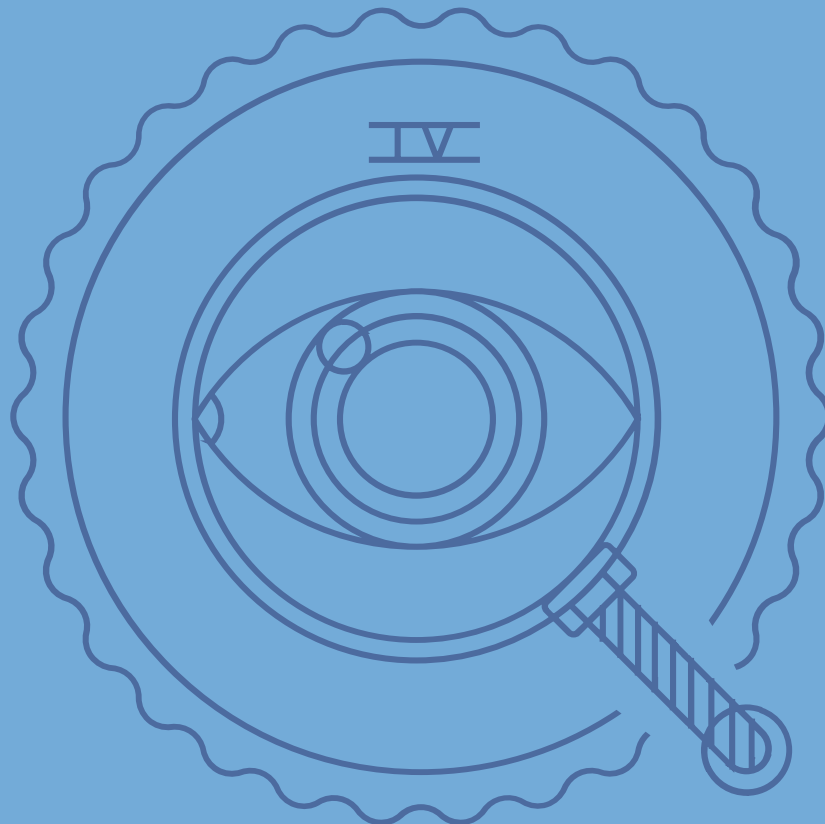


CONSTITUTION

MODULE 11

THE FOURTH AMENDMENT



CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

THE FOURTH AMENDMENT

The Fourth Amendment protects us from unreasonable search and seizures of our person, our house, our papers, and our effects. In many cases, this amendment governs our interactions with the police. Before the government—including police officers—can search your home or seize your property, it needs a good reason. This is the big idea behind the Fourth Amendment’s warrant requirement. The government needs particularized suspicion—a reason that’s specific to each suspect—before it can get a warrant. Broadly speaking, our Constitution says that the police should only be able to invade a person’s rights to privacy, property, or liberty if they have a specific reason to think that the suspect has done something wrong.

Learning Objectives

At the conclusion of this module, you should be able to:

1. Describe the origins of the Fourth Amendment and the Founding generation’s vision for this provision.
2. Discuss how the Supreme Court has interpreted the Fourth Amendment over time.
3. Describe how the Fourth Amendment contributes to debates about individual privacy.
4. Analyze how the Supreme Court has applied the Fourth Amendment to new technologies.
5. Identify current areas of debate over the Fourth Amendment.

11.1 Activity: Can They Do That?

Purpose

Before the government can search your home or seize your property, it needs a good reason. This is the big idea behind the Fourth Amendment’s warrant requirement. In this activity, you will learn about the Fourth Amendment, its keywords, and its defining concepts.

Process

Read the [text of the Fourth Amendment](#) and answer the following questions as a group:

- What is a search?
- What is a seizure?
- How do you know if a search or seizure is “reasonable” or “unreasonable”?
- What is a warrant?

CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

- What counts as “papers”?
- What are “effects”?

Activity 11.1 Notes & Teachers Comments

Launch

Ask the class to brainstorm their definition of the word “privacy.”

- What is privacy?
- Where do we have privacy?
- Why is privacy important?
- Have the entire class read the text of the Fourth Amendment.

