments following Rehnquist’s death, Justice John Paul Stevens said that Rehnquist “sometimes described these opinions by quoting from Thomas Gray’s *Elegy Written in a Country Churchyard*: ‘Full many a flower is born to blush unseen, And waste its sweetness on the desert air.’”¹ Rehnquist was a man without pretense. He paid no attention to what the media said about his cases, once telling a reporter that a good justice must “stand on [his] own two feet” and never be “bamboozled by current, trendy ideas.”²

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¹ Justice John Paul Stevens, Statement at the Announcement of the Death of Chief Justice William H. Rehnquist (Oct. 3, 2005) (on file with author).

² John A. Jenkins, *The Partisan: A Talk with Justice Rehnquist*, N.Y. TIMES MAG., Mar. 3, 1985, at 28, 101. This was a quality that Rehnquist admired in his mentor,

Pretense aside, one area of jurisprudence where Rehnquist's opinions were both highly anticipated and had a tremendous practical effect on day-to-day life is the Fourth Amendment. To review Rehnquist's majority opinions in Fourth Amendment cases is essentially to read a casebook on search and seizure. His careful analysis in those opinions has shaped privacy rights in our country, and Rehnquist's Fourth Amendment opinions are an important part of his legacy.

Rehnquist was a lifelong public servant. During World War II, he served in the Army Air Forces as a weather observer in the United States and North Africa.³ He served as Assistant Attorney General in the Department of Justice's Office of Legal Counsel from 1969 to 1972.⁴ And, of course, he spent more than thirty-three years serving as a Supreme Court Justice.⁵ It is perhaps from this perspective as a public servant that Rehnquist's Fourth Amendment cases demonstrate his particular concern for providing guidance and flexibility to those who serve the public as law enforcement officers. In considering the reasonableness of various police investigatory techniques, Rehnquist was always mindful of the practical realities and safety risks facing the police. Those considerations came through especially clear in his opinions analyzing the Fourth Amendment interests at stake when police officers conduct traffic stops and execute search warrants.

I. TRAFFIC STOPS

In 1973, one year after Rehnquist was sworn in as a Supreme Court Justice, he wrote in *Cady v. Dombrowski*:

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving

Justice Robert H. Jackson. See The Honorable William H. Rehnquist, *Robert H. Jackson: A Perspective Twenty-Five Years Later*, 44 ALB. L. REV. 533, 539 (1980) (noting that Justice Jackson "did not have to read the views of some particular columnist, commentator, or editorial writer in order to know what he thought about a particular factual situation").

³ Stevens, *supra* note 1, at V.

⁴ See *id.*

⁵ See *id.*

automobiles will be substantially greater than police-citizen contact in a home or office.⁶

That insight foreshadowed one major subject of Rehnquist's majority opinions. Over the course of the next thirty-three years, Rehnquist would write a substantial number of opinions defining and refining how the dictates of the Fourth Amendment shaped acceptable police procedures during traffic stops. Rehnquist himself had some experience with traffic stops: He was revered by his colleagues as a fair and efficient administrator who was always punctual and he was known to acquire the occasional speeding ticket.⁷

A. Reasonable Suspicion to Initiate a Stop

Rehnquist's first Fourth Amendment opinion, *Adams v. Williams*,⁸ was a case that involved a police officer, patrolling alone in a high-crime area, who received a tip from an informant that a person seated in a nearby vehicle was carrying drugs and had a concealed gun in his waistband.⁹ Based on the informant's tip, the officer approached the vehicle to conduct a *Terry*¹⁰ stop of its occupant.¹¹ Rehnquist rejected the argument that reasonable suspicion of criminal activity must be based on the officer's personal observations, stating that "[t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape."¹² Rehnquist further concluded that when the suspect refused to comply with the officer's request to exit the vehicle and instead rolled down his car window, the officer did not violate the Fourth Amendment by reaching into the vehicle to frisk the suspect for

⁶ *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

⁷ *Speeding Ticket for Rehnquist*, MILWAUKEE SENTINEL, Aug. 20, 1977, at 3; *Rehnquist Given Speeding Citation*, L.A. TIMES, Sept. 14, 1986, at 34; George Rush et al., *Justice Is Served—With A Ticket*, N.Y. DAILY NEWS (Aug. 23, 2002, 12:00 AM), <http://news.google.com/newspapers?nid=1368&dat=19770820&id=iY5QAAAAIIBAJ&sjid=5BEEAAAAIIBAJ&pg=5518,3542506>.

