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HOW DO THE FOURTH AND FIFTH AMENDMENTS PROTECT AGAINST UNREASONABLE LAW ENFORCEMENT PROCEDURES?



LESSON PURPOSE

The Fourth Amendment limits the powers of government officials to search and seize individuals, their homes, their papers, and other property. The Fifth Amendment contains several other important protections for criminal defendants, including protection from self-incrimination. This lesson focuses on the Fourth Amendment and the protection from self-incrimination in the Fifth Amendment. It examines the history of these protections and why they were important to the Framers.

When you have finished this lesson, you should be able to explain the purpose and history of the Fourth Amendment and issues raised by its interpretation. You also should be able to explain the importance of the Fifth Amendment provision against self-incrimination. Finally, you should be able to evaluate, take, and defend positions on contemporary issues involving the Fourth Amendment and self-incrimination.

TERMS AND CONCEPTS TO UNDERSTAND

affidavit	seizure
exclusionary rule	self-incrimination
probable cause	use immunity
reasonableness	warrant
search	

WHAT IS THE HISTORY OF THE FOURTH AMENDMENT?

Americans inherited from British history the principle that “a man’s home is his castle.” The right to privacy and its importance to a free society have been understood at least since the Magna Carta. One way English common law protected the right to privacy was by prohibiting judges from giving law enforcement officials general warrants, also known as writs of assistance. A **warrant** is a document given to a police officer or other government official giving permission to intrude into a person’s privacy—**search**—or interfere with a person’s property or freedom of movement—**seizure**. A general warrant does not describe in detail the places to be searched or the things or persons to be seized. General warrants have been referred to as open-ended “hunting licenses” because they allow government officials to search people, businesses, homes, and property indiscriminately.

Despite the common law prohibition against general warrants, Parliament and royal commissions sometimes allowed their use. General warrants were used to harass and persecute individuals who were critical of the government or who, like Puritans, dissented from the Church of England.



Should police be able to search school lockers without a warrant or a student’s permission? Why or why not?

In the eighteenth century Parliament also approved the use of general warrants in the American colonies. British officials used such warrants to collect taxes, to recover stolen goods—including slaves—and to prosecute persons they believed to have violated British trade restrictions by smuggling tea and other products into the colonies. The British were not entirely wrong in suspecting the colonists of smuggling. John Hancock’s father, for one, made a great deal of money smuggling tea into Boston. A general warrant enabled the British to discover that John Hancock himself was smuggling wine.

The colonists’ strong objections to British trade laws and the use of general warrants contributed to the American Revolution. After the Revolution state declarations of rights typically outlawed general warrants. Anti-Federalists later criticized the Constitution for not placing similar limitations on the national government. Abraham Holmes, a delegate to the Massachusetts ratifying convention, said, “There is no provision made in the Constitution to prevent...the most innocent person...[from] being taken by virtue of a general warrant...and dragged from his home.”