Ask the entire class to define the following terms and ideas found in the Fourth Amendment. Take notes because you will complete the key terms in a future activity.

- What is a search?
- What is a seizure?
- How do you know if a search or seizure is “reasonable” or “unreasonable”?
- What is a warrant?
- What counts as “papers”?
- What are “effects”?

Activity Synthesis

As a group, examine the meaning of the word “privacy.” Ask students the following questions and discuss:

- Is the word “privacy” in the Fourth Amendment?
- Does the Fourth Amendment protect privacy? If so, how?

Activity Extension (Optional)

Now that students have begun to be exposed to the text of the Fourth Amendment and some of its key concepts, ask them to write a short journal entry with these prompts:

- Where in your life do you come into contact with a government official or agent?
- Have you personally experienced an invasion of your privacy by someone in the government?
- What about in other parts of your life?
- What about on social media?

CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

11.2 Video Activity: The Fourth Amendment History

Purpose

In this activity, you will learn more about the stories and history that led the Founding generation to add the Fourth Amendment to the Constitution. From there, you will explore how the Supreme Court has interpreted the Fourth Amendment over time.

Process

Watch [the video](#) about the Fourth Amendment.

Then, complete the [Video Reflection: The Fourth Amendment](#) History worksheet.

Identify any areas that are unclear to you or where you would like further explanation. Be prepared to discuss your answers in a group and to ask your teacher any remaining questions.

Activity 11.2 Notes & Teachers Comments

Launch

Give students time to watch the video and answer the questions.

Activity Synthesis

Have students share their responses in small groups and then discuss as a class.

Activity Extension (Optional)

Have students write three to five sentences summarizing their understanding of the Fourth Amendment protections at this point in the module.

11.3 Activity: A Reasonable Expectation of Privacy

Purpose

To qualify as a “search” for Fourth Amendment purposes, a government official (often a police officer) must violate someone’s constitutionally protected “reasonable expectation of privacy.” In this activity, you will explore the concept of privacy in different settings.

Process

Evaluate the short privacy scenarios in the [Activity Guide: A Reasonable Expectation of Privacy](#) worksheet.

Be prepared to answer questions related to your choices.

CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

Activity 11.3 Notes & Teachers Comments

Launch

Ask the following questions and then discuss them briefly before starting the worksheet:

- What is privacy?
- How do expectations of privacy shape Fourth Amendment cases?

Activity Synthesis

When all students have completed the evaluation, provide directions for the Activity Guide: A Reasonable Expectation of Privacy.

- Create a line in the classroom (or other instructional space)—either along a wall, chalkboard, on the floor, or digitally.
- Place a sign or card that reads “High” at one end of the line, one that reads “Medium” at the midpoint, and one that reads “Low” at the opposite end (signs can also include the corresponding statements below).
- Read out loud the scenarios (you may choose some or all of the scenarios). Students should move to a corresponding spot along the line according to how they think it ranks on a spectrum of “reasonable expectation of privacy.”
- Ask individual students why they chose to stand where they did.
- You can spend five minutes on this activity, or an entire class period.
- The amount of discussion and the depth of follow-up questions is up to your discretion.

Activity Extension (Optional)

Some suggested follow-up questions for this activity include:

1. Why did you choose to stand in that place?
2. What is the rationale for why the police would want to search in that situation?
3. What is the rationale for why the public would want the police to search in that situation?
4. Why would we expect privacy for ourselves and others in that particular situation?
5. What facts would be necessary to change your answer from high to low? From low to high?
6. What generalizations can you make about where we have a reasonable expectation of privacy, and where we do not?
7. Do you agree with the Supreme Court’s use of the reasonable expectation of privacy as part of its analysis in Fourth Amendment cases? What are the strengths of this approach? What are its weaknesses?
8. How should courts reconcile differing views about expectations of privacy?

CONSTITUTION 101

Module 11: The Fourth Amendment
Lesson Plan

11.4 Activity: Fourth Amendment Interactive Constitution Common Interpretation Essay

Purpose

In this activity, you will get a better understanding of key terms of the Fourth Amendment and read how two top scholars explain the Fourth Amendment's text, history, and case law.

