People v. McKinnon--A New Move in Search and Seizure

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PEOPLE v. McKINNON—A NEW MOVE IN SEARCH AND SEIZURE

The Fourth Amendment to the United States Constitution protects citizens against unreasonable searches and seizures and requires, upon a showing of probable cause, the issuance of a warrant prior to search or seizure. Nevertheless, the Supreme Court has recognized that exceptional situations militate against securing a warrant prior to a search. For example, there may be a likelihood that evidence will be destroyed or an officer placed in danger if a search is not conducted immediately. In defining certain narrow exceptions to the warrant requirement, the Court has recognized that in extraordinary circumstances individual privacy may be sacrificed in order to meet the needs of law enforcement.

The California Supreme Court in the recent case of People v. McKinnon has broadened an exception to the warrant requirement. In that case, the court held that if law enforcement officials have probable cause, they may conduct a warrantless search and seizure of goods consigned to a common carrier for shipment. In so holding the California court relied on the well-developed rule that automobiles may be the proper subject of warrantless searches and seizures because they are fleeting targets.

This note adopts the position that the holding of the California court is not sound and that the analogy to the automobile exception

1. U.S. CONST. amend. IV. "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."

2. See text accompanying notes 37-41 infra.

3. "It is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." Chimel v. California, 395 U.S. 752, 763 (1969). Preston v. United States, 376 U.S. 364, 367 (1964).

4. 7 Cal. 3d 899, 500 P.2d 1097, 103 Cal. Rptr. 897 (1972).

5. Id. at 902-03, 500 P.2d at 1099, 103 Cal. Rptr. at 899.

ignores the fundamental basis of the United States Supreme Court decisions dealing with this exception. The court fails to address the crucial question of whether exigent circumstances justified the warrantless search. By failing to confront this question directly, the court arrives at a holding that is inconsistent with the controlling cases and puts forth a rule that cannot withstand analysis. Finally, it will be argued that the holding is undesirable, because it significantly erodes the requirements for obtaining a search warrant with a consequent loss of individual privacy.

**Factual Setting of McKinnon**

On March 10, 1969, Lloyd George McKinnon and John Scott Turk brought five cardboard cartons to the United Airlines freight counter at the San Diego airport. The cartons were described as containing "personal effects" and were consigned for shipment to Seattle. The airline agent, suspecting the cartons contained contraband, obtained permission from his supervisor to inspect one of the cartons. Discovering what he believed were packages of marijuana, the agent notified the police. An officer from the State Bureau of Narcotics arrived some twenty or thirty minutes later and conducted a search verifying that the contents of the packages were marijuana. The defendants

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7. 7 Cal. 3d at 903, 500 P.2d at 1100, 103 Cal. Rptr. at 900.
8. The defense argued that the airline agent was acting as an agent of the police when he opened the footlockers and therefore the search should be subject to the Fourth Amendment warrant requirement. A witness for the defense testified that she had interviewed the airline agent a few days before the hearing and had been told by the agent that the police had asked him and his fellow agents to be alert for suspicious persons or packages. If their suspicions were aroused they were allegedly told to open the box and if contraband were found they were to leave the box open and call the police. *Id.* at 905, 500 P.2d at 1101, 103 Cal. Rptr. at 901. The court held that whether an individual is acting as an agent of the police is ordinarily a question of fact and in this case "the evidence fully supports the magistrate's finding of fact that Gos was acting as a private individual when he opened the package here in issue. For the reasons stated, therefore, it was not necessary that in so doing he have probable cause to believe it contained contraband." *Id.* at 916, 500 P.2d at 1109, 103 Cal. Rptr. at 909.


The subject of when a private individual loses his private status and takes on the status of an agent of the police is outside the scope of this note. For an example of a situation holding private individuals to be acting in concert with the police and thereby rendering the seized evidence inadmissible, see *Stapleton v. Superior Court*, 70 Cal. 2d 97, 447 P.2d 967, 73 Cal. Rptr. 575 (1968). For a discussion of the agency problem in the specific context of airport searches see Note, *Airport Security Searches and the Fourth Amendment*, 71 COLUM. L. REV. 1039 (1971).
were apprehended shortly thereafter\(^9\) and were subsequently charged with transporting marijuana\(^{10}\) and possession of marijuana for sale.\(^{11}\)

The defendants both filed motions to suppress the evidence on the ground that it was the product of an illegal search and seizure.\(^{12}\) The court at the preliminary hearing dismissed the charges as to McKinnon and set aside the information as to Turk.\(^{13}\) The appellate court affirmed. The California Supreme Court, in a four to three decision, reversed and held the evidence admissible.