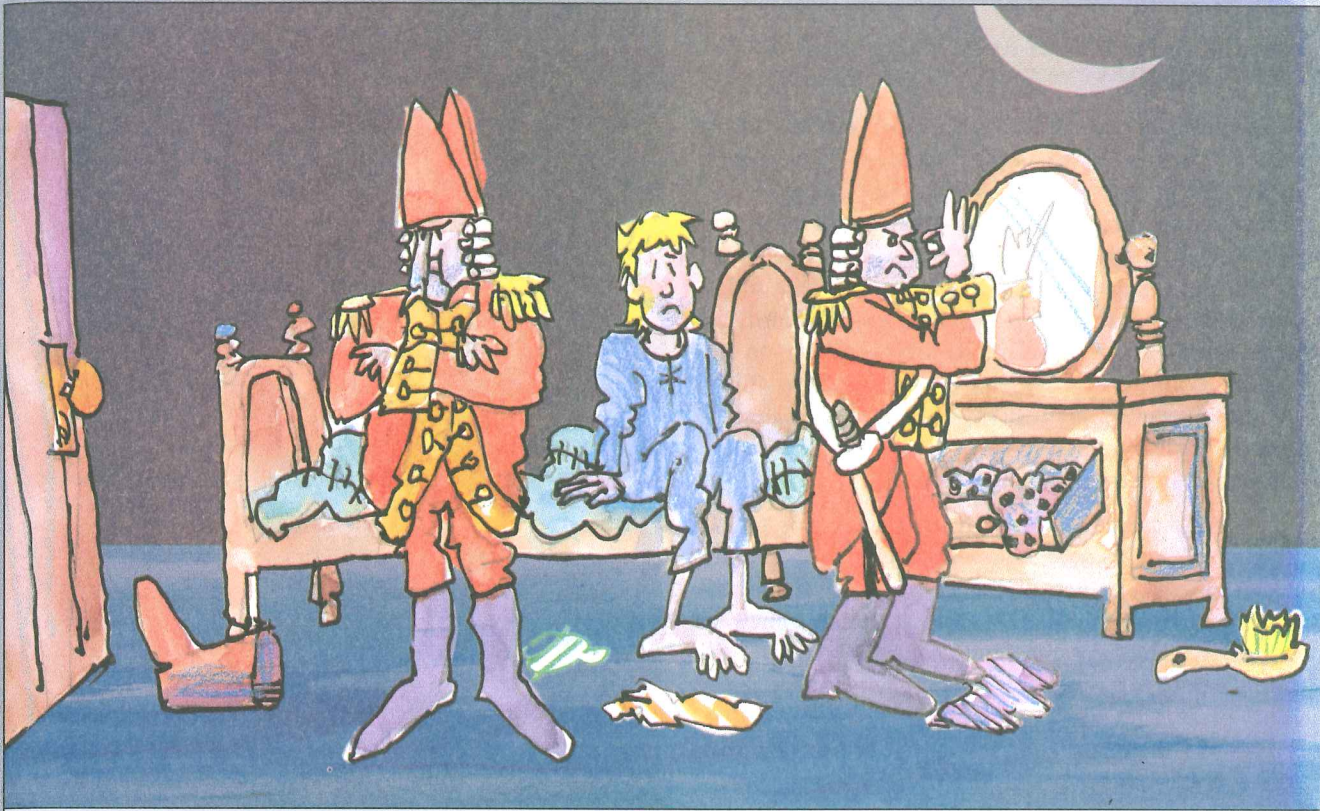
WHAT IS THE PURPOSE AND IMPORTANCE OF THE FOURTH AMENDMENT?

Few provisions in the Bill of Rights grew so directly out of colonial experience as the Fourth Amendment. The amendment protects persons, houses, papers, and other personal effects from “unreasonable searches and seizures.” In particular the amendment

- Prohibits general warrants
- Requires applications for warrants to be supported by probable cause (discussed later in this lesson)
- Requires a judge or magistrate, not the official who will serve the warrant, to decide whether probable cause exists
- Requires applications for warrants to “particularly” describe the “place to be searched, and the persons or things to be seized”

Soon after he served as a judge at the Nuremberg trials of Nazi war criminals in 1949, Supreme Court Justice Robert Jackson stressed the importance to a free society of the protections against unreasonable searches and seizures. He said,

“ Among the deprivations of rights, none is so effective in cowing a population, crushing



Why did Parliament approve the use of general warrants to allow searches in the American colonies?

the spirit of the individual and putting terror in every heart as uncontrolled search and seizure. It is one of the first and most effective weapons in the arsenal of every arbitrary government.

Courts have interpreted the Fourth Amendment as protecting reasonable expectations of privacy, although the amendment does not specifically state that it protects privacy. However, protecting privacy against intrusion by government officials is a deeply held value in the United States. Privacy also is an important component of the rights to freedom of conscience, thought, religion, expression, and property. The rapid growth of surveillance and other technology makes concerns about privacy particularly acute today.