Process

Review the words below in the [Activity Guide: Key Terms - Fourth Amendment](#) worksheet about the Fourth Amendment's key terms:

- Search
- Seizure
- Privacy
- Reasonable
- Warrant
- Probable cause
- Exclusionary rule
- Third-party doctrine

Then, read the [Fourth Amendment Common Interpretation Essay](#) by Barry Friedman and Orin Kerr.

Fourth Amendment: Search and Seizure

- [Text of the Constitution](#)
- [Common Interpretation](#)

Finally, paraphrase the key terms in the [Activity Guide: Key Terms - Fourth Amendment worksheet](#) in your own words or give examples from the essay. Hint: If you have any trouble, check out the video again for extra information on each term and note the timestamp for future help.

Activity 11.4 Notes & Teachers Comments

Launch

Before beginning the activity, students list words that come to mind when they think of the Fourth Amendment. Whenever relevant (or helpful), they can connect the list of words in this activity to concepts of digital privacy.

CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

- Search
- Seizure
- Privacy
- Reasonable
- Warrant
- Probable cause
- Exclusionary rule
- Third-party doctrine

Activity Synthesis

Have students complete the Activity Guide: Key Terms - Fourth Amendment worksheet and list where in the video these terms can be found. Next, have students read the [Fourth Amendment Common Interpretation Essay](#) by Barry Friedman and Orin Kerr and then paraphrase the key terms. Remind students to reference the video for help if needed and note the timestamp in the video where they can find the terms for future activities.

11.5 Activity: Fourth Amendment Supreme Court Cases

Purpose

The Supreme Court usually considers Fourth Amendment cases starting with a basic question, “Was there a search or a seizure?” If so, the Court must ask whether the search or seizure was reasonable. If not, then the search or seizure violates the Fourth Amendment. In this activity, you will explore landmark decisions by the Supreme Court interpreting the Fourth Amendment.

Process

Read the Supreme Court case excerpt that has been assigned to you and answer the following questions in the [Case Brief: Fourth Amendment Supreme Court Cases](#) worksheet:

- Who are the people associated with the case?
- What is the issue at hand?
- What was the outcome in the case?
- What reasons did the Court give for its decision?
- How did this change the way the Court interprets the Fourth Amendment?

Review your answers as a group and make sure each group member can summarize the answers for their classmates.

CONSTITUTION 101

Module 11: The Fourth Amendment Lesson Plan

Activity 11.5 Notes & Teachers Comments

Launch

Divide the class into groups and assign a case to each group.

- *Olmstead v. United States* (1928)
- *Mapp v. Ohio* (1961)
- *Katz v. United States* (1967)
- *Terry v. Ohio* (1968)
- *Carpenter v. United States* (2008)

Groups will review the [Case Brief: Fourth Amendment Supreme Court Cases worksheet](#) and case excerpts from the Founders' Library and complete the worksheet.

Have students share and jigsaw cases together to develop their understanding of the Fourth Amendment case law. A jigsaw technique is a method of organizing classroom activity that makes students dependent on each other to succeed. It breaks classes into groups that each assemble a piece of an assignment and synthesize their work when finished. Review how the cases are connected and what new ideas come out with each case. Assign a student to list these overarching ideas on the board or type up and project.

Activity Synthesis

Once the case jigsaw is complete, have students engage in a constitutional conversation on the following question:

- Can the government track you 24 hours a day, seven days a week, for an entire month, using your cell phone data and location information without a warrant?
- Questions to facilitate discussion:
- Do you sign over all of your information to cell phone companies when you buy a plan and agree to the terms of agreement?
- When your apps track you, can the cell phone companies provide this data to the police without a warrant?

11.6 Test Your Knowledge

Purpose

Congratulations for completing the activities in this module! Now it's time to apply what you have learned about the basic ideas and concepts covered.

Process

Complete the questions in the following quiz to test your knowledge.

- [Test Your Knowledge: The Fourth Amendment](#)

CONSTITUTION 101

Module 11: The Fourth Amendment
Lesson Plan

11.7 Extended Activity: Primary Source Reading: Otis

Purpose

In this activity, you will learn more about the founding story of the Fourth Amendment and gain insight into the origins of the Fourth Amendment.