In this typical air freight search case we are called upon to reconsider People v. McGrew\(^{14}\) and Abt v. Superior Court\(^{15}\) in the light of supervening developments in the law. As will appear, we conclude that the rule of those decisions is no longer to be followed, and that a chattel consigned to a common carrier for shipment may lawfully be searched upon probable cause to believe it contains contraband.\(^{16}\)

*People v. McGrew*\(^{17}\) and *Abt v. Superior Court*\(^{18}\) were cases remarkably similar on their facts to the situation before the court in *McKinnon*. Both cases involved packages containing marijuana which were consigned for shipment at an airport,\(^{19}\) and in both cases officers conducted a search without obtaining a warrant.\(^{20}\) But in those two cases the searches were declared invalid. The court based its decisions on a finding that it was not impractical for the police to secure a warrant prior to the search.\(^{21}\) The *McKinnon* court therefore found it necessary to directly overrule *McGrew* and *Abt*.\(^{22}\)

### The Fourth Amendment Warrant Requirement

In order to investigate the soundness of the court’s holding in

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9. 7 Cal. 3d at 903-04, 500 P.2d at 1100, 103 Cal. Rptr. at 900.
12. 7 Cal. 3d at 903, 500 P.2d at 1099, 103 Cal. Rptr. at 899.
13. Id.
14. Id. at 902-03, 500 P.2d at 1099, 103 Cal. Rptr. at 899.
15. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).
20. See text accompanying note 14 supra.
McKinnon, it is necessary to discuss the Fourth Amendment warrant requirement. Interpretations of the Fourth Amendment have been confusing.\textsuperscript{21} It is well established that the purpose of the Fourth Amendment is to protect citizens against unreasonable intrusions by government officials.\textsuperscript{22} In order to effectuate this policy the Supreme Court has developed a per se rule of reasonableness which requires that a warrant be obtained unless the facts fit into one of a few exceptions.\textsuperscript{23}

For a number of years there has been a conflict between those who thought that a warrantless search would be proper if by looking at all the facts it could be deemed reasonable, and those who thought that the Fourth Amendment required a warrant for a search to be reasonable. The Court's decisions have swung back and forth between these two positions. \textit{United States v. Rabinowitz}\textsuperscript{24} was the leading case for the reasonableness of the search approach.

The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances—the total atmosphere of the case. It is a sufficient precaution that law officers must justify their conduct before courts which have always been, and must be, jealous of the individual's right of privacy within the broad sweep of the Fourth Amendment.\textsuperscript{25}

In a dissenting opinion Mr. Justice Frankfurter eloquently defended the per se requirement.

One cannot wrench "unreasonable searches" from the text and context and historic content of the Fourth Amendment. It was the answer of the Revolutionary statesmen to the evils of searches without warrants and searches with warrants unrestricted in scope. Both were deemed "unreasonable." Words must be read with the gloss of the experience of those who framed them. Because the experience of the framers of the Bill of Rights was so vivid, they assumed that it would be carried down the stream of history and that their words would receive the significance of the experience to which they were addressed—a significance not to be found in the dictionary. When the Fourth Amendment outlawed "unreasonable searches" and then went on to define the very

\textsuperscript{21} In Coolidge v. New Hampshire, 403 U.S. 443, 483 (1971), Mr. Justice Stewart noted the difficulties existing in the cases interpreting the Fourth Amendment. "Of course, it would be nonsense to pretend that our decision today reduces Fourth Amendment law to complete order and harmony. The decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent."


\textsuperscript{24} 339 U.S. 56 (1950).

\textsuperscript{25} Id. at 66.
restricted authority that even a search warrant issued by a magis-
trate could give, the framers said with all the clarity of the gloss
of history that a search is "unreasonable" unless a warrant au-
thorizes it, barring only exceptions justified by absolute neces-
sity.26

Rabinowitz overruled Trupiano v. United States27 which had
stated the per se requirement.28 However, Chimel v. California29
overruled Rabinowitz and reinstated the strict warrant require
ment.30 A recent and direct statement of the warrant require
ment can be found in Katz v. United States.31 "[S]earches con
ducted outside the judicial process, without prior approval by judge or magistrate, are per se unrea
sonable under the Fourth Amendment—subject only to a few specifi
cally established and well-delineated exceptions."32

Even though Rabinowitz has been overruled and the per se war
rant requirement established as good law today, the philosophi
cal argument still continues.33 The strict per se requirement can be diffi
cult for the courts to apply in cases where probable cause is obvious,
where the search was conducted in a restrained manner, and where
it appears that going to a magistrate is an extreme formality. The
immediate effect of applying the rule in such a situation is suppression
of incriminating evidence and quite possibly loss of a conviction. To
the extent that the police cannot carry out immediate warrantless
searches there is a feeling that some evidence will be lost and crimini
als will evade punishment. No doubt some courts have trouble
applying the rule when such results occur.34

