

Chapter 15: The Right to Protection against Illegal Search and Seizure

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The Bill of Rights is a miniature code of criminal procedure. These ten amendments list seventeen rights designed to guarantee fairness to individuals accused of crimes. The Fourth Amendment contains the first of these protections: “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.” The right had its roots in English history, but the American struggle for independence gave it special significance for the new nation.

One of the colonial grievances against the British government concerned warrants (written authorization) that officials in charge of trade used to search colonists’ property for smuggled goods. These documents, called writs of assistance, gave officers broad power to conduct searches and seize property based only on their general suspicion of unlawful actions. First introduced during the reign of Henry VIII (1513–47), the British government claimed that general search warrants, which did not allege a specific crime, were necessary for effective law enforcement, especially against publications the government considered dangerous. This practice was controversial, however, and Parliament began to limit the power after it forced King James II from the throne in the Glorious Revolution of 1688. By the eve of the American Revolution, general warrants had declined dramatically as a tool to restrain the press, but they continued to be used unchecked in the enforcement of customs law. Britons did not object to broad search and seizure powers in this area because the writs were used infrequently in the search for smuggled goods in England. The American experience was dramatically different.

Opposition to general warrants came to a head in Boston, one of the busiest ports in the colonies and center of the smuggling trade. In Massachusetts, as elsewhere, customs officials could enter and search buildings simply on the authority of their royal appointments. In 1761, Boston merchants hired lawyer James Otis to challenge the legality of these writs. His presentation in court electrified the colonists because he asserted the supremacy of fundamental law, such as individual rights, over legislative power. A man’s home and property, he argued, were sacred; his privacy could not be invaded on the whim of government officials. Here, Otis anticipated Sir William Pitt, a prominent member of Parliament who gave eloquent voice to this right two years later. “The poorest man may in his cottage bid defiance to all the force of the Crown,” Pitt thundered. “It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but

the King of England cannot enter: all his forces dare not cross the threshold of that ruined tenement.” This sentiment, expressed in the seventeenth-century maxim “A man’s home is his castle,” embodied a central tenet of liberty for the colonists.

Otis lost his case, but not his cause. Colonial mobs thwarted efforts of officials to search and seize suspicious goods, and colonial courts refused to grant the writ. Americans found in this issue a fundamental right of the accused; protecting individuals from unreasonable searches and seizures was a right they deemed essential to liberty. Significantly, it was a right not previously included in colonial charters, laws, or declarations.

The framers of the Bill of Rights intended the Fourth Amendment to ensure that their new government could not resort to the high-handed search measures and abuses of power they had experienced as colonists. But the language they used, although pregnant with meaning, lacked specific definition. What was an unreasonable search? How much detail did a warrant have to include in its description of suspected goods? The colonial and revolutionary experience provided examples to guide interpretation, but it left no settled answers.

For almost a century, the Supreme Court was relatively silent on these questions, leaving state courts to wrestle with similar protections listed in their separate constitutions. In 1886, however, the justices considered *Boyd v. United States*, a case in which the Fourth Amendment loomed large even though the offense was minor. Two brothers, both New York City merchants, were found guilty of importing goods illegally after the judge required them to produce the evidence that convicted them. They appealed, claiming the order violated the Fourth Amendment. What made the issue complicated was the absence of a physical search. The brothers were accused of avoiding taxes by importing plate glass illegally, so the judge required them to produce their invoices as evidence of payment, which of course proved the charge against them.

In its decision, the U.S. Supreme Court agreed that this order was an illegal seizure because no official had provided sufficient evidence, or probable cause, to justify a warrant. The justices also linked the warrantless seizure of evidence to the Fifth Amendment’s protection against self-incrimination. The order to produce the invoice meant the brothers were compelled to give evidence that incriminated them. “Unconstitutional practices get their first footing. . . by silent approaches and slight deviations from legal modes of procedure,” the majority opinion declared. “It is the duty of the courts to be watchful for the constitutional rights of the citizen, and guard against any stealthy encroachments thereon.”

The 'unreasonable searches and seizures' condemned in the fourth amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the fifth amendment; and compelling a man 'in a criminal case to be a witness against himself,' which is condemned in the fifth amendment, throws light on the question as to what is an 'unreasonable search and seizure.'

