Garden State CLE Presents:

Landmark Summer - 2017

Recent Bill of Rights Law in New Jersey

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Garden State CLE

Lesson Plan

1.) Searches for criminal evidence conducted by trained dogs

According to US Supreme Court a "sniff" search by a trained dog does not constitute a search within the meaning of the 4th Amendment. It has none of the normal attributes of a traditional search under the 4th Amendment. As a result, police may conduct a dog "sniff" search without any showing of articulable suspicion. United States v. Place, 462 US 696 (1983)

The Court has also ruled that police may conduct a dog sniff search during the course of a routine motor vehicle stop without any level of suspicion, provided that the search does not prolong the mission and purpose of the stop. Illinois v. Caballes, 543 US 405 (2005); Rodriguez, v. US, 135 S. Ct. 1609 (2015) (motor vehicle stop unreasonably prolonged due to dog search).

Previous New Jersey law required a level of reasonable suspicion in order to conduct a dog search. State v. Cancel, 256 NJ Super. 430 (App. Div. 1992) (luggage); State v. Elders, 386 NJ Super. 208 (App. Div. 2006) (reversed on other grounds) (motor vehicle search); State v. Baum, 393 NJ Super. 275 (App. Div. 275 (App. Div. 2007) (motor vehicle search).

The New Jersey Supreme Court has now dropped the "reasonable suspicion" requirement and conformed New Jersey law to the federal standard. In Sate v. Dunbar, ___ N.J. ___ (2017) the Court agreed that a dog search conducted during an otherwise lawful detention is not a search within the meaning of the 4th Amendment,

It also ruled that an officer does not need reasonable suspicion independent from the justification for a traffic stop in order to conduct a canine sniff. But the police may not conduct a canine sniff in a manner that prolongs a traffic stop beyond the time required to complete the stop's mission, unless the officer possesses reasonable and articulable suspicion to do so. In other words, in the absence of such suspicion, an officer may not add time to the stop. Thus, if an officer has an articulable reasonable suspicion independent from the reason for the traffic stop that a suspect possesses narcotics, the officer may continue a detention to administer a canine sniff.

2.) Collection of DNA samples following a conviction for certain disorderly persons offenses

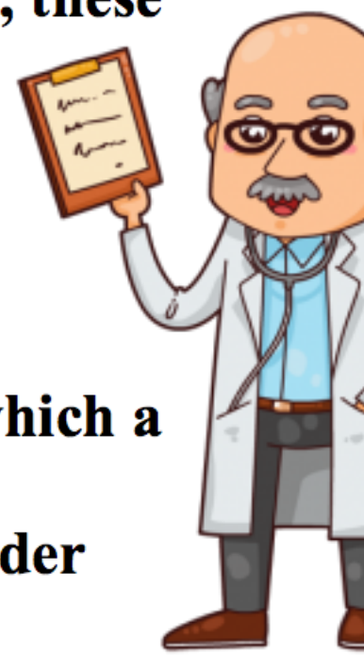
The reasonableness of taking a DNA sample from certain arrested and convicted offenders has been approved by both the United States Supreme Court (Maryland v. King, 133 S. Ct. 1958 (2013)) and New Jersey Supreme Court. (A.A. v. Attorney General, 189 N.J. 128, 914 A.2d 260 (2007); State v. O'Hagen, 189 N.J. 140, 914 A.2d 267 (2007)). (But see State v. Gathers, 449 NJ Super. 265 (App. Div. 2017) (sample taken long after arrest unreasonable)

Since 1994, the New Jersey Legislature has authorized the collection of biological material from people who have been charged, convicted or acquitted by reason of insanity for certain serious offenses. (NJSA 53:1-20.20)

Depending on the nature of the underlying criminal offense, genetic material used to provide a DNA sample can be collected at the time of arrest, as a condition of release from custody or as a part of a lawfully imposed sentence following conviction.

For most of the history of the DNA collection statute, the taking of biological material was limited to defendants and suspects charged with crimes. However, in 2017, the Legislature expanded the range of offenses that require the collection of biological materials to included specified disorderly persons' offenses.