Process

Read the [Primary Source: James Otis](#) and complete the [Activity Guide: James Otis, Speech on the Writs of Assistance](#) worksheet. Be prepared to share your brief with the class and discuss connections to the Fourth Amendment today.

Activity 11.7 Notes & Teachers Comments

Launch

Give students time to read and answer questions about James Otis, Speech on the Writs of Assistance.

Activity Synthesis

Have students share their worksheet responses on Otis's speech and then engage in a class discussion on how this case influenced the Founding generation's vision for the Fourth Amendment.

- What connections do you see between this source and other materials we have learned in this module?
- What words do you hear that are similar? What ideas do you hear that are similar?
- Are there any differences?
- Are there any areas that we are still debating today?

Activity Extension (Optional)

Now that students have a better understanding of the origins of the Fourth Amendment, ask them to use the Writing Rights Interactive to identify two state constitutions that influenced the Fourth Amendment.

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.2 Video Reflection

THE FOURTH AMENDMENT HISTORY

In this activity, you will learn more about the stories and history that led the Founding generation to add the Fourth Amendment to the Constitution. From there, you will explore how the Supreme Court has interpreted the Fourth Amendment over time.

Watch the [video](#) and answer the following questions.

What does the Fourth Amendment say?

Why did the Founding generation include the Fourth Amendment in the Bill of Rights? In other words, what problems were they trying to address?

How does modern technology make Fourth Amendment issues more complicated?

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.2 Video Reflection

When does the Fourth Amendment allow the government to search or seize our person, our houses, our papers, or our effects?

When is a government's search or seizure "reasonable"?

How has the Supreme Court interpreted the Fourth Amendment over time?

What are some leading cases on the Fourth Amendment?

Write three to five sentences summarizing your understanding of Fourth Amendment protections.

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.3 Activity Guide

A REASONABLE EXPECTATION OF PRIVACY?

To qualify as a “search” for Fourth Amendment purposes, a government official (often a police officer) must violate someone’s constitutionally protected “reasonable expectation of privacy.” In this activity, you will explore the concept of privacy in different settings.

Evaluate the scenarios below. What level of privacy from government intrusion do you expect in each of the scenarios below? Use the following scale to rate each scenario by marking with an “X” for each. As you respond, think about how differences in time and place might change the expectation of privacy in a given category. Please note any of these thoughts below.

Low	Medium	High
The government should be able to search or seize for any reason; neither the individual nor society generally would recognize an expectation of privacy.	The government needs a good and fairly specific reason to search; there might be an individual expectation of privacy, but not one recognized broadly by society as reasonable.	The government must have a particular (and very specific) reason based on concrete information to search in that moment; there is both an individual and society expectation of privacy.

What level of privacy from government intrusion do you expect in each scenario?	L	M	H
Inside your home or apartment			
The contents of your luggage at an airport prior to boarding the plane			
A package you receive through the U.S. mail or FedEx/UPS			
The location data transmitted by your cell phone that shows where you have traveled			
Inside your car as you travel on a public roadway			
The contents of your coat pockets and backpack as you walk along the sidewalk			
The contents of your garbage can when you put it out on the street for collection			
The text messages and pictures on your cell phone			
Inside a vehicle that is parked outside of your garage, next to your home			

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.4 Activity Guide

KEY TERMS - FOURTH AMENDMENT

In this activity, you will get a better understanding of key terms of the Fourth Amendment and read how two top scholars explain the Fourth Amendment's text, history, and case law. In this activity, you will learn about the Fourth Amendment, its key terms, and its defining concepts.

Read the [text of the Fourth Amendment](#), and then complete the worksheet

Key Term	Definition	Paraphrase each term in your own words.	Give an example that highlights each term <i>Either from the Constitution, a Supreme Court case, or a real-world example.</i>	Video Timestamp <i>Write down the timestamp for when Jeff defines the term in the video.</i>
Search	Entering someone's home to look for evidence is a search, but passively observing someone in plain view in public is not.			
Seizure	When the government restrains someone or takes her property, there's a seizure. When the government doesn't, there isn't.			