Justice Joseph P. Bradley, *Boyd v. United States* (1886)

The case was significant because it gave life to the Fourth Amendment and kept it, as Justice William Brennan said almost a century later, from becoming "a dead letter in the federal courts."

That general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed, or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.

Virginia Declaration of Rights (1776)

The Court's impassioned defense of individual rights overshadowed its failure to address the question of how to enforce the right. Under previous practice, even illegally seized evidence could be admitted as proof of a crime. The solution was obvious: exclude such evidence from trial. The Court took this step three decades later in 1914 in the case of *Weeks v. United States*. Weeks had been convicted of using the mails to transport lottery tickets, but the evidence against him came from a warrantless search. He argued that this illegally obtained evidence should be excluded from trial, and the Supreme Court agreed. The decision announced what came to be known as the exclusionary rule: federal courts must exclude, or not use, evidence obtained through unconstitutional searches. The rule applied only to U.S. courts, and even then there was one exception. If state or local police turned over illegally obtained evidence to federal prosecutors, the evidence could be used in federal courts. The practice, appropriately called the "silver platter" exception because evidence figuratively came to investigators the way servants once delivered invitations to a ball, too often was a routine method of investigation for federal officials. It continued even after the Court decided in 1948 that the ban on illegal searches, but not the exclusionary rule, applied to states under the Fourteenth Amendment. Two-thirds of the states chose to continue the practice of allowing improperly seized evidence at trial.

The Fourth Amendment, it appeared, gave Americans a right but not a complete remedy. Finally in 1960, the justices abandoned the silver platter doctrine. More significantly, the next year they abruptly applied the exclusionary rule to state as well as federal courts. The case

began with a future national celebrity, a woman who possessed obscene materials, and an impatient police force. It would end with angry protests that the Supreme Court was willing to let criminals go free simply because law officers had made a mistake.

On May 20, 1957, Don King was not yet the boxing promoter and celebrity he would become; he ran an illegal lottery in Cleveland, Ohio—and his house had just been bombed. His call to a local policeman set in motion a case that would affect every station house in America.

Three days later, an anonymous tip led plainclothes police to the home of Dollree Mapp, who rented out rooms in her house to boarders from the fight game and illegal betting or numbers racket. When she appeared after several hours, the detectives asked for permission to search her house. She called her lawyer, who advised her not to let the cops in without a search warrant. Soon the plainclothesmen were back, this time accompanied by uniformed officers. They claimed to have a warrant, and when Mapp denied them entry, they broke open the door, waving a piece of paper that she grabbed and stuffed down her sweater. A struggle followed, during which police recovered the paper and handcuffed Mapp. By this time her lawyer had arrived, but they prevented him from entering the house.

After dragging her upstairs, officers began to search the entire house. In the basement, they opened a trunk containing pictures of nude males and females, “lewd” books, and betting materials. They arrested her for violating Ohio’s obscenity law, despite her protests that the materials belonged to a former tenant. Convicted of possessing the betting equipment and pornographic books, Mapp received a one-to-seven year sentence in the Ohio State Reformatory for Women.

She appealed, arguing that the police violated her Fourth Amendment rights by seizing items not listed specifically in the search warrant. The prosecution, in fact, could not produce a warrant—it had been lost, the state said—but argued that, even if the search was improper, Ohio law still allowed illegally seized evidence to be admitted at trial. On this point, the state was correct. The U.S. Supreme Court had ruled that a police search without a specifically worded warrant was illegal. Rather than impose the exclusionary rule, however, the Court had allowed individual states to correct the wrong done by an illegal search in whatever manner they chose. Ohio decided to accept improperly seized evidence at trial but to punish the offending police officer as a trespasser.

