

Student Handout 1

History of the Fourth Amendment

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.

A knock at the door in the middle of the night. This fear was familiar to colonial Americans—it could mean a ransacked house or an arrest without cause. The Fourth Amendment to the U.S. Constitution was drafted to protect citizens from such arbitrary government invasions of their privacy. According to Justice Louis Brandeis, the Fourth Amendment guarantees the “right to be left alone—the most comprehensive of rights and the right most valued by civilized men.”

General Warrants

Since the fourteenth century, England allowed the use of general warrants, which authorized government agents to search wherever they wanted and to seize whatever or whomever they wished. Because the general warrant did not expire until the king’s death, it could remain in effect for years. None of the great English documents of liberty, such as the Magna Carta or the English Bill of Rights, forbade general warrants, although English courts restricted their use in the mid-eighteenth century. Nonetheless, the British government widely used general warrants in colonial America.

As Justice William Brennan wrote 200 years later, “the evil of the general warrant is often regarded as the single immediate cause of the American Revolution.” A type of general warrant known as a writ of assistance allowed British customs officials to search colonial homes and businesses at will, without any restrictions, to look for smuggled goods on which import duties had not been paid. The warrant did not specify particular persons suspected of illegal activity or houses to be searched. The general warrant permitted totally arbitrary acts of government.

Colonial Americans believed that “a man’s house is his castle” and that government officials should not be able to invade that domain at will. After the Revolutionary War, eight states included a protection against general warrants in their new constitutions. And during the ratification of the U.S. Constitution, five states proposed adding an amendment restricting searches and seizures. In 1789, James Madison’s version of what became the Fourth Amendment passed with little debate in Congress.

That amendment had two parts. The first part protected the people against “unreasonable searches and seizures.” The second part, the Warrant Clause, required that a warrant, or court order, for an arrest or search specifically describe the “place to be searched, and the persons or things to be seized.” Also, warrants had to be based on probable cause, that is, reasonable grounds—not just the whim of a government official. The Fourth Amendment did not define an “unreasonable” search or seizure, however, nor was it clear whether *all* searches and seizures required a warrant and probable cause.

Reasonable Expectations of Privacy

The first part of the Fourth Amendment sets forth the conditions under which it applies. The amendment protects the people’s right to be secure “in their persons, houses, papers, and effects.” Does this phrase mean that the Fourth Amendment only applies within a home or office, not to telephone conversations in a public phone booth?

At first, the Supreme Court interpreted the Fourth Amendment to apply only to actual physical intrusions into a “constitutionally protected area”—such as a home, office, or physical body. On these grounds, for instance, the Court in *Olmstead v. United States* (1928) held that wiretapping without a warrant did not violate the Fourth Amendment if the bugs were planted *outside* the home. The federal agents in that case had not committed an “actual physical invasion” of the home or office of Olmstead, a suspected bootlegger.

In *Katz v. United States* (1967), the Supreme Court expressly overruled *Olmstead*. Katz was convicted of sending betting information across state lines, based on police wiretaps of a public phone booth. Even though the bug was

placed on the outside of the booth, the Supreme Court overturned Katz's conviction. As Justice Potter Stewart, on behalf of the Court's majority, wrote:

[T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected. . . .

The *Katz* decision established that the Fourth Amendment applied wherever a person had "a reasonable expectation of privacy," not just in a home or office. This phrase has become the critical test for what the Fourth Amendment protects.

Unreasonable Searches and Seizures

The Fourth Amendment only applies to "unreasonable searches and seizures." In *Terry v. Ohio* (1968), the Supreme Court defined these terms. At issue in *Terry* was the police practice of "stop and frisk," where an officer stops persons on the street and pats them down for weapons.

In general, the Supreme Court has ruled that while the Fourth Amendment expresses a preference for warrants based on probable cause, it does not always require them. As a rule, however, the Court has held that warrantless searches or seizures without probable cause are inherently "unreasonable."