WHAT DO YOU THINK?

- 1 What powers should be given to law enforcement officers in order for them to be able to enforce the law? Is the Fourth Amendment's prohibition against general warrants still desirable in light of ongoing threats of terrorism? Explain.
- 2 What values are served by requiring law enforcement officers to get permission from a judge to arrest someone or search his or her property?

- 3 In 2007 the deputy director of national intelligence stated, "Protecting anonymity isn't a fight that can be won. Anyone [who has] typed in their name on Google understands that." Privacy, he argued, has basically become what the government and the business community say it is. Do you agree or disagree? Why?

WHAT ISSUES ARISE IN INTERPRETING AND APPLYING THE FOURTH AMENDMENT?

The Fourth Amendment protects against "unreasonable" searches and seizures. It seeks to strike a balance between society's need for order and safety and the individual's right to autonomy and privacy. Achieving the proper balance under ever-changing circumstances is the ongoing challenge in interpreting the Fourth Amendment.

The Fourth Amendment raises three important questions:

- When is a warrant required?
- What is probable cause and when is it required?
- How should the Fourth Amendment be enforced?

WHEN IS A WARRANT REQUIRED? WHAT IS PROBABLE CAUSE?

Requiring police officers and other officials to get warrants before they can search, arrest, or seize evidence is a means of checking their power and protecting individuals from arbitrary and unlawful government actions. Government officials who want a warrant must submit an **affidavit**, or sworn statement, to a judge. **Probable cause** means that there is enough evidence for a reasonable person to believe that it is likely that an illegal act is being or has been committed. The official requesting a warrant must describe facts and circumstances in sufficient detail to persuade the judge that probable cause exists to issue a warrant.

Probable cause requires more than a hunch or a vague suspicion, but it does not require absolute certainty. Determining whether probable cause exists requires careful analysis of the facts of each case and is somewhat subjective. The Supreme Court continually refines the specific criteria for probable cause in light of experience. This process reveals a commitment to protecting the rights of individuals while also protecting society from those who break the law.

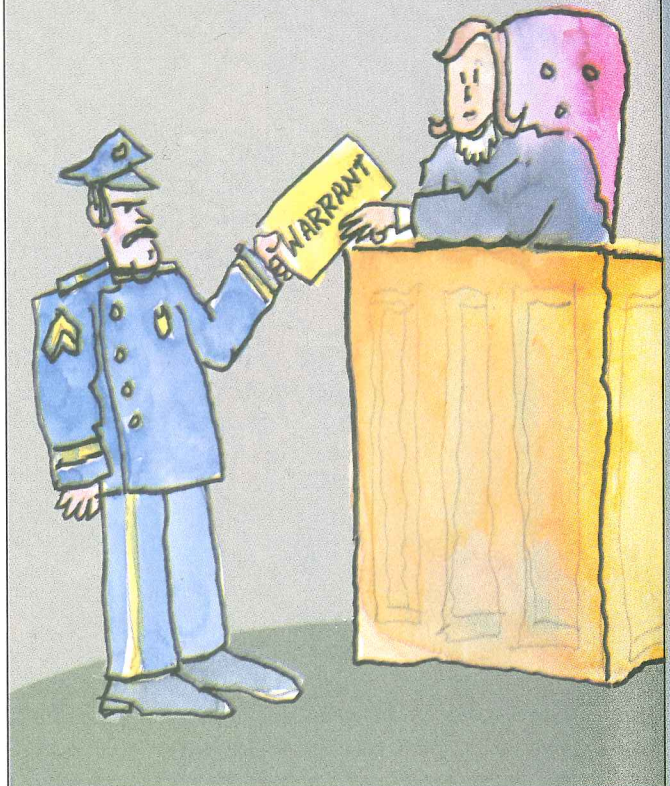
During the 1960s the Supreme Court held that searches conducted without warrants are inherently unreasonable. By the 1970s the Court had recognized a number of exceptions to the warrant requirement. There are times when law enforcement officers cannot wait for a warrant. For example, police may be on the scene of a violent crime or a robbery in progress. If they do not arrest the suspect immediately, then the person might injure a police officer or others or escape. Under these emergency circumstances it is necessary for officers to be able to arrest a person or search property without a warrant.