26. Id. at 70.
28. "It is a cardinal rule that, in seizing goods and articles, law enforcement
agents must secure and use search warrants wherever reasonably practicable." Id.
at 705.
30. Id. at 767-68. Chimel did not reinstate the Trupiano holding. Trupiano
disallowed seizure of objects in plain sight, incident to a valid arrest, when the law
enforcement officials knew for some time in advance that the search was to be con
31. No decision since Trupiano has gone quite so far in disallowing seizure of objects
in plain view. The latest decision on the point is Coolidge v. New Hampshire, 403
U.S. 443 (1971). There, the Court held that evidence resulting from a seizure of ob
jects in plain view during a valid arrest is admissible even if the officers had time to
obtain a warrant, as long as the discovery was "inadvertent." Id. at 469-71, 482. But
Chimel did reaffirm the general principle that warrantless searches are per se unre
asonable unless there are exigent circumstances. 395 U.S. 752, 767-68.
32. Id. at 347 (1967).
33. Id. at 357.
34. See, e.g., Mr. Justice Stewart's extended analysis of the present differences in
philosophy concerning warrantless searches and seizures in Coolidge v. New Hamp
34. Of course there are some who believe we pay too large a price for the ex-
The reason for the per se requirement is the belief that a neutral magistrate should determine the existence of probable cause. A fervent desire to root out criminal activity must be encouraged, but it must also be controlled to protect the privacy of the citizenry. Proponents of a strict showing of necessity to dispense with the warrant requirement believe that the deliberate and impartial judgment of a magistrate should be interposed between the citizen and a police search. It is thought that a neutral and detached magistrate can bring a degree of objectivity to a situation which, in times of stress, may be difficult to expect of law enforcement officials.35

The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.36

A citizen has a right to expect that, absent an emergency, the impartial judgment of a magistrate will be interposed between him and a police search.

Exceptions to the Warrant Requirement

The courts have recognized that in certain instances a search may be reasonable without a warrant, given an emergency or exigent circumstances.37 Fortunately, the exceptions to the warrant requirement have been well defined and rarely expanded. Three well recognized exceptions have developed. First, a search may be conducted without a warrant if it is incident to a valid arrest;38 second, an object may be seized when in plain view;39 finally, a warrantless search of an automobile is valid if there is some probability that it will be removed from the area.40 These exceptions were all developed on the theory that to require a warrant in these circumstances would create a great likelihood that evidence or contraband would be destroyed or removed.
from the jurisdiction, or would create a danger to police or bystanders.\textsuperscript{41}

Illustrative of the Court's reluctance to infringe upon the citizen's fundamental rights by liberally construing these exceptions is \textit{Chimel v. California}\textsuperscript{42} where the Court held that the scope of a search incident to a lawful arrest includes only the person of the arrestee and the area under his immediate control.\textsuperscript{43} The solid reasoning behind this decision is that the officer needs to secure his own safety by checking the arrestee for weapons and to prevent any evidence or contraband from being destroyed. Thus the exigent circumstances allow the officers to search only in a limited area.

The theory of the \textit{Chimel} decision is sound. It is based upon the proposition that if a reasonable search requires the interposition of a judge's determination of probable cause, then any exception to this purposeful requirement must be limited solely to the need for the exception. \textit{Thus the exigencies strictly determine the scope of the warrantless search.}\textsuperscript{44} For if the per se warrant requirement is indeed desirable, then the exceptions to it must be strictly circumscribed by need.

Just as the scope of a search incident to an arrest is narrowly limited, so is the plain view exception to the warrant requirement. This exception has been limited to the exact circumstances the name indicates, objects in plain view of an officer who is where he has a right to be. For instance, objects in a closed container are not considered in plain view even though the container is in plain view.\textsuperscript{45} In fact the California Supreme Court has said that the situation described by this exception is really no search at all.\textsuperscript{46}

The exception that is particularly relevant to this note has come to be known as the "automobile" exception. The development and extent of this exception is crucial to the decision in \textit{McKinnon}.

The automobile exception was first recognized in \textit{Carroll v. United States}.\textsuperscript{47} Believing that Mr. Carroll's car contained illegal liquor, a federal agent, acting upon probable cause, stopped the car on the highway and searched it without securing a warrant. He found

\begin{itemize}
  \item \textsuperscript{41} See note 3 \textit{supra}.
  \item \textsuperscript{43} 395 U.S. at 763.
  \item \textsuperscript{44} "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." \textit{Terry v. Ohio}, 392 U.S. 1, 19 (1968) (Fortas, J., concurring), \textit{citing Warden v. Hayden}, 387 U.S. 294, 310 (1967).
  \item \textsuperscript{46} \textit{Id.} at 56, 442 P.2d at 668, 69 Cal. Rptr. at 588.
  \item \textsuperscript{47} 267 U.S. 132 (1925).
\end{itemize}
illegal liquor, and Mr. Carroll was arrested and convicted. The Supreme Court upheld the warrantless search on the theory that by the time the warrant procedures were complied with, an automobile moving on the highway would be removed from the jurisdiction.48

The Court took great care in developing the historical basis for this exception to the warrant requirement, showing that from the early formation of the government, statutes have differentiated vehicles such as boats, cars, sleds, and wagons from buildings or homes that are stationary.