The DNA sample is mandated for the specific offenses after a defendant has been convicted or found not guilty by reason of insanity. Under N.J.S.A. 53:1-20.20(h), these offenses include:



1.) An act of domestic violence;

2.) Prostitution under N.J.S.A. 2C:34-1;

3.) Any disorderly persons offense relating to narcotics or dangerous drugs for which a person is required to be fingerprinted pursuant to N.J.S.A. 53:1-18.1, excluding possession of 50 grams or less of marijuana or less than five grams of hashish under N.J.S.2C:35-10;

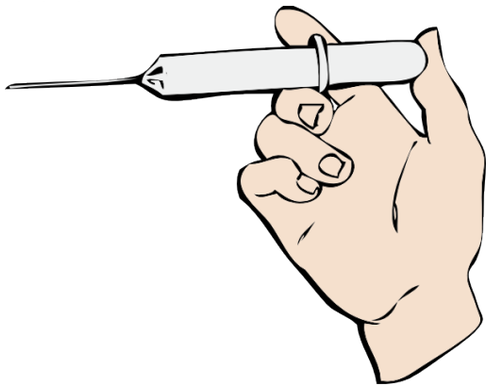
4.) Any disorderly persons offense for which a person is required to be fingerprinted pursuant to R.S.53:1-15 except for shoplifting under N.J.S.2C:20-11.

The Legislature's exclusion of common disorderly persons' offenses such as shoplifting and possession of marijuana under 50 grams may be due to the sheer volume of testing such offenses would entail for law enforcement. On the other hand, while marijuana cases are excluded from consideration, common paraphernalia charges under N.J.S.A. 2C:36-2 and N.J.S.A. 2C:36-6 are not.

The collection of biological material from a defendant is a condition of sentence. Specifically, N.J.S.A. 53:1-20.20(g) provides:

> **If the person is sentenced to a term of imprisonment or confinement, the person shall have a blood sample drawn or other biological sample collected for purposes of DNA testing upon commencement of the period of imprisonment or confinement. If the person is not sentenced to a term of imprisonment or confinement, the person shall provide a DNA sample as a condition of the sentence imposed.**

Based upon the foregoing statute, the requirement for the taking of biological material from the defendant should be included where relevant in the judge's plea colloquy under Rule 7:6-2(a)(1) and the opening statement as required under Rule 7:14-1(a).



3.) New Test for Double Jeopardy in New Jersey

The double jeopardy protections of the 5th Amendment and Article I, paragraph 11 of the New Jersey Constitution of 1947 are considered by the New Jersey Supreme Court to be co-extensive. As a result, people in New Jersey do not receive any additional double jeopardy protections under the State Constitution.

The double jeopardy clause protects against three eventualities (North Carolina v. Pearce, 395 US 711, 717 (1969):

(1) A second prosecution for the same offense after acquittal;

(2) A second prosecution for the same offense after conviction; and

(3) Multiple punishments for the same offense.

In 1932, the United States Supreme Court established the so-called "same elements" test to determine if two statutes are the same for double jeopardy purposes. Blockbuger v. US, 284 US 299 (1932). If each statute has a unique element that the other does not, the two statutes are not the same for double jeopardy purposes.

[Examples: drunk driving in a school zone (NJSA 39:4-50(g) vs. drunk driving (NJSA 39:4-50(a)) are the same for double jeopardy contrasted with school-zone drug distribution (NJSA 2C:35-7) vs. loitering (NJSA 2C:33-2.1)]

In 1980, the Supreme Court created a second test for double jeopardy, they "same evidence" test. (Illinois v. Vitale, 447 US 410 (1980)). Double jeopardy bars use of the same evidence in a second prosecution that was relied upon during the first prosecution. New Jersey quickly adopted this standard. See State v. Dively, 92 NJ 573 (1983); State v. DeLuca, 108 NJ 98 (1987).

