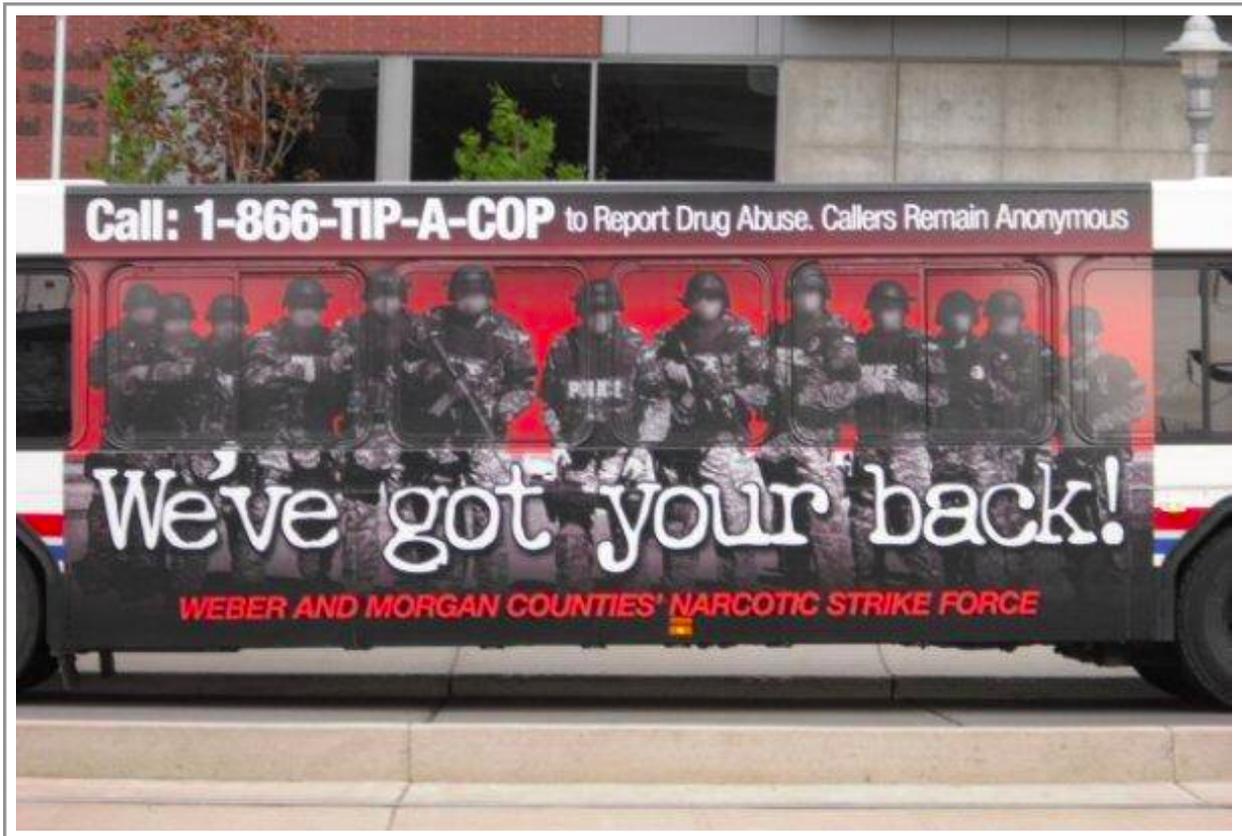


# Police Warrant Reform

*A Libertas Institute Policy Analysis*

Sponsor: Representative Marc Roberts

Floor Sponsor: Senator Luz Robles



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## Relevant Scenarios

**Scenario #1:** Tipped off by a vengeful ex-lover, police obtain a knock-and-announce warrant to seize marijuana plants allegedly growing in a Utah man's basement. Though the man had a predictable daily schedule and could likely have been detained on the way to work or running errands, officers chose to execute the warrant in the dark of night while the suspect was asleep.

Though they claimed to knock and announce before forcibly entering the home, the suspect and his neighbors said that they did not hear it. Claiming that he thought he was under attack, the suspect fired at his intruders—police officers serving a legal warrant—and in the ensuing melee several officers were injured, one died, and the suspect was also shot several times.

**Scenario #2:** Executing a felony arrest warrant in search of a soldier who had gone AWOL, police officers banged on the door of a Utah man at 2:30am. Not wanting to further scare his already frightened young daughter, who heard the shouting and pounding and woke her father up, he decided to grab a baseball bat instead of his shotgun. He looked out a window but saw no police cars or flashing lights. He heard no announcement from the men at the door that they were police officers. With his bat in one hand, he quickly opened his door to find three officers pointing rifles at his face, screaming at him to drop the bat.