In 1961, the Supreme Court reversed Mapp’s conviction by a vote of 6 to 3. Writing for the majority, Justice Tom Clark noted that the law excluded illegally seized evidence in federal courts but not in state courts. The result, he concluded, defied logic: “The state, by admitting evidence unlawfully seized, serves to encourage disobedience of the Federal Constitution which it is bound to uphold.” Applying the exclusionary rule to both state and federal courts “is not only the logical dictate of prior cases, but it also makes very good sense. There is no war between the Constitution and common sense.” Clark acknowledged that criminals could

go free “because the constable blundered,” in the words of an earlier justice, Benjamin Cardozo, but “it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”

Dollree Mapp won her case, but her troubles did not end. She moved to New York City, where she dabbled unsuccessfully in several businesses before being convicted in 1971—after a proper search—on charges of receiving stolen property. Sentenced to twenty years in prison, she was pardoned after serving nine years. Later she recalled her role in the case that changed police practices: “I know right from wrong, and I knew I was right in this case. You have to be man enough or woman enough to stand and fight if it’s something worth fighting for. And *Mapp v. Ohio* was worth fighting for.”

The decision in *Mapp* infuriated police and prosecutors because it had important practical consequences: any evidence seized in violation of the Constitution would no longer be admissible at any criminal trial, federal or state. The exclusionary rule would handcuff them in fighting crime, they claimed, and it would let criminals go free. These concerns certainly were legitimate, but as it turned out, they were largely unfounded. Numerous studies have demonstrated that few criminals go unpunished because of the rule. Instead, law enforcement officers became more careful and more professional in their work. “Cops learned to obtain warrants, secure evidence, and prepare cases,” the police chief of Minneapolis reported later. “Arrests that had been clouded by sloppiness, illegality, and recklessness were now much tidier.” The result was better law enforcement.

The Supreme Court also recognized instances when circumstances made it impractical or unnecessary to obtain a warrant. In a series of cases since *Mapp v. Ohio*, the justices allowed exceptions to the exclusionary rule. For example, if prosecutors prove that the discovery of otherwise illegal evidence was inevitable, then courts can admit it at trial. This situation might arise if law officers discovered a murder victim after they obtained evidence illegally. They could claim an exception to the exclusionary rule if they could prove that they would have searched the area anyway and thereby discovered the body. The justices also recognized a “good faith” exception if an unintentional mistake occurs, as when, for example, an officer obtains a warrant but the warrant contains an error in its description.

We think that obtaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical ‘intrusion into a constitutionally protected area,’ . . . constitutes a search—at least where (as here) the technology in question is not in general public use. This assures preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.

Justice Antonin Scalia, *Kyllo v. United States* (2001)

Other circumstances may not require a warrant at all. Police do not need court permission to search whenever an individual consents voluntarily or when the officer is acting legally and spots something in plain view. They may also search an area under the defendant's immediate control, as well as conduct searches to protect themselves, when making an arrest. With these exceptions, the Court has tried to fit its guidelines to the real-life situations police encounter. It has sought to balance the rights of individuals with the need for order. The central questions are always the same: when does privacy give way to a more important public purpose, and for what reasons?

Cases about search and seizure are, in fact, cases about privacy and security. The great object of the Fourth Amendment is to protect privacy. The amendment's language signals the value the framers placed on protecting our right to be left alone unless there is a strong and justifiable reason to invade that privacy. We are free to live in private and to possess things in private. As a society, we believe the right to "to be secure in [our] persons, houses, papers, and effects" is an essential liberty, one equally necessary for our individual happiness and for the common good. But we also recognize that this right is not absolute. The amendment provides a way for society to ensure its security against individuals who would use their privacy to harm others. It allows the government to invade our privacy for probable cause if it can demonstrate to an independent authority—a judge—good and legitimate reasons for doing so.

Today, questions surrounding security and privacy are more complicated than ever. The September 11, 2001, terrorist attacks on the World Trade Center and the Pentagon gave the issue a special urgency. New technologies also raise new problems. The Supreme Court has always taken into account new means of communication when considering the Fourth Amendment, as when it decided in the 1920s that monitoring telephone conversations through wiretaps required a warrant even though no physical intrusion on privacy occurred. Now we have instruments that can see inside buildings, powerful computers that collect and manipulate vast amounts of personal information, machines that permit us to communicate instantly with people all over the globe. These technologies make our private lives more comfortable and more flexible; they also have the potential to make our society more vulnerable. How do we balance our right to privacy with our need for security?