We have made a somewhat extended reference to these statutes to show that the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.49

This exception, based upon mobility, was followed in three cases involving automobiles and illegal liquor.50 It must be emphasized that these cases all involved automobiles stopped in the course of transportation where there was danger that the suspected contraband would be removed from the jurisdiction.

In *Preston v. United States*51 the Court held to the reasoning behind the automobile exception. Three men seated in a car were arrested for vagrancy, and the car was taken to a police garage where it was later searched. The search was held to be too remote from the arrest to be valid as a search incident to an arrest.52 The Court also stated that the *Carroll* exception could not be applied as the men and the car were in police custody, and hence there was no danger that the car would be moved out of the jurisdiction.53 Again, the idea of mobility determining exigency was emphasized.54

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48. *Id.* at 151, 153.
49. *Id.* at 153.
52. *Id.* at 367-68.
53. "There was no danger that any of the men arrested could have used any weapons in the car or could have destroyed any evidence of a crime . . . . Nor . . . was there any danger that the car would be moved out of the locality or jurisdiction." *Id.* at 368.
54. Another auto case often mentioned in the development of this exception is *Cooper v. California*, 386 U.S. 58 (1967). However, this case is not in point as the
People v. McGrew

As previously mentioned the fact situations in McGrew and McKinnon were remarkably similar. The reasoning of the majority in People v. McGrew was a sound interpretation of Fourth Amendment principles. The California Supreme Court followed the strict per se warrant requirement and held that absent an emergency a warrant must be obtained. The significance of the majority position was that it found no "fleeting circumstances" sufficient to justify a warrantless search by the police. The court held that there was no likelihood that the lockers would be removed or the contraband destroyed as the lockers were safely in the custody of the airlines.

It is important to note that the court in McGrew was making essentially a factual determination that there was no likelihood of the suspected contraband being removed from the reach of a search warrant. This decision, which appears to be sound, must be refuted by the McKinnon court if the majority is to later decide that there was an emergency sufficient to justify a warrantless search.

Chambers v. Maroney

The majority opinion in McKinnon relied upon Chambers v. Maroney to such an extent that the court did not find it necessary to refute the finding in People v. McGrew. Instead, McGrew was held not to be viable law in light of Chambers.

In Chambers two men were stopped on the highway in their automobile. The police had probable cause to believe the men had robbed a service station a short time previously. The car was not searched at the time of arrest, but because of the time of night and the poor street lighting the car was towed to the police station where it was searched a few hours thereafter.

Writing for a majority of the Court, Mr. Justice White first considered whether the car could initially have been searched at the time of arrest without a warrant. He found that such a search would have

Court used the reasonableness of the search standard in allowing a warrantless search. Id. at 62.

55. 1 Cal. 3d 404, 462 P.2d 1, 82 Cal. Rptr. 473 (1969).
56. Id. at 409, 462 P.2d at 4, 82 Cal. Rptr. at 476.
57. Id. at 410, 462 P.2d at 5, 82 Cal. Rptr. at 476-77.
58. Id.
59. The dissenters in McGrew, who become the majority in McKinnon, did not rely on the "automobile" exception in their dissent. Instead, they argued that McGrew consented to the search because of the lack of a reasonable expectation of privacy, and that he contractually accepted the right of the airlines to search. Id. at 414-17, 462 P.2d at 8-10, 103 Cal. Rptr. at 479-81.
60. 399 U.S. 42 (1970).
61. 7 Cal. 3d at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
been justified by the exigencies of the situation as the automobile was a fleeting target for a search.\textsuperscript{62} Turning to the subsequent search at the station house, the Court said:

Arguably, because of the preference for a magistrate’s judgment, only the immobilization of the car should be permitted until a search warrant is obtained; arguably, only the “lesser” intrusion is permissible until the magistrate authorizes the “greater.” But which is the “greater” and which the “lesser” intrusion is itself a debatable question and the answer may depend on a variety of circumstances. For constitutional purposes, we see no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.\textsuperscript{63}

The Court reasoned that exigent circumstances forced the police to choose between one of two alternatives: either the car had to be seized until a warrant could be obtained or an immediate search could be conducted without a warrant. Since neither course of action creates a greater intrusion into the individual’s right of privacy, either alternative was viewed as reasonable.\textsuperscript{64}

The trouble with this line of reasoning is that the car had already been seized and towed to the police station. At this point in time, the initial dilemma facing the police was no longer present. But Justice White reasoned that the mobility of the car still obtained at the station house, because the car must continue to be kept immobilized.\textsuperscript{65}

The Court thus put forth a doctrine of constructive mobility into the law of warrantless searches of movable vehicles.