Thinking they were being attacked and robbed, the man's wife and two daughters were screaming to know what had happened. The man was handcuffed, told to confess, all while being treated harshly and being sworn at by officers. After looking at the man's ID and checking ownership of his cars, officers realized they had the wrong person. Rather than offer an apology, one of them told the man "well you're lucky you didn't come upstairs with a gun, because I would have wasted ya."

All members of this family have suffered psychological trauma as a result. Fortunately, officers restrained themselves and the man was not physically harmed.

**Scenario #3:** Narcotics detectives used a battering ram to knock down the door of a 76-year-old Utah woman while executing a “no knock” warrant. The woman, whose son said she was “traumatized” by the event, had a gun put in her face while being questioned whether she owned a gun or drugs. She answered no to both. The officers soon realized that they had busted down the wrong door.

An error on the part of one of the detectives led to officers invading the wrong home, thereby terrorizing an innocent individual not named in the warrant nor suspected of committing any crime. “We did not do our due diligence on this one,” said police chief Chris Burbank, apologizing for the error.

“It scared us because I had my grandson here and my daughter-in-law,” said neighbor Paul Fracasso. “They could have come to our house. They should have done more homework on the situation and thoroughly checked out their sources instead of just hitting an elderly lady’s house.” The officer causing the error was investigated by a civilian review board and subsequently punished with 20 hours of unpaid leave.

## Introduction

According to one estimate, roughly 40,000 SWAT or tactical raids are conducted around the country each year—*over 100 per day*. In most cases, officers detain the suspects and seize the desired evidence without harm to themselves or those present in the home they entered. But in too many cases, something goes wrong and somebody—in many cases an innocent person—gets hurt, or worse, killed. Utah is not an exception to this trend.

This violent enforcement of the law, primarily relating to drug enforcement, suggests a weakening—if not abandonment—of the restraint that the American legal system was designed to ensure when dealing with warrants.

Prior to the Revolutionary War, agents of the British government used “writs of assistance” to authorize general searches and seizures. This broad targeting of innocent people, and the taking and destruction of their property, played a large role in the brewing opposition to the Crown. As James Otis argued, these writs were “a power that places the liberty of every man in the hands of every petty officer.”

Due to their experience with this abuse of authority, the framers of the Constitution passed the 4th amendment which required a warrant signed by an impartial judge, based upon probable cause, that was specific to a person or property. Accordingly, today we expect judges to serve as a check on the authority of law enforcement officials to ensure that the rights of each citizen are considered and protected.

But what happens if judges don’t “check” this authority when necessary? Are a citizen’s rights fully regarded when the judge and law enforcement officer have a “history” together and therefore are somewhat predisposed to collaborate? How can we be sure that judges around the state are upholding our rights and granting the authority to forcibly enter a person’s home based on a consistent state-wide standard?

To ensure that punishments meted out by judges around the state are equitable, the Utah legislature establishes sentencing guidelines; it would clearly be problematic for a judge to punish a convict with 40 years in prison while another judge imposes a sentence of only one year on another person for the same crime. As with sentencing, we believe it is necessary for the legislature to establish reasonable guidelines for judges when being asked to sign off on a request to forcibly enter a person's home.

We wish to minimize the risk both to citizens and law enforcement officials, and believe that better judicial oversight—to ensure that forcible entry is occurring only when absolutely necessary, and when the circumstances truly justify its use—will facilitate this important objective.

## Bill Proposal

77-7-8. Forcible entry to ~~make~~ **conduct search or make** arrest -- Conditions requiring a warrant.

- (1) (a) Subject to Subsection s (2) **and (3)** , a peace officer when **conducting a search or** making an arrest may forcibly enter the building :
    - (i) in which the **target of a search is reasonably believed to be located,**  
**or**
    - (ii) **where the** person to be arrested is, or in which there are reasonable grounds for believing ~~him~~ **the person** to be.
  - (b) Before making the forcible entry, the officer shall :
    - (i) **identify him or herself as a law enforcement officer; and**
    - (ii) demand admission and explain the purpose for which admission is desired.
  - (c) (i) The officer need not give a demand and explanation before making a forcible entry under the exceptions in ~~Section~~ **Subsection 77-7-6 (1)(a)** or where there is ~~reason~~ **probable cause** to believe evidence will be **easily or quickly** secreted or destroyed.
    - (ii) **The officer shall identify him or herself and state the purpose of entering the premises as soon as practicable after entering the premises.**
  - (d) **The officer shall use the least amount of force necessary to effectuate forcible entry under this section.**
- (2) If the building to be entered under Subsection (1) appears to be a private residence or the officer knows the building is a private residence, ~~and~~ if there is no consent to enter , **if there are no exceptions present under Subsection 77-7-6(1)(a), ~~for there are no exigent circumstances,~~ and if there is no probable cause to believe evidence will be easily or quickly secreted or destroyed,** the officer shall, before entering the building:
- (a) obtain an arrest or search warrant if the building is the residence of the person to be arrested; or

(b) obtain a search warrant if the building is a residence, but not the residence of the person whose arrest is sought.