⁸ 407 U.S. 143 (1972).

⁹ *Id.* at 144-45.

¹⁰ *See Terry v. Ohio*, 392 U.S. 1 (1968).

¹¹ *Williams*, 407 U.S. at 145.

¹² *Id.*

the gun supposedly at his waist.¹³ That action was “a limited intrusion designed to insure [the officer’s] safety,”¹⁴ and Rehnquist emphasized that the purpose of an investigatory frisk is “to allow the officer to pursue his investigation without fear of violence.”¹⁵

Rehnquist’s deference to the investigatory judgments of trained police officers appeared in his Fourth Amendment opinions throughout his tenure. In one of his final Fourth Amendment opinions, *United States v. Arvizu*,¹⁶ Rehnquist again emphasized the importance of allowing police officers to responsibly investigate crime. In *Arvizu*, the court of appeals concluded that many of the facts that led a border patrol agent in a remote area of southeastern Arizona to stop a van were susceptible to innocent explanation and therefore entitled to no weight in a reasonable suspicion analysis.¹⁷ Rehnquist’s opinion rejected that approach and emphasized that reasonable suspicion is analyzed by evaluating the “totality of the circumstances,” which “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”¹⁸

B. Procedures During a Stop

For scenarios unfolding after a police officer validly stops a vehicle, Rehnquist’s opinions were carefully crafted with an eye toward ensuring that officers remained safe in the course of their investigations. In *Maryland v. Wilson*,¹⁹ Rehnquist wrote that police may, as a matter of course, order the passengers of a lawfully stopped car to exit the vehicle during a traffic stop.²⁰ Rehnquist explained that traffic stops are “[r]egrettably . . . dangerous encounters,” and he cited statistics tracking officer

¹³ *Id.* at 148.

¹⁴ *Id.*

¹⁵ *Id.* at 146.

¹⁶ 534 U.S. 266 (2002).

¹⁷ *Id.* at 268, 272-73.

¹⁸ *Id.* at 273 (quoting *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

¹⁹ 519 U.S. 408 (1997).

²⁰ *Id.* at 410 (extending *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), which held that officers may order a driver to exit his vehicle during a traffic stop).

assaults and deaths during traffic pursuits and stops.²¹ Rehnquist concluded that the weighty interest of officer safety, balanced against the limited additional intrusion on a passenger who is already in a stopped car, was sufficient to justify ordering passengers out of a vehicle.²²

Of course, the safety threat to a police officer does not dissipate once the occupants exit the vehicle. That threat reaches its height when an officer effects a custodial arrest. In the context of traffic stops, Rehnquist wrote numerous opinions on the strictures of the search incident to arrest exception to the Fourth Amendment's warrant requirement.²³

In the first of those opinions, *United States v. Robinson*, Rehnquist rejected the argument that a search incident to a lawful arrest must be based on the likelihood that a particular suspect is armed.²⁴ Deferring to the officer's best judgment about how to remain safe during his investigation, Rehnquist stated, "A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment," and the authority to search "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."²⁵ He noted that "the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical *Terry*-type stop."²⁶ That elevated danger, Rehnquist concluded, was "an adequate basis for treating all custodial arrests alike for purposes of search justification."²⁷

²¹ *Id.* at 413 (citing FED. BUREAU OF INVESTIGATION, UNIFORM CRIME REPORTS: LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 71, 33 (1994)).

²² *Id.* at 413-15.

²³ The search incident to a lawful arrest was a legitimate exception to the Fourth Amendment's warrant requirement long before Rehnquist joined the Court. *See United States v. Robinson*, 414 U.S. 218, 224-25 (1973) (noting that search incident to arrest exception had been recognized by the Supreme Court as early as *Weeks v. United States*, 232 U.S. 383 (1914)).