Although the US Supreme Court reversed itself and rejected the same-evidence test back in 1993 (United States v. Dixon, 509 US 688 (1993), the New Jersey Supreme did nothing to eliminate the two tests for double jeopardy…until now.

On May 16, 2017, the New Jersey Supreme Court also dropped the same-evidence test and held that for arrests occurring after that date, the only test for double jeopardy will be the same elements test from *Blockburger*, 509 US 688 (1993).

4.) Video taping of police is protected by the 1st Amendment

Fields, v. City of Philadelphia, ___ F. 3d ___ (3td cir. 2017) 2017 WL 2884391

Every Circuit Court of Appeals to address this issue (First, Fifth, Seventh, Ninth, and Eleventh) has held that there is a First Amendment right to record police activity in public.

The First Amendment protects actual photos, videos, and recordings, and for this protection to have meaning the Amendment must also protect the act of creating that material. There is no practical difference between allowing police to prevent people from taking recordings and actually banning the possession or distribution of them.

The First Amendment protects the public's right of access to information about their officials' public activities. It goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw.

Access to information regarding public police activity is particularly important because it leads to citizen discourse on public issues, the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.

To record what there is the right for the eye to see or the ear to hear corroborates or lays aside subjective impressions for objective facts. Hence to record is to see and hear more accurately. Recordings also facilitate discussion because of the ease in which they can be widely distributed via different forms of media. Accordingly, recording police activity in public falls squarely within the First Amendment right of access to information. As no doubt the press has this right, so does the public

We do not say that all recording is protected or desirable. The right to record police is not absolute. It is subject to reasonable time, place, and manner restrictions. But in public places these restrictions are restrained.

For example, if a person's recording interferes with police activity, that activity might not be protected. For instance, recording a police conversation with a confidential informant may interfere with an investigation and put a life at stake.

In sum, under the First Amendment's right of access to information the public has the commensurate right to record—photograph, film, or audio record—police officers conducting official police activity in public areas.

New Jersey case on video of public officials performing their duties is Maurice River Township School Board v. Maurice River township Teachers Assoc., 187 N.J. Super. 566 (Chn. Div. 1982).

5.) Plain Feel Exception

State v. Evans, 449 NJ Super. 66 (App. Div. 2017)

The plain feel to the warrant requirement has two elements:

1.) The frisk of the defendant or his clothing must be justified at the inception by a reasonable suspicion that the defendant is in possession of a weapon (Terry v. Ohio, 392 US 1 (1968); and

2.) The character of the contraband must be immediately apparent to the officer.

The threshold requirement for the application of the plain feel exception is that the character of the contraband be "immediately apparent." Although the trial judge made this finding, that conclusion is not supported by the record. [The arresting officer] never testified it was "immediately apparent" to him that the bulge concealed drugs. [The arresting police officer] stated he felt the bulge in defendant's groin area and manipulated it. He said the bulge "felt like a rocklike substance" and that when he felt the rocklike substance, he "believe[d]" it was "[c]rack cocaine." When he viewed the substances retrieved, he "suspect[ed]" them to be "[c]rack cocaine and heroin."

We recognize that the line between "immediately apparent" and "probable cause" is easily blurred. Rather than making a conclusory statement, the officer should articulate specific facts that support his assertion that the nature of the contraband was immediately apparent.

By way of example, both our court and the Supreme Court found the plain feel doctrine applicable when the officer conducting a lawful search "feels an object whose contour or mass makes its identity immediately apparent." The size and shape of the contraband can be independently assessed by the court's inspection of the physical evidence and give credence to or cast doubt upon the officer's assertion that its identity was "immediately apparent" with a mere touch. The officer's knowledge that the arrestee has concealed drugs on his person in the past may also contribute to the officer's immediate realization that the bulge he touched was drugs.