This doctrine only narrowly expanded the police power to make a warrantless search. \textit{Chambers} still demanded that there be exigent circumstances for the police to make an initial intrusion into a citizen’s privacy.\textsuperscript{66} \textit{Chambers} did say that if the police must seize the car and deny access to it to all persons, then they have the right to search it without securing a warrant.\textsuperscript{67}

Viewing the car as mobile at the station house is of course pure fiction. The vehicle can only be considered to be mobile in a very lim-

\textsuperscript{62} 399 U.S. at 51.
\textsuperscript{63} \textit{Id.} at 51-52.
\textsuperscript{64} In dissent, Mr. Justice Harlan seriously questioned the soundness of the majority’s reasoning, “[P]ersons who wish to avoid a search . . . will almost certainly prefer a brief loss of the use of the vehicle in exchange for the opportunity to have a magistrate pass upon the justification for the search.” He went on to point out that such a person can always consent to an immediate search if he will be more deeply offended by a temporary immobilization of his vehicle. \textit{Id.} at 64.
\textsuperscript{65} “The probable-cause factor still obtained at the station house and so did the mobility of the car unless the Fourth Amendment permits a warrantless seizure of the car and the denial of its use to anyone until a warrant is secured.” \textit{Id.} at 52.
\textsuperscript{66} \textit{Id.} at 50-51.
\textsuperscript{67} \textit{Id.} at 52.
ited sense in that the police must continue to detain the automobile, refusing possession to anyone until a warrant is obtained. But in reality the car is in effective police custody and has been rendered as immovable as any object can be that is not actually nailed down. Such a fiction makes the Chambers holding difficult to reconcile with other automobile exception cases. 68

Chambers demanded that there be exigent circumstances for the police to make the initial intrusion. It was only after this initial determination that the case slips from the strict per se requirement to the Rabinowitz reasonable test. 69 If the per se warrant requirement is to be followed, it should not be brushed aside on the rationale that since the police have already made such a large, justified intrusion into privacy, a little more of an intrusion should not require a warrant.

While it can be argued that Chambers does not logically follow in the development of the automobile exception, the decision represents only a narrow expansion of the automobile exception. The Court did not purport to do away with the requirement of exigent circumstances in the context of a warrantless search of a movable vehicle. Chambers may be cited for the proposition that given exigent circumstances justifying a warrantless search of a movable vehicle, it is not unreasonable for the car to be searched a short while later at the police station without obtaining a warrant. However, it must be emphasized that the requirements of the Carroll exception have not been changed for an initial intrusion.

Exigent Circumstances

In order to overrule McGrew the majority in McKinnon first considered whether footlockers consigned to a common carrier for shipment could be equated with automobiles as proper subjects for warrantless searches and seizures. It was recognized that unlike an automobile, a box or trunk does not possess its own motive power, but the distinction was found to be insignificant:

[A] box [consigned for shipment with a common carrier] has neither wheels nor motive power; but these features of an automobile are legally relevant only insofar as they make it movable despite its dimensions. A box ... is movable without such appurtenances. It is also true that a box or trunk, as distinguished from an automobile, may serve the double purpose of both storing goods and packaging them for shipment. But whenever such a box is consigned to a common carrier, there can be no doubt that it is intended, in fact, to be moved. 70

68. Compare Chambers with the other cases cited in note 72 infra.

69. For a discussion of the Rabinowitz reasonableness test see text accompanying notes 24-33 supra.

70. 7 Cal. 3d at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
Since the footlockers were found to possess the requisite mobility, which the majority felt was the distinguishing characteristic of automobiles, that explained their special treatment under the Fourth Amendment, and it logically followed that "the reasons for the rule permitting a warrantless search of a vehicle upon probable cause are equally applicable to the search of such a chattel." 7

The analogy of the court may well be questioned. Is a chattel consigned to a common carrier for shipment movable? It must be remembered that in the development of the Carroll exception the word "movable" connotes "fleeting circumstances". 72 Surely the circumstances are not fleeting simply because, as the court points out, the owner intends that something be moved. The footlockers could have been considered fleeting only if they had been placed in a vehicle and were about to be shipped from the jurisdiction; 73 but this was not the fact situation in McKinnon. In McKinnon the footlockers had merely been placed in the custody of the airline.

The automobile exception is based on the concept of "mobility"—fleeting circumstances—determining exigency. A vehicle in the course of transport may be searched or seized because it is a fleeting target. This is not true of sealed containers consigned for shipment with a common carrier. Such objects are not fleeting until placed in a movable vehicle. The court's reasoning is particularly weak when the object is in the custody of individuals who are anxious to see it delivered into police custody.