²⁴ *See id.* at 234.

²⁵ *Id.* at 235.

²⁶ *Id.* at 234-35.

²⁷ *Id.* at 235. In a companion case decided on the same day as *Robinson*, Rehnquist wrote that a search incident to a lawful arrest is always reasonable under the Fourth

Although Rehnquist was satisfied with a bright-line rule giving police officers permission to conduct searches incident to custodial arrests, he hesitated to expand the search incident to arrest exception beyond its justifications.²⁸ In *Knowles v. Iowa*,²⁹ Rehnquist declined to expand the exception to traffic-stop scenarios where the subject was issued a citation, rather than being subjected to a full custodial arrest.³⁰ He explained that when a citation is issued, the officer safety concern “is not present to the same extent and the concern for destruction . . . of evidence is not present at all.”³¹

Rehnquist did, however, believe that the rationales underlying the search incident to arrest exception justified searching the passenger compartment of a vehicle contemporaneously with the arrest of a “recent occupant.”³² In his final opinion on this topic, *Thornton v. United States*, Rehnquist concluded that the holding of *New York v. Belton*³³—that an officer may search the passenger compartment of a vehicle contemporaneously with the arrest of an occupant—should be extended to scenarios where police initiate contact with the suspect after he has exited his vehicle.³⁴ Writing for five members of the Court, Rehnquist explained that “[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle.”³⁵ “The stress [of an arrest],” Rehnquist explained, “is no less merely because the arrestee exited his car before the officer initiated contact, nor is an

Amendment, notwithstanding the lack of a departmental requirement that suspects be taken into custody for the particular offense of arrest. *Gustafson v. Florida*, 414 U.S. 260, 265 (1973) (“It is sufficient that the officer had probable cause to arrest the petitioner and that he lawfully . . . placed the petitioner in custody.”).

²⁸ In *Chimel v. California*, 395 U.S. 752 (1969), the Court outlined two rationales for the search incident to arrest exception: (1) “to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape,” and (2) “to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.” *Id.* at 763.

²⁹ 525 U.S. 113 (1998).

³⁰ *Id.* at 118-19.

³¹ *Id.* at 119.

³² *Thornton v. United States*, 541 U.S. 615, 619-20 (2004).

³³ 453 U.S. 454 (1981).

³⁴ *Thornton*, 541 U.S. at 617.

³⁵ *Id.* at 621.

arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle.”³⁶

Of course, the arrestee in *Thornton* was arguably not “in control of” his vehicle when the officer searched it; he was handcuffed and in the backseat of a patrol car.³⁷ In the post-Rehnquist era, the Court has limited vehicle searches in those circumstances to scenarios where evidence of the crime of arrest might be found in the vehicle. In *Arizona v. Gant*,³⁸ decided in 2009, the Court held that the safety and evidentiary justifications underlying the search incident to arrest exception “d[id] not authorize a vehicle search incident to a recent occupant’s arrest after the arrestee has been secured and cannot access the interior of the vehicle,” but that “circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.”³⁹ The Court stated that its holding was “[c]onsistent with . . . *Thornton*,” a case where evidence of the crime of arrest (drug possession) might have been found in the arrestee’s car.⁴⁰

Although *Gant* indicates some pushback to the broad authority Rehnquist carved out for police officers to protect themselves from harm while conducting arrests, Rehnquist’s traffic-stop opinions carefully scrutinized the competing interests at stake when police officers approach criminal suspects on the road. In his balance, the concern for officer safety prevailed with regularity.

II. SEARCH WARRANTS

In addition to traffic stops, Rehnquist authored several opinions addressing another investigatory practice that can pose severe safety risks to police officers: executing search warrants. In opinions on this topic, Rehnquist tackled the difficult realities facing officers who are tasked with entering homes to conduct full-fledged searches. In those opinions, he remained steadfast in his concern for officer safety.

³⁶ *Id.*

³⁷ *See id.* at 618.

³⁸ 556 U.S. 332 (2009); *see also Thornton*, 541 U.S. at 618.

³⁹ *Id.* at 335.