6.) Plain View Exception

State v. Gonzales, 227 NJ 77 (2016)

We now hold that the inadvertence requirement for a plain-view seizure is at odds with the objective-reasonableness standard that governs our state-law constitutional jurisprudence. Accordingly, like the United States Supreme Court and most other state courts, we now hold that an inadvertent discovery of contraband or evidence of a crime is no longer a predicate for a plain-view seizure. Provided that a police officer is lawfully in the viewing area and the nature of the evidence is immediately apparent (and other constitutional prerequisites are met), the evidence may be seized. This holding is a new rule of law and therefore must be applied prospectively. Nevertheless, we conclude that the discovery of the drugs in this case was sufficiently inadvertent to satisfy the then existing plain-view standard.

This holding now makes New Jersey law consistent with the federal standard for plain view seizures. Horton v. California, 496 *U.S.* 128 (1990)

Analysis:

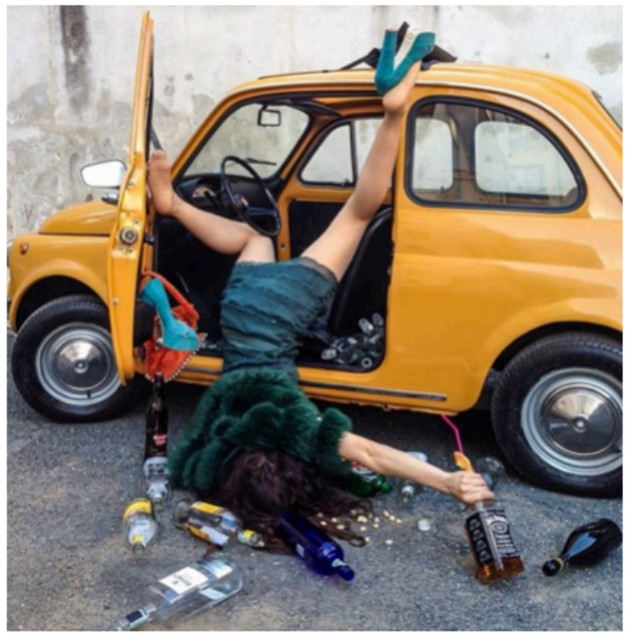
Under the plain-view doctrine, the constitutional limiting principle is that the officer must lawfully be in the area where he observed and seized the incriminating item or contraband, and it must be immediately apparent that the seized item is evidence of a crime. State v. Gonzales, 227 NJ 77, 101 (2016)

1.) Lawfully in the viewing area

2.) Probable cause to associate the item in plain view with a violation of the law.

The immediately apparent language has been dropped by the Supreme Court in plain view cases, a holding that has now been adopted by our own Supreme Court.

7.) Order to exit vehicle: Passenger



State v. Bacome, 228 NJ 94 (2017)

Background for orders to exit vehicle:

Pennsylvania v. Mimms, 434 US 106 (1977) (drivers)

Maryland v. Wilson, 519 US 408 (1997) (passengers)

State v. Smith, 134 NJ 599 (1994) (safety concerns)

State v. Legette, 274 NJ Super. 278 (Law Div. 1994) (summons)

In *Smith*, we determined that a police officer may order a passenger out of a vehicle if the officer can "point to specific and articulable facts that would warrant heightened caution to justify ordering the occupants to step out of a vehicle detained for a traffic violation." Furtive movements may satisfy the heightened caution standard. The unknown nature of surreptitious movements creates risk for an officer and, in turn, that risk supports the exercise of heightened caution. It would be impractical to require officers to determine whether the movement was to hide a weapon or a box of tissues before taking any precautionary measures. Such a rule would threaten officer safety.

In sum, we find that the detectives' heightened caution justified removal of the passenger from the vehicle, placing the detectives in a position lawfully to observe the contraband in plain view. The evidence, therefore, was appropriately seized under the plain-view exception to the warrant requirement.

8.) Warrantless Home entry during investigative detention

State v. Legette, 227 NJ 460 (2017)

In response to a noise complaint, an officer arrived at Defendant James L. Legette's apartment complex, where he observed defendant standing with another man in a public area. Because defendant began to walk away when the officer identified himself, the officer commenced an investigatory stop, asking defendant for identification. When defendant offered to retrieve identification from his apartment, the officer said he would have to accompany defendant. While in his apartment, defendant removed the sweatshirt he was wearing. The officer seized the sweatshirt and ultimately discovered a handgun in its pocket.