(3) A judge or magistrate issuing a warrant pursuant to Subsection (2) shall ensure that the affidavit:

(a) explains why law enforcement officials cannot detain the suspect or search the residence using less invasive or confrontational methods;

(b) explains why the warrant cannot be executed during daylight hours, if the warrant is to be executed at night, which is the time between one hour after sunset on one day and one hour before sunrise on the following day; and

(c) describes:

(i) investigative activities that have been, or will be, undertaken prior to execution of the warrant to ensure that the correct building is identified and that potential harm to innocent third parties, the building, and law enforcement officers may be minimized; or

(ii) why no investigative activities are needed.

(4) Any information or property obtained in violation of this section is inadmissible in any judicial proceedings.

## Notes

### **(1)(b) “...the officer shall: (i) identify him or herself as a law enforcement officer...”**

This codifies what should be standard practice (unless using a no-knock warrant): to require law enforcement officers, prior to serving a forcible entry warrant, to clearly identify themselves to assure people inside the building that the people banging on their door are not burglars, gang members, etc. Many defendants claim that the officers attempting to enter their home did not disclose their identity prior to entering, and that they were therefore concerned that they were under attack. This clause makes clear that disclosing the identity of officers is a requirement.

Under (1)(c)(i) an officer may forcibly enter a building without making a demand and explanation, so we propose requiring, in these cases, that the officer’s identity and authority be disclosed in as soon as practicable after the entry has been made.

### **(1)(c)(i) “...or where there is ~~reason~~ probable cause to believe evidence will be easily or quickly secreted or destroyed.”**

Given that most forcible entries occur over allegations of drug possession or use, and because such home raids can cause significant harm to property or a person’s life—including the officers serving the warrant—it is important to reasonably restrain the authority so it is not excessively or unnecessarily used. As such, we recommend elevating the belief of evidence to probable cause. We further think it important to clarify that forcible entry for such evidence is only necessary, and thus authorized, when officers have probable cause to believe that it can be easily or quickly secreted or destroyed. In other words, large marijuana plants aren’t going anywhere anytime soon, unlike a small bag of heroin that can be flushed. The latter may justify forcible entry whereas the former does not.

### **(1)(d) The officer shall use the least amount of force necessary to effectuate forcible entry under this section.**

If a judge determines that a warrant can be served without needing a “no knock,” for example, then the judge should not authorize an unnecessary escalation of

violence. Accordingly, to protect lives and property, law enforcement officers should be statutorily required to exercise only the least amount of force necessary to detain the suspect or seize the evidence.

**(3) A judge or magistrate issuing a warrant pursuant to Subsection (2) shall ensure that the affidavit...**

To establish a judicial standard for forcible entry warrants, Subsection (3) outlines some simple steps that must be followed in seeking such authority in an affidavit. Judges will be required to collect and review certain information so as to ensure that they are only authorizing the amount of force that's necessary, and that the circumstances of the situation merit the judge's approval. Additionally, the warrants (when unsealed) will better inform policy makers and the public as to whether the amount of force exercised in a given situation was necessary and therefore justified.

**(a) explains why law enforcement officials cannot detain the suspect or search the residence using less invasive or confrontational methods;**

The common law "castle doctrine" makes clear that a man's home is his castle or sanctuary. As such, the state must be restrained such that a residence is forcibly entered only when absolutely necessary. Accordingly, judges being asked to authorize such an action should always seek to understand whether the arrest or seizure can happen using a less invasive or confrontational method.

Some options, in contrast to the "no knock" and "knock and announce" methods, include:

1. **Takedown:** Effect the arrest away from his home on a traffic stop or when he is walking down the street, etc.
2. **Ruse:** Get the suspect to exit his home for some reason and then effect the arrest.
3. **Surround and call out:** Set a perimeter and call out the suspect from the objective and then effect the arrest.
4. **Breach and hold:** Set a perimeter, knock and announce, breach an entry point, effect entry, or call out.

5. **Deliberate entry:** Knock and announce, breach or breach and hold, clear the objective at a methodical pace.

