

Basic Fourth Amendment (4th) "Objective Reasonableness" ("OR") Force Considerations

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- 4th does not set the standard for all government force (also see 5th, 8th, and 14th Amendments)
- 4th addresses misuse of governmental power, not the accidental effects of otherwise lawful conduct
- 4th is not violated by:
 - an arrest based on probable cause, even though the wrong person is arrested
 - the mistaken execution of a valid search warrant on the wrong premises
- Almost every use of force, however minute, poses some risk of death.

- A 4th seizure occurs when there is a governmental termination of freedom of movement through means intentionally applied. A "seizure" triggering 4th's protections occurs only when government actors have by means of physical force or show of authority in some way restrained a person's liberty.

- Basics - Determining 4th OR:
 - requires careful balancing of the nature and quality of the intrusion on the person's 4th interests against the countervailing governmental interests at stake
 - is not capable of precise definition or mechanical application
 - must be judged from the perspective of a reasonable law enforcement officer (LEO) on the scene
 - not to be judged with 20/20 hindsight
 - looks at the totality of the circumstances as reasonably perceived by the LEO
 - reasonableness at the moment of the seizure

- Basics - 4th OR force:
 - right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it
 - Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers violates the 4th.
 - In judging reasonableness of LEO's actions - must consider the risk of bodily harm that LEO's actions posed to person in light of the threat to the public that the LEO was trying to eliminate.

- 4th's OR force inquiry:
 - requires careful attention to the facts and circumstances of each particular case, including:
 - the severity of the crime at issue,
 - whether the person poses an immediate threat to the safety of the LEOs or others,
 - whether person is actively resisting arrest, and
 - whether person is attempting to evade arrest by flight
 - pacing of event:
 - allowance for fact that LEOs are often forced to make split-second judgments
 - in circumstances that are tense, uncertain, and rapidly evolving
 - LEO's underlying intent or motivation is not relevant

Basic Force Consideration Principles:

- LEO must have lawful authority to take action or use force
- LEO may use that amount of force upon a person that the law allows, and no more.
- LEO must have acceptable legal basis (justification) for everything done (not done) that negatively impacts persons or their property.
 - **Each force application** - Each force technique or tool application (including causing pain) is an application of force.
 - **Force must be justified** - Each application (or continuing application) of force must be justified.
 - **Force justification factors** - Any factor used to justify force application(s), including continuing or escalated force, must be explained
- Just because the law allows LEO to use force, does not automatically mean that using the force is the most prudent course of action
- There are consequences to adopting force standards that are more restrictive than legal standards.
- The force goal *should* be (NOT the legal standard(s)) to use the minimum force necessary to accomplish lawful objectives (from a 20/20 hindsight, Hollywood scripted, "perfection" perspective)

Basic 4th Amendment “Objectively Reasonable” Force Analysis Guidelines

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1. *Graham* Factors as (potential for injury risk) Importance ranked by *Chew*:
 - a. Immediate threat to safety of LEOs or others
 - i. Beware - “possible” vs. “immediate” threat
 - ii. Simple LEO statement that he fears for his safety or the safety of others is not enough; there must be objective factors to justify such a concern
 - b. Actively resisting
 - c. Circumstances tense, uncertain, rapidly evolving (“pace” of events)
 - d. Severity of the crime at issue
 - e. Attempting to evade seizure by flight
2. Additional (9th Circuit, and others) force factors, court may also consider:
 - a. the availability of alternative methods of capturing or subduing a person (risk of injury approach)
 - b. what LEOs knew about person’s health, mental condition, or other relevant frailties
3. Additional Force Factors (if person is not an immediate threat or attempting to flee):
 - a. **Force to Gain Compliance:**
 - i. **Force for failing to comply** - Multiple (or continuing) applications of force cannot be justified solely on the grounds person fails to comply with command, absent other indications: *e.g.*, poses immediate threat or about to flee.
 - (1) Particularly true when more than one LEO present to assist in controlling situation.
 - ii. **Ability to comply** - Any decision to apply multiple (or continuing) force applications must consider whether person is capable of complying with commands; consideration include:
 - (1) Conflicting commands,
 - (2) Ability to comprehend commands,
 - (3) Physically able to comply with commands,
 - (4) Emotionally able to comply with commands,
 - (5) Mentally able to comply with commands, or
 - (6) Inability to comply due to trauma
 - iii. **Warning and adequate opportunity to comply** - Warning of imminent force application to gain compliance with lawful directive:
 - (1) Giving warning before force is used.
 - (2) Consider whether warning will be comprehended
 - iv. **Sufficient time for volitional warning compliance** - Time between force applications to give sufficient time for voluntary compliance (tolerance factors) to lawful directive/command.
 - (1) Concern of too short of time for voluntary compliance
 - v. **Pain (person’s perception of pain) to gain compliance** - If “pain” is being used to gain compliance, consideration of whether person will perceive the pain and be able to comply with command(s)
 - vi. **Pain as distraction** - If “pain” is going to be used as a distraction, consideration of use of discomfort or pain (force) to cause distraction to attempt to facilitate capture, control, restrain, and/or other lawful force objective
 - b. **Pacing - need for “haste”** - Where there is no reason to endanger life in order to act with haste. The slower the pacing of the event or the need for the application(s) of force the less force that will be justified.