The trial court denied defendant's motion to suppress the handgun, and the Appellate Division affirmed., [concluding] that it was reasonable for police officers to follow arrestees into their homes. For the reasons set forth in this opinion, we decline to extend [cases involving arrestees] to detainees. Although warrantless entries into the home require probable cause, investigatory stops require the lower standard of reasonable suspicion. We therefore hold that, when conducting an investigatory stop, it is not permissible for an officer to follow suspects into their homes.

The State asserts, finally, that there was consent for Dill to enter the apartment. The factual record before us does not support this conclusion. To establish that defendant waived his Fourth Amendment rights, the State must show that defendant had "knowledge of the right to refuse consent." *State v. Johnson*, 68 *N.J.* 349, 353–54 (1975). [The arresting officer] exerted his authority over defendant by stopping defendant from walking toward the parking lot. Subsequently, defendant did not respond when [the officer] indicated that he would have to accompany defendant into the apartment. Under these circumstances, the State has not shown that defendant thought he could refuse entry into his apartment. Therefore, we do not find that the search was consensual.

Contrast the federal standard for home entry following an arrest based upon probable cause in Washington v. Chrisman, 455 U.S. 1 (1982).

9.) Credentials exception to warrant requirement

State v. Hamlett, 449 NJ Super. 159 (App. Div. 2017)

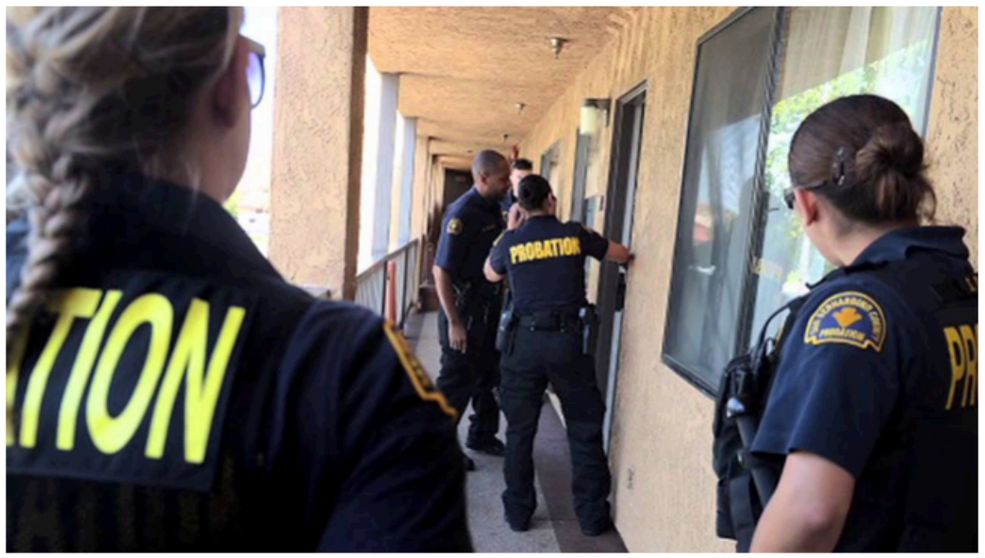
[Following a motor vehicle stop, the arresting police officer] inquired as to the whereabouts of the vehicle's rental agreement. Defendant replied he was unaware of its location, or whether it included his name. Because defendant was unable to produce a valid driver's license, [the officer] ordered him out of the car. He then patted defendant down for weapons, found none, and placed defendant on the curb. In an effort to avoid unnecessarily prolonging the stop, [the officer] searched for the vehicle's credentials in the side visor and glove compartment, and in an open compartment located near the gear shifter. [The officer] then opened the center console, where he observed 7.25 grams of cocaine, two bricks of heroin, 98.6 grams of marijuana, and $2,595 in cash. Defendant was arrested, and a search of his person revealed a bag containing additional marijuana, cocaine, and heroin.