But in *Terry* the Supreme Court created an exception to that rule. The Court said that probable cause is not required for every search and seizure under the Fourth Amendment. Some searches can be "reasonable" without probable cause, depending on the circumstances. In *Terry*, the Court emphasized the specific facts of the case. Officer McFadden, a policeman with thirty-nine years of experience, noticed three men in downtown Cleveland, two of whom walked back and forth in front of a store window about a dozen times. He suspected the men of "casing a job, a stick up," and decided to investigate. He also feared "they may have a gun."

Officer McFadden had no concrete information giving him probable cause to stop the men or search them—he just had a generalized "hunch" based on his experience. Nonetheless, Officer McFadden "approached the men, identified himself as a police officer, and asked for their names." When the men gave mumbled answers, the officer grabbed defendant Terry, patted him down and found a gun, then discovered another revolver when patting down the other two suspects. The Court ruled that Officer McFadden's actions, while certainly searches and seizures, were not "unreasonable" under the Fourth Amendment.

Other "Reasonable" Searches and Seizures

The *Terry* decision made way for other exceptions to the probable cause requirement besides a "stop and frisk." Ordinarily, probable cause would require that a particular person was reasonably likely to have committed a particular offense. But the Court has found certain searches and seizures to be "reasonable" even without probable cause in cases where the intrusion was believed to be slight or in special situations—such as schools. Under current Fourth Amendment law, searches and seizures without probable cause are "reasonable" in circumstances such as the following.

Sobriety Checkpoints. Even without probable cause that a specific driver has been drinking and driving, police may routinely stop all motorists in roadblocks. Such "seizures" are not "unreasonable" because the states have a strong interest in deterring drunk driving and the intrusion on the drivers stopped is "slight." However, random "spot checks" of individual motorists without probable cause violates the Fourth Amendment.

Drug Testing. Federal law can require drug and alcohol tests of railroad workers after major accidents without probable cause to believe a person was using drugs or alcohol, because of the government's interest in safety. Also, certain federal customs employees who might be investigating drug crimes can be required to undergo mandatory drug testing without probable cause.

Student Searches. The Supreme Court ruled in *New Jersey v. T.L.O.* (1985) that probable cause is not required when students are searched by school officials. In that case, a teacher accused T.L.O., a high school student, of smoking in the bathroom in violation of school rules. When questioned by the assistant principal, the girl denied that she smoked at all. The assistant principal then demanded to see the contents of her purse, which upon a thorough search revealed marijuana and drug-related paraphernalia. As a result, the state brought delinquency charges against the student in juvenile court.

The Supreme Court ruled that while the Fourth Amendment applies to public school officials and teachers, a student's expectation of privacy must be weighed against the school's need to preserve a sound learning environment. School officials do not need warrants or probable cause to conduct in-school searches, the Court ruled, as long as they meet the test of "reasonableness under all circumstances." Police officers who conduct searches on school premises, however, must still have probable cause.

The Supreme Court further restricted students' Fourth Amendment rights in *Vernonia School District 47J v. Acton* (1995). The Court held that schools may require all student athletes to take drug tests, whether or not any of them was suspected of actual drug use.

Taken together, these cases indicate that "unreasonable" is the controlling word in the Fourth Amendment. Not all searches and seizures require warrants, or even probable cause. But they all must be "reasonable." How the Supreme Court defines "reasonable" varies from case to case.

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After you have finished reading the history of the Fourth Amendment, answer the following questions in complete sentences.

1. What is a general warrant and why did Justice William Brennan believe such warrants to be "the single immediate cause of the American Revolution"?
2. According to the Constitution, in order to obtain a warrant to search a person's home, what information must the police convey to a judge?
3. List some of the factors the Supreme Court considers when trying to determine whether or not a search is reasonable.
4. Do you believe that Officer McFadden acted reasonably or unreasonably? Why?
5. What reasons did the Supreme Court give for upholding the school's right to search a student without probable cause in the case of *New Jersey v. T.L.O.*?