Although the framers never could have imagined these new technologies, they gave us an amendment flexible enough to adapt to them. They left us no formula to apply in any and all circumstances, but they did provide us with a vital principle of liberty and a durable achievement. The principle? We live under a government of laws, not of men, and the role of government and of law is to protect and promote our individual rights and not simply our collective security. Justice Felix Frankfurter, in the 1950s, said it eloquently: "A knock on the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police. . . [is] inconsistent with the conception of human rights

enshrined in the history and the basic constitutional documents of English-speaking peoples.” The durable achievement? We live in a society where we do not fear a knock on the door.

The Exclusionary Rule

The case of *Weeks v. United States* (1914) marked the beginning of the federal exclusionary rule that bars improperly seized evidence from being used at trial. Prior to this decision, courts operated on the premise that the need for justice outweighed the search and seizure protections of the Fourth Amendment, so they regularly admitted evidence taken without a proper warrant. In the Supreme Court’s majority opinion, Justice William Day emphasized the obligation of federal courts and law officers to respect the constitutional rights of individuals. He concluded that the essential violation of the Fourth Amendment was the invasion of Weeks’s right of personal security, personal liberty, and private property. The illegally seized evidence, the Court ruled, could not be used in a federal trial. The decision did not restrict the states, however. Not until *Mapp v. Ohio* (1961) *did the Court apply the exclusionary rule to state criminal trials.*

The defendant was arrested by a police officer, so far as the record shows, without warrant, at the Union Station in Kansas City, Missouri, where he was employed by an express company. Other police officers had gone to the house of the defendant, and being told by a neighbor where the key was kept, found it and entered the house. They searched the defendant’s room and took possession of various papers and articles found there, which were afterwards turned over to the United States marshal. Later in the same day police officers returned with the marshal, who thought he might find additional evidence, and, being admitted by someone in the house, probably a boarder, in response to a rap, the marshal searched the defendant’s room and carried away certain letters and envelopes found in the drawer of a chiffonier. Neither the marshal nor the police officer had a search warrant. . . .

The effect of the 4th Amendment is to put the courts of the United States and Federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people, their persons, houses, papers, and effects, against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving to it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws. The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights. . . .

The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land. . . .

We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States, acting under color of his office, in direct violation of the constitutional rights of the defendant; that having made a seasonable application for their return, which was heard and passed upon by the court, there was involved in the order refusing the application a denial of the constitutional rights of the accused, and that the court should have restored these letters to the accused. In holding them and permitting their use upon the trial, we think prejudicial error was committed.

New Means of Invading Privacy

In the late 1920s, Roy Olmstead was convicted of unlawfully transporting and selling liquor in violation of the National Prohibition Act. His appeal offered the Supreme Court the first opportunity to consider whether the use of illegal wiretapping to gather evidence could be used in federal trials. The majority ruled 5 to 4 in *Olmstead v. United States* (1928) that wiretapping did not involve the physical invasion of a defendant's home, which meant that it fell outside the Fourth Amendment's requirement of a warrant for a legal search. In his dissent below, Justice Louis Brandeis argued that the Fourth and Fifth Amendments were linked and together they protected a general right to privacy, which illegal wiretapping violated. Later, both the Supreme Court and Congress agreed with Brandeis's position, with the result that law officers must secure a warrant before using this means of search and seizure.

When the Fourth and Fifth Amendments were adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means known to man by which a government could directly effect self-incrimination . . . Protection against . . . invasion of "the sanctities of a man's home and the privacies of life" was provided in the Fourth and Fifth Amendments by specific language . . . But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet. Moreover, "in the application of a Constitution, our contemplation cannot be only of what has been, but of what may be." The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping . . . Can it be that the Constitution affords no protection against such invasions of individual security?

The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men. To protect, that right, every unjustifiable intrusion by the government upon the privacy of the individual, whatever the means employed, must be deemed a violation of the Fourth Amendment. And the use, as evidence in a criminal proceeding, of facts ascertained by such intrusion must be deemed a violation of the Fifth.

By the laws of Washington, wire tapping is a crime . . . To prove its case, the government was obliged to lay bare the crimes committed by its officers on its behalf. A federal court should not permit such a prosecution to continue. . . .

Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.

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