We recognized the vitality of the credentials exception to the warrant requirement. "[W]here there has been a traffic violation and the operator of the motor vehicle is unable to produce proof of registration, a police officer may search the car for evidence of ownership. That search "must be 'confined to the glove compartment or other area where a registration might normally be kept in a vehicle[.]' "

More recently, in *State v. Keaton*, 222 *N.J.* 438, 442–43, 119 *A*.3d 906 (2015), the Court considered whether the warrantless entry of the defendant's overturned vehicle to obtain motor vehicle credentials, without providing the defendant with an opportunity to consent to the entry or present those credentials beforehand, was unlawful. In *Keaton*, when police arrived at the scene of the one-car accident, the defendant had been removed from the vehicle and was receiving treatment from emergency medical personnel. The trooper never asked the defendant for his credentials or for permission to enter the vehicle. After crawling in a rear window, the trooper saw an open backpack containing a handgun and a small amount of marijuana on the dashboard.

[T]he Court said that "under settled law, the warrantless search of a vehicle is only permissible after the driver has been provided the opportunity to produce his credentials and is either unable or unwilling to do so".

10.) Protective sweeps: Vehicles v. Residences



The New Jersey Supreme Court now refers to automobile searches for weapons as a "protective sweep". See State v. Robinson, 228 NJ 529 (2017) (No articulable suspicion to believe a weapon was hidden inside motor vehicle). Weapons searches of motor vehicles based upon a reasonable suspicion have long been authorized under federal and New Jersey law. State v. Lund, 119 NJ 35 (1990); Michigan v. Long, 463 US 1032 (1983). These searches are not cursory sweeps, but rather should be as thorough as necessary to make sure that no hidden weapons are in the passenger compartment of the vehicle. By contrast, traditional protective sweep jurisprudence has involved a cursory search for people, not evidence during a police residential entry.

Case Law:

Maryland v. Buie, *494* U.S. *325 (1990)*. (Sweep conducted as incident to an in-home arrest).

State v. Davila, *203* N.J. 97 (2010). (Sweep conducted as a result of a consensual entry)

State v. Cope, 224 NJ 530 (2016) (Sweep as incident to an arrest in house that included an attached porch)

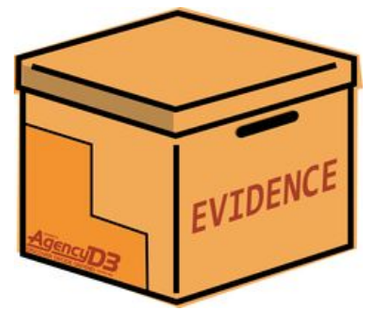
State v. Gamble, 218 NJ 412 (2014) (Extends sweep to motor vehicles based upon reasonable suspicion)

State v. Bryant, 227 NJ 60 (2016) (residence)

When a woman called 911 to report that her boyfriend had struck her, officers were dispatched to the address she provided. While two officers stayed with the woman, who was in a car in a nearby parking lot, two other officers knocked on the door of defendant Charles Bryant, Jr.'s home. When defendant answered, an officer instructed him to take a seat on the couch. As defendant followed this instruction, the officers entered. One conducted a protective sweep of the apartment while the other questioned defendant. All of this was done without knowing the name of the woman's alleged attacker or defendant's name, and without any indication that there were either other people or any weapons present in the apartment.

Under such circumstances, we find that the law enforcement officers did not adhere to the rigorous standards for proceeding without a warrant under the protective sweep doctrine. Accordingly, we hold that the evidence obtained as a result of their impermissible search must be suppressed.

Here, there is sufficient evidence in the record to support the trial court's factual finding that [the officer] and [his partner] lacked information when approaching the apartment, including the name or description of the assailant, the number of parties involved, or whether there were weapons involved. Although we accept these findings as true, we cannot conclude from these findings that a protective sweep was justified. Rather, we find that [the officer's] suspicion, at most, was a subjective hunch.