It might be proper for the California court to extend the Carroll

71. Id.
72. All of the Supreme Court decisions following Carroll in which the exception has been held to apply have involved automobiles. Chambers v. Maroney, 399 U.S. 42 (1970); Dyke v. Taylor Implement Mfg. Co., 391 U.S. 216 (1968); Preston v. United States, 376 U.S. 364 (1964); Brinegar v. United States, 338 U.S. 160 (1949); Scher v. United States, 305 U.S. 251 (1938); Husty v. United States, 282 U.S. 694 (1931).
At least two lower federal court cases have extended the Chambers rationale to suitcases being carried by defendant at the time of his arrest when the search of the suitcase was made after the arrest was effected. United States v. Maynard, 439 F.2d 1086 (9th Cir. 1971); United States v. Mehciz, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971). But see United States v. Colbert, 454 F.2d 801 (5th Cir. 1972) (two to one decision); where on similar facts the court held the above two cases were no longer consistent with the "Carroll principle and its underlying rationale" in light of the decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971). Id. at 804. For a discussion of the holding in Coolidge see text accompanying notes 84-105 infra.
73. Mr. Justice Peters, in a vigorous dissent, answered the majority's argument this way: "The rule of Carroll, and its progeny is clear. Where the goods are in the course of transportation, i.e., in a vehicle capable of conveying them beyond the jurisdiction, a search without a warrant may be conducted . . . [upon] probable cause . . . . A carton in a freight office is not a vehicle. It may be used to store goods or to package them for shipment; a carton cannot get from here to there on its own power." 7 Cal. 3d at 922, 500 P.2d at 1113, 103 Cal. Rptr. at 913.
exception to movables about to be placed in a vehicle and sent from the jurisdiction. This would simply extend the *Carroll* exception one step further to include property about to be placed in the course of transportation. Although this may not be a proper extension of *Carroll*, it would at least be an attempt to be consistent with the theory of *Carroll*.

It is also disturbing to note that the court gives as one reason for allowing this warrantless search that the consignee may come to reclaim his goods. The court here seems to be relying on the fact that a footlocker is inherently movable. Such reasoning would allow all chattels not within the immediate control of the owner to be searched by the police without any showing of exigent circumstances other than the simple fact that the chattels may be moved. Surely the court cannot be advocating such a position since it would abrogate much of the protection of the Fourth Amendment.

The Misapplication of Chambers

The dissent in *McGrew* never argued that there were fleeting circumstances that justified police seizure of the contraband. The *McGrew* dissents argued a consent theory. As the majority in *McKinnon*, three of the same justices argued the *Carroll* exception, claiming that *Chambers* expanded the exception to include the fact situation of *McGrew* and *McKinnon*. This is perhaps the major mistake in *McKinnon*. *Chambers* only dealt with an extension of police search power after an initial, legal intrusion had been made. *Chambers* did not modify in any way the need for fleeting circumstances to make an initial seizure of the vehicle. Thus, *Chambers* cannot have any effect on police power to initially seize freight cargo consigned to a common carrier. The court must rely on the *Carroll* exception to justify the first intrusion.

Instead of making an independent determination that the footlockers could have been the object of a warrantless search, the *McKinnon* court labeled the freight "mobile in the constitutional sense" and concluded that the search was valid. The *McKinnon* majority did not squarely confront the issue of whether there were exigent circumstances. The only instance in *McKinnon* where the majority confronted this issue was when they stated: "[A]bsent these remedies, the chattel will be shipped out of the jurisdiction or claimed by its owner or by

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74. *Id.* at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
75. See note 59 *supra*.
76. 1 Cal. 3d at 414-17, 462 P.2d at 8-10, 82 Cal. Rptr. at 479-81.
77. See text accompanying notes 62-67 *supra*.
78. 7 Cal. 3d at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
the consignee.  

This is directly contrary to the finding of the McGrew court:

Nor was there any likelihood that the lockers would be removed or the contraband destroyed; both footlockers were safely in the custody of the airlines. ‘[T]he airlines were not even under a contractual obligation to ship the footlockers before a warrant could be obtained.’

Instead of confronting this conflict, the McKinnon court says the finding of the McGrew court is no longer legally relevant in light of Chambers. The McKinnon court tries to analogize from Chambers to McKinnon with the following language,

In Chambers the defendants’ automobile was seized by police officers and impounded at the police station; if the high court can say, as it does, that under those circumstances “the mobility of the car” still obtained at the station house [citation], a fortiori chattel such as here involved remains “mobile” in the constitutional sense despite its limited and voluntary bailment to a common carrier.

The mobility referred to in Chambers is the direct result of an initial seizure resulting from exigent circumstances. The mobility results solely from the fact that once it was determined that the auto could be seized without a warrant, the auto remained “mobile” until the police searched it. The mobility in Chambers refers to the status of a car seized under exigent circumstances, but as yet not searched. The mobility in McKinnon simply refers to physical mobility, and it is therefore improper for the court to use the Chambers concept in the absence of an initial determination of exigent circumstances.