For example, if a suspect has a predictable daily schedule and can therefore be pulled over on the side of the road or detained as he's exiting his home to go to work, then judges may push back and ask why forcible entry should be justified if a less invasive or confrontational method is possible given the circumstances.

**(b) explains why the warrant cannot be executed during daylight hours, if the warrant is to be executed at night, which is the time between one hour after sunset on one day and one hour before sunrise on the following day;**

Forcibly entering a home while its residents are sleeping can cause disorientation and alarm—especially if residents hear only shouting, and not the distinct announcement that it's the police—leading them to suspect a criminal invasion and thus trigger a defensive response against law enforcement officers executing a legal warrant. Accordingly, a judge must ensure that a nighttime execution of the warrant is necessary before authorizing it.

**(c) describes: (i) investigative activities that have been, or will be, undertaken prior to execution of the warrant to ensure that the correct building is identified and that potential harm to innocent third parties, the building, and law enforcement officers may be minimized; or (ii) why no investigative activities are needed.**

Tragically, innocent people are often harmed or killed when warrants are served—sometimes on the wrong home. While most SWAT teams are very deliberate in their efforts, including observing a residence to observe the comings and goings of its occupants and assess when it will be least risky to enter, many task and strike forces do not take this necessary step. If a home is to be forcibly entered, it is necessary to know: 1) that the home is the correct one; 2) where in the home the suspect is likely to be; and 3) what time of day is best to find only the suspect at home, thereby not harming family members or friends in the process. To fulfill this reasonable requirement, investigative activities (sometimes called “scouting”) should be made mandatory for all uses of residential forcible entry—both for the

officer's sake, as well as others living in or visiting the residence. If others are known to occupy the home, extra caution should be taken, and therefore extra investigation should be done to collect additional information and ensure the safety of all involved.

**(4) Any information or property obtained in violation of this section is inadmissible in any judicial proceedings.**

Another way to restrain unnecessary violence when seeking to detain a suspect or seize evidence is to statutorily invalidate what is obtained as a result. While judges currently have the discretion to rule such evidence as inadmissible, it should be codified in law that what is obtained by violating the law cannot be used to prosecute an individual. This added protection will encourage officers to seek forcible entry only when absolutely necessary and when properly justified.

## Conclusion

Law enforcement officers have a dangerous job. We as citizens collectively delegate our authority to them to help “keep the peace” and ensure our physical security. We applaud those who recognize and respect this fundamental objective.

Since the inception of this country, and despite the good intentions of most police officers, we have required judicial oversight over warrants—to check abuse, restrain excesses, and ensure that the authority is only being used when and where necessary. To the extent that such oversight is inefficient or unbalanced, reasonable guidelines should be implemented to create a transparent and level playing field.

Given national trends of warrant execution rife with police abuse and injury or death of innocent individuals, and in light of tragic instances that have happened here in Utah, the policy in regards to a limited aspect of police activity must be amended to better protect *all* persons—police and citizens alike.

We propose the above changes as a reasonable way of implementing this protection, thereby increasing the public’s trust in the officers who serve them—and in the judicial oversight upon which we have historically relied. When government force is restrained and cautiously used, it will be better justified and supported by citizens at large.

## Talking Points

- Police officers recognize that they need the trust of the community in which they operate. Adding clarity to when they may forcibly enter a resident’s home will establish greater trust in the process and justification for use of force.
- This bill is about protecting people on *both* sides of the gun—reducing unnecessary risk and violence against both perpetrators and police officers.
- To the extent possible, suspects should be detained in the safest way possible; only when *absolutely necessary* should a judge authorize forcible entry into a home—especially when innocent individuals may be present.
- Since the founding of this country we have relied upon judges to serve as a check against police authority. If that check isn’t working well, we should strengthen it with reasonable guidelines for judges to follow.
- The legislature gives guidelines to judges for how sentencing is to be done. It logically follows that other guidelines for judges may be appropriate and necessary. We believe that this is the case with forcible entry warrants.
- SLC Police Chief Chris Burbank: “I spent eight years on the SWAT team. I’ve served hundreds of no-knock warrants. I know firsthand how it all operates. I also know firsthand that there are better alternatives. Too often we start with the highest level of force. We should always start at the lowest level. If the police show up and the situation deteriorates, then that’s our fault. We haven’t done our job right. I think we get too caught up in the whole officer safety thing. The danger you expose everyone to in these raids is significant.”
- Representative Lee Perry (Lieutenant, Highway Patrol): “If there’s something that can benefit both law enforcement and citizens, I think that’s an outstanding compromise and a great way to go.”
- Standard-Examiner editorial: “...there have been enough adverse incidents involving raid-style police searches to merit more discussion on the issue.”