The Court has also held that in some circumstances warrants are never required. For example, vessels may be boarded and searched randomly for purposes of inspecting documentation. No warrant is required if a person consents to being searched or arrested or to having his or her property seized.

HOW DOES THE EXCLUSIONARY RULE ENFORCE THE FOURTH AMENDMENT'S WARRANT REQUIREMENT?

What should be done if law enforcement officers or other government officials break the law by not showing probable cause and obtaining warrants for searches and seizures?

In 1914 the Supreme Court held that the national government could not introduce papers belonging to a defendant in court as evidence because officers had seized the papers from the defendant's home without a



What purposes are served by requiring law enforcement officers to get a warrant from a judge before conducting a search?

warrant (*Weeks v. United States*). Preventing the government from using illegally obtained evidence at trial is known as the **exclusionary rule**. Judges created the exclusionary rule to discourage law enforcement officers from breaking the law. The courts have argued that the rule is the most effective way of preventing violations of individual rights during arrests, searches, seizures, and interrogations.

In 1961 the Supreme Court extended the exclusionary rule to criminal trials in state courts (*Mapp v. Ohio*). This resulted in considerable controversy and widespread criticism of the Court's action. Criminal defendants in state courts often have committed dangerous crimes. Public sympathy for the rights of such defendants usually is not as high as it is for so-called white-collar criminals, who more often are prosecuted in federal courts. The use of the exclusionary rule in state courts sometimes resulted in defendants being set free or retried if the evidence against them was not allowed to be used at their trials. Some critics claim that the Court has "tied the hands of the police." They argue that the exclusionary rule is too high a price to pay for government violations of the Fourth Amendment. Others believe that the Supreme Court's decision in *Mapp* is inconsistent with principles of

federalism and exceeds the national government's power over the states.

Since 1961 the Supreme Court has modified the exclusionary rule in several ways. For example, if government officials relied in good faith on a defective search warrant, then they can introduce at trial evidence that they obtained in an illegal search. If government officials can show that they would have discovered the evidence as a routine matter—the “inevitable discovery” rule—then they can introduce at trial evidence they obtained in violation of the Fourth Amendment.

WHAT ARE SOME ALTERNATIVES TO THE EXCLUSIONARY RULE?

Americans continue to debate other ways to check the abuse of power by law enforcement officers and other government officials, rather than losing valuable evidence against criminals at trial. Proposals include

- **Departmental discipline**
Some law enforcement agencies have created independent boards that investigate claims that an officer violated a right of a criminal

defendant. A board conducts hearings and if it finds that the officer violated the Fourth Amendment, then it imposes discipline.

- **Civilian review boards**
A civilian review board appointed by local government officials sometimes supervises law enforcement agencies. Such boards investigate charges against officers accused of breaking the law or violating rules and procedures. If a board concludes that an officer broke the law, then it recommends appropriate action to the law enforcement agency or suggests criminal prosecution.
- **Civil suits**
Persons who believe that their rights have been violated by government officials sometimes have the right to sue individual officers or their agencies for money damages in a civil court or under the Civil Rights Act of 1964. Some argue that awarding money damages to criminal defendants whose Fourth Amendment rights were violated would be better than excluding evidence