A factual finding of exigency warranting a seizure or search of the footlockers is therefore the crucial issue in McKinnon. If the footlockers were indeed a fleeting target for a search there would be no reason to invoke the rationale of Chambers. Without such a finding, Chambers is not applicable to the facts of McKinnon.

The actual holding of the case was, “that a chattel consigned to a common carrier for shipment may lawfully be searched upon probable cause to believe it contains contraband.” This holding is so broad and lays down such an inflexible rule that it poses a serious threat to Fourth Amendment standards. It is also not responsive to the question posed throughout this note: Is the target of the search such a fleeting object that there is no time to secure a search warrant from a neutral and detached magistrate?

79. Id. at 909, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
80. 1 Cal. 3d at 410, 462 P.2d at 5, 82 Cal. Rptr. at 476-77.
81. 7 Cal. 3d at 910, 500 P.2d at 1104, 103 Cal. Rptr. at 904.
82. Id.
83. 7 Cal. 3d at 902-03, 500 P.2d at 1099, 103 Cal. Rptr. at 899.
The holding allows the police acting on probable cause to make a warrantless search of any cargo consigned to any type of common carrier. There is no qualification that there be exigent circumstances. Evidently the court feels that anytime cargo is consigned to a common carrier there is a reasonable likelihood of it being removed from the possibility of police search before a warrant can be obtained. Unfortunately, there is no reasoning in the opinion to support this idea.

The court by laying down this wide, inflexible rule enlarges police search power beyond that permitted by the per se warrant requirement and the Carroll exception. The fact that the holding is a rule, and not a standard, indicates that the court has indeed neglected to consider the true concept of exigency. As a rule of law it does not allow for the flexibility necessary to protect citizens when there would be time to secure a warrant.

**Coolidge v. New Hampshire**

The latest United States Supreme Court decision addressing the automobile exception is *Coolidge v. New Hampshire*. Mr. Coolidge had been under suspicion of murder for several days. He was arrested in his home pursuant to warrants issued for his arrest and for a search of the premises. The warrants were held to be invalid because they were not issued by a neutral and detached magistrate, hence, the search and seizure consideration was based upon a warrantless search. At the time of his arrest, Coolidge's car was parked in his driveway. It was seized and taken to the police station where it was searched two days later and subsequently over a year later. Incriminating evidence was found in the car which was introduced into evidence at trial and led to Coolidge's conviction.

Writing for a plurality of the court, Mr. Justice Stewart held that the search could not be justified under the automobile exception. In
Part IIB of his opinion⁹⁰ he narrowed those cases dealing with the automobile exception to a strict showing of exigent circumstances.⁹¹ In fact, Justice Stewart would have limited Chambers to its facts: "Chambers . . . held only that, where the police may stop and search an automobile under Carroll, they may also seize and search it later at the police station."⁹² This part of the opinion however, was not joined in by Mr. Justice Harlan who was the fifth member of the court constituting the plurality. The court in McKinnon correctly noted that this part of the opinion was therefore without force as precedent.⁹³

But in Part IIB of the opinion,⁹⁴ which was joined in by Justice Harlan and is therefore of precedential force, Justice Stewart emphasized that warrantless searches are per se unreasonable. "If we were to agree with Mr. Justice White that . . . seizures and searches of automobiles are . . . per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution."⁹⁵

Whatever else Coolidge stands for,⁹⁶ it is obvious that an automobile cannot be searched without a warrant merely because it is an automobile. The capacity for mobility must be shown to be relevant to the warrantless search. It is simply not enough to say that there is a possibility that the vehicle may be moved.

This reasoning is very applicable to McKinnon since the plurality, with Harlan concurring, emphasize that categories do not determine if a warrantless search may be made, but rather exigent circumstances do.⁹⁷ Again, the issue is whether there were exigent circumstances.

The majority in McKinnon felt that if Coolidge did apply it could

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⁹⁰ Id. at 458-64.
⁹¹ Justice Stewart examined the automobile exception in detail in this part of his opinion. He concluded that all of the cases rested on a strict showing of exigent circumstances to justify a warrantless search or seizure. "The word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears. [T]here is nothing in this case to invoke . . . the rule of Carroll v. United States . . . . [B]y no possible stretch of the legal imagination can this be made into a case where 'it is not practicable to secure a warrant' . . . ." Id. at 461-62, quoting, Carroll v. United States, 267 U.S. 132, 153 (1925).
⁹² Id. at 463.
⁹³ 7 Cal. 3d at 911, 500 P.2d 1105, 103 Cal. Rptr. at 905.
⁹⁴ 403 U.S. at 473-84.
⁹⁵ Id. at 480.
⁹⁶ Because of the similarity of the holdings in Part IIB of the plurality opinion which Justice Harlan did not join in, and Part IID which Justice Harlan did join in, some writers have referred to Part IIB of the opinion as the holding of the case while the language of Part IID should be considered controlling. E.g., The Supreme Court, 1970 Term, 85 Harv. L. Rev. 3, 247-48 (1971); 76 Dick. L. Rev. 333, 337 (1972).
⁹⁷ See 403 U.S. at 479.
be distinguished on its facts. Four reasons were given for this proposition. In McKinnon, the police knew for only a short time of the existence or probable contents of the five cartons presented by respondents for shipment; second, the defendants were departing from the premises and one was aboard an airplane preparing to fly out of the jurisdiction; third, the cartons had been consigned to be delivered to a remote jurisdiction; and, finally, there was probable cause to believe that the cartons contained not mere evidence, but contraband.