⁴⁰ *Id.*

In *United States v. Ramirez*,⁴¹ an informant told an agent from the Bureau of Alcohol, Tobacco, and Firearms that he had seen a person he believed to be an escaped convict at Hernan Ramirez's house in Boring, Oregon.⁴² The informant also told the agent that Ramirez "might have a stash of guns and drugs hidden in his garage."⁴³ During the execution of a "no-knock" search warrant, officers broke a "window in the garage and pointed a gun through the opening, hoping thereby to dissuade any of the occupants from rushing to the weapons the officers believed might be in the garage."⁴⁴ Rehnquist wrote that although excessive or unnecessary destruction of property in the course of a search may violate the Fourth Amendment, the officers in this case acted reasonably by breaking a single garage window, given their information about a weapons stash there.⁴⁵

Rehnquist authored an opinion approving of more intrusive tactics in *Muehler v. Mena*,⁴⁶ his final Fourth Amendment opinion. *Muehler* was a case brought under 42 U.S.C. § 1983 against officers who had executed a search warrant for evidence of a drive-by shooting at a suspected gang house.⁴⁷ The plaintiff, Iris Mena, was awakened by police officers wearing tactical gear who "entered her bedroom and placed her in handcuffs at gunpoint."⁴⁸ Mena and three other occupants were then detained in handcuffs for around two hours while police executed the search warrant.⁴⁹ Rehnquist rejected Mena's argument that police detained her for an unreasonable amount of time and in an unreasonable manner.⁵⁰ Noting that "this was no ordinary search," he explained that "[t]he governmental interests in not only detaining, but using handcuffs, are at their maximum when, as here, a warrant authorizes a search for weapons and a wanted gang member resides on the premises."⁵¹ "In such inherently dangerous

⁴¹ 523 U.S. 65 (1998).

⁴² *Id.* at 68.

⁴³ *Id.* at 68-69.

⁴⁴ *Id.*

⁴⁵ *Id.* at 71-72.

⁴⁶ 544 U.S. 93 (2005).

⁴⁷ *Id.* at 95-96.

⁴⁸ *Id.* at 96.

⁴⁹ *Id.* at 96, 100.

⁵⁰ *Id.* at 96-97.

⁵¹ *Id.* at 100.

situations,” he concluded, “the use of handcuffs minimizes the risk of harm to both officers and occupants.”⁵²

Although Rehnquist was willing to allow officers flexibility in executing search warrants to ensure their safety, he did not sanction police actions that did not further the purpose of the search. In *Wilson v. Layne*,⁵³ Rehnquist concluded that officers who invited a reporter and a photographer from the *Washington Post* to accompany them in executing a search warrant as part of the U.S. Marshals’ “ride-along” policy violated the Fourth Amendment.⁵⁴ Rehnquist noted the special protection afforded to the home under the Fourth Amendment,⁵⁵ and he concluded those protections would be “significantly watered down” if a general government interest in allowing media ride alongs was sufficient to allow entry of media personnel into a home.⁵⁶

Like his traffic-stop opinions, Rehnquist’s opinions analyzing police conduct during the execution of search warrants convey his genuine concern for the safety of law enforcement officers who, for our benefit, enter private homes to search for evidence of crime. Although Rehnquist recognized that the Fourth Amendment imposes some limitations on the manner in which police may execute search warrants, his opinions afford officers broad discretion to determine how best to protect themselves while performing this important duty.

* * *

Rehnquist’s opinions analyzing the competing interests presented by day-to-day, police-investigative practices highlight his keen understanding of the practical realities facing police officers in the field. Although Rehnquist was, without a doubt, a conservative jurist, his opinions provided clear limits on officers’ discretion when he believed the Fourth Amendment dictated that result. From start to finish, Rehnquist vigilantly ensured that the Fourth Amendment provided the protections for which it was

⁵² *Id.*

⁵³ 526 U.S. 603 (1999).

⁵⁴ *Id.* at 605-06.

⁵⁵ *Id.* at 610-11.

⁵⁶ *Id.* at 612.

intended without exposing our law enforcement officers to an unreasonable risk of harm.