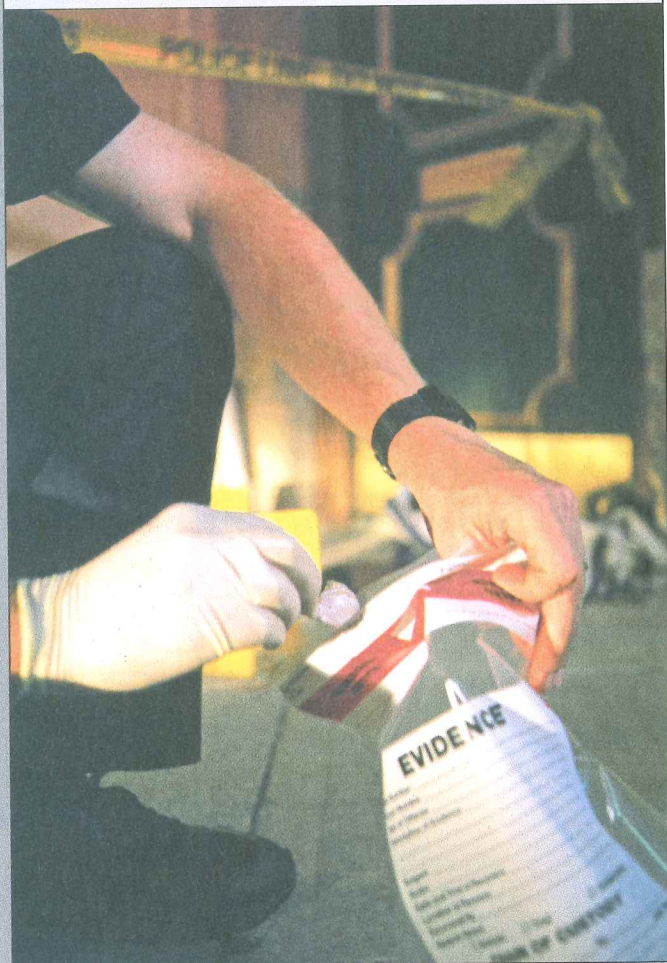
Under what conditions, if any, should a law enforcement officer be able to arrest someone without a warrant?

CRITICAL THINKING EXERCISE

Deciding Whether to Apply the Exclusionary Rule

Work in groups of three to five students. Consider the following situations in which government officials illegally obtained evidence of a crime. Then answer the questions that follow and be prepared to present and defend your positions.

- A chief executive officer (CEO) of a major corporation that employs hundreds of thousands of workers faces criminal charges for stealing millions of dollars from employee pension funds. Government officials obtained evidence of the crime by hacking into the CEO's home computer.
- A high school junior faces criminal charges for selling marijuana. Police suspected that the student was involved in drug trafficking, went to the student's home without a warrant, and broke in after they determined that no one was home. They found receipts for drug sales and other incriminating evidence.



If law enforcement officers obtain evidence illegally, what should be done with it? Why?

- A person faces criminal conspiracy charges for planning to blow up an office building in a major American city. Government officials obtained evidence of the plot by illegally wire-tapping the defendant's home telephone.
 - A person faces criminal charges for tax evasion, a crime that government officials had suspected for many years but never been able to prove. They obtained evidence to support the charges by paying the defendant's accountant to give them records of the defendant's income for the past fifteen years.
- 1 Should the evidence obtained in each situation be allowed in or excluded from the trial of each of the defendants? Explain your reasoning.
 - 2 If you think the exclusionary rule is not appropriate in any of the situations described above, what alternative would you suggest and why?

WHEN ARE WARRANTS AND PROBABLE CAUSE NOT REQUIRED?

The Supreme Court has held that warrants are never required in certain circumstances. For example, the warrant requirement is "unsuited to the school environment" because school officials are guardians of students, not law enforcement officers. Searches conducted at schools are reviewed to determine if the search was "reasonable." The Court has held that a search is reasonable if

- Specific facts, together with rational inferences from those facts, justified the intrusion
- The search was reasonably related in scope to the circumstances justifying it (*T.L.O. v. New Jersey*, 1985)

Safety and health are primary considerations used for determining whether a search is reasonable in the public school setting. The court has approved the **reasonableness** standard in two other settings:

- Random drug testing of public and transportation employees and students who participate in extracurricular activities in public schools
- Searches of homes of people who are on probation