"Each of these factors was specifically found to be lacking in Coolidge; measured by the high court's own standards, therefore, the opportunity to search in the case at bar was much more 'fleeting'—and prompt action was far more imperative—than in Coolidge."  

The McKinnon majority is saying that different facts in Coolidge dictate that the target of the search was not as fleeting as in McKinnon. However, this does not mean that it was not practical for the police to secure a warrant in both instances. Again, the majority in McKinnon does not address the issue of exigent circumstances and explain why they think the cargo would be shipped out of the jurisdiction before the police could secure a warrant.

The first of the four differences listed above is the only one that has any sound implication for McKinnon. The court distinguished Coolidge on the basis that in Coolidge the officers knew about the car and its role in the murder for some time prior to their seizure of it. Thus there was sufficient time to obtain a warrant and, hence, the Carroll exception would not apply. This would differentiate Coolidge from McKinnon if the court in McKinnon would also find that there was not time to comply with the warrant procedures. Yet, the court did not explicitly make this finding.

The court's observation that the defendants were departing from the premises is not relevant. By the court's own account of the facts in McKinnon, Officer McLaughlin searched the footlockers before he even knew where the suspects were, or if they were leaving the premises. If this situation constituted an emergency justifying a warrantless search, it was an exigency after the fact only.

The significance of the court's statement that the cartons were consigned for shipment to a remote jurisdiction again begs the question whether there was time to comply with the warrant requirement. There was no indication that the cartons were about to be shipped, and the truth is that they were in the effective custody of the airline.

98. 7 Cal. 3d at 910, 500 P.2d at 1105, 103 Cal. Rptr. at 905.
99. Id. at 911, 500 P.2d at 1105, 103 Cal. Rptr. at 905.
100. Id.
101. Id. at 903-04, 500 P.2d at 1100, 103 Cal. Rptr. at 900.
102. In dissent, Justice Peters said on this point: "In McGrew the People con-
The final reason given by the court for distinguishing *Coolidge* is quite mysterious. Because the cartons contained contraband as opposed to "mere evidence" the court seems to be saying that a lesser standard applies in order to justify a warrantless search. It is true that Justice Stewart mentions such a distinction twice in the course of his plurality opinion in *Coolidge*, but this was not the holding of the case and in fact such a distinction was expressly rejected in *Warden v. Hayden*, as the plurality specifically acknowledged.

*Coolidge* is relevant to *McKinnon* because it emphasizes that categories do not determine the existence of exigent circumstances. It also emphasizes the strict warrant requirement and the desirability of preserving this requirement in order to protect Fourth Amendment guarantees. Although *Coolidge* is easily distinguished from the McGrew-McKinnon fact situation, it does apply to show that there must be a determination made whether it was reasonably possible to obtain a warrant before making an initial intrusion into Fourth Amendment guarantees. The police in *Coolidge* had ample time to secure a warrant to search the car, thus their search was illegal. The *McKinnon* court must ask itself the same question and then detail why footlockers are now a "fleeting target" when in *McGrew* they were not.

**Conclusion**

*People v. McKinnon* wrote an undesirable and unjustified expansion of police search power into California law. The court arrived at this expansion by enlarging the automobile exception as developed in *Chambers v. Maroney*. This note has demonstrated that the reliance on *Chambers* as authority for *McKinnon* was unjustified as *Chambers* expanded police search power in a very narrow manner, and only after an initial intrusion had been justified by exigent circumstances. In *McKinnon* the court never truly confronted the issue of exigent circumstances, but rather sought to bring the case within the *Carroll* exception by enlarging the category of automobiles to include freight consigned to a common carrier. This category expansion ignored the theory of the automobile exception and thus allowed the court to promulgate a rule broader than the exception allows. Also, the California
court mistakenly distinguished *Coolidge v. New Hampshire* which reemphasized the strict warrant requirement and the requirement of exigent circumstances.

The broad, inflexible holding of the court allows the police upon probable cause to search any freight consigned to any common carrier without any regard to whether there is time to secure a warrant before the freight is removed from the jurisdiction. Thus, the holding stands in opposition to the principles of the strict warrant requirement and the *Carroll* exception and as such should be regarded as unsound law. The impartial determination of probable cause by a neutral magistrate should be required whenever possible.

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