[The officer] did not testify that any visual or auditory signs existed that led him to believe there was another person in the apartment. Moreover, there is no evidence that [the officer] knew defendant. Nor is there any evidence that the officers were suddenly surprised once inside the apartment, that defendant appeared overly nervous, or that his behavior suggested the presence of another person. In fact, [this officer] conducted the sweep without waiting to hear defendant's answer to [his partner's] questions [to the defendant]. There was therefore no opportunity for [the officer] to determine whether any of defendant's statements were inconsistent or dishonest.

In the present case, the officers might have obtained the information they needed by asking defendant preliminary questions, such as: "Were you just in an argument with your girlfriend?" and "Is there anyone else here in the apartment?" Had the officers asked those, or similar, questions and waited for defendant's response, their fears could have been allayed or a reasonable and articulable suspicion formed. [The searching officer's] failure to pose these basic questions, or wait for a response to the other officer's questions, reduced his actions to, at best, nothing more than acting on a hunch.

Officers' diligence in asking the correct questions and assessing the response or the responder's demeanor before conducting a protective sweep of the home ensures the proper balance between the rights of citizens to be secure in their homes and the need for law enforcement to protect themselves in these dangerous situations.

The officers here lacked reasonable and articulable suspicion that another party was present, much less that another party posed a danger to officer safety. Because there was no evidence of reasonable and articulable suspicion, the State failed to meet its burden of presenting evidence sufficient to establish an exception to the warrant requirement.

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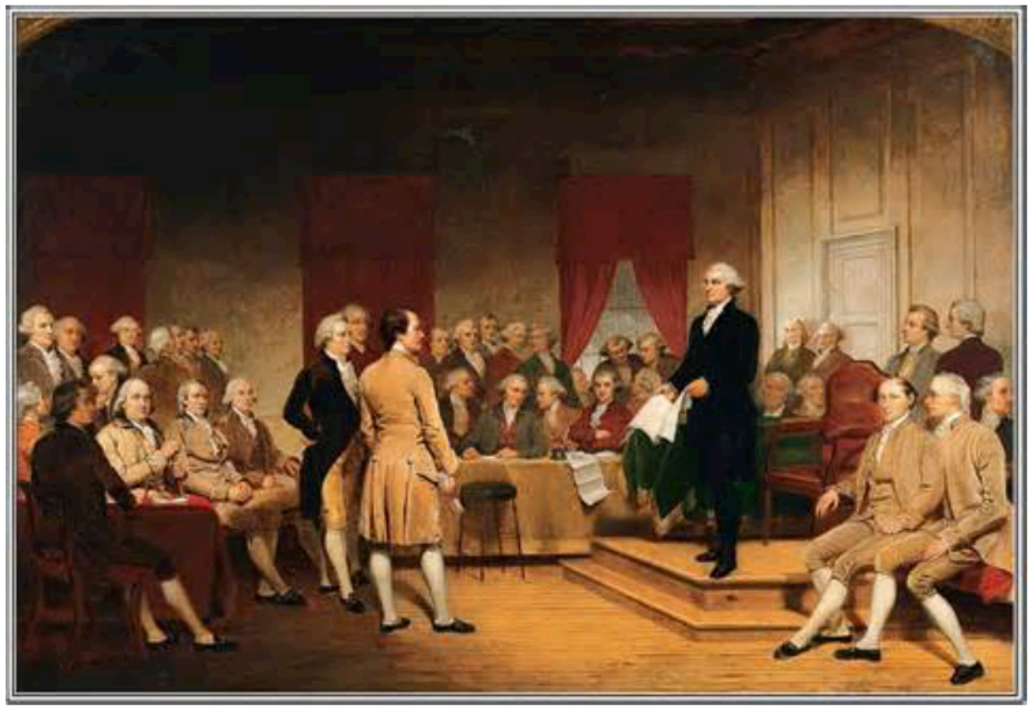

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