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.4 Activity Guide

Reasonable	Generally, for a search or seizure to be reasonable, the police need to go to a judge and secure a warrant supported by probable cause. However, there are times when a warrant is not required.			
Warrant	A warrant ensures that searches and seizures are generally cleared in advance by a judge. To get a warrant from a judge, the government must show “probable cause.”			
Probable Cause	“Probable cause” simply means a certain level of suspicion of criminal activity to justify a particular search or a particular seizure. Probable cause requires a “fair probability” that, for instance, the relevant evidence of a crime will be found in the place (or thing) to be searched.			



CONSTITUTION 101

Module 11 : The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.4 Activity Guide

Exclusionary Rule	<p>The exclusionary rule is being followed when a court throws out evidence in a criminal trial that the police found through violating the Fourth Amendment.</p>			
Third-Party Doctrine	<p>When an individual gives her information or data to someone else—like a private company—she generally abandons her reasonable expectation of privacy in that information or data. Under the third-party doctrine, when the government tries to obtain this “third-party” information, it is not considered a search for Fourth Amendment purposes and the government is not required to get a warrant before getting access to it.</p>			



CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

OLMSTEAD V. UNITED STATES (1928)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Olmstead v. United States was one of the most important early cases interpreting the Fourth Amendment. In *Olmstead*, federal agents suspected that Roy Olmstead was running an illegal liquor business during the height of Prohibition. Without a judicial warrant, the agents installed wiretaps on the phone lines leading to the office of Olmstead's business, as well as to Olmstead's home and to those of his suspected accomplices. The wiretaps were installed on the parts of the phone lines in the public street and in the basement of the office building. Able to listen to the suspect's phone conversations, the agents uncovered evidence that Olmstead was selling liquor and arrested him. In a 5-4 decision, the Supreme Court ruled that the government's use of wiretaps had not violated the Fourth Amendment. For the Court majority, a Fourth Amendment violation required an actual physical examination of one's person, home, papers, or physical effects. On this view, the government's use of wiretaps was not a search because it did not involve a trespass on Olmstead's property and because the government had not seized any of his physical papers or effects. However, in a powerful dissent, Justice Louis Brandeis disagreed. There, Brandeis challenged the Court to translate old constitutional principles to meet the challenges of new contexts and emerging technologies—arguing that the Court must read the Fourth Amendment in such a way that it protected at least as much privacy as in the Founding era. Decades later, the Supreme Court would embrace Brandeis's insights in *Katz v. United States* (1967).

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Taft

The Court begins with the Constitution's text. The Fourth Amendment provides – “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.” . . .

Then, the Court pivots to history, rooting the Fourth Amendment's purpose in Founding-era concerns about general warrants and writs of assistance. The well known historical purpose of the Fourth Amendment, directed against general warrants and writs of

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

assistance, was to prevent the use of governmental force to search a man's house, his person, his papers and his effects, and to prevent their seizure against his will. . . .

To trigger Fourth Amendment protections, the government must physically search or seize the suspect's own body, house, papers, or stuff. The Amendment itself shows that the search is to be of material things – the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized. . . .

No physical search or seizure, no Fourth Amendment violation. The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing, and that only. There was no entry of the houses or offices of the defendants. . . .

We refuse to extend Fourth Amendment protections to telephone wires. By the invention of the telephone fifty years ago and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the Amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched. . . .

However, Congress *could* pass a law to cover them; that is a job for Congress, not the courts. Congress may, of course, protect the secrecy of telephone messages by making them, when intercepted, inadmissible in evidence in federal criminal trials by direct legislation, and thus depart from the common law of evidence. But the courts may not adopt such a policy by attributing an enlarged and unusual meaning to the Fourth Amendment. The reasonable view is that one who installs in his house a telephone instrument with connecting wires intends to project his voice to those quite outside, and that the wires beyond his house and messages while passing over them are not within the protection of the Fourth Amendment. Here, those who intercepted the projected voices were not in the house of either party to the conversation. . . .

Our decision is consistent with well-established precedent. Neither the cases we have cited nor any of the many federal decisions brought to our attention hold the Fourth Amendment to have been violated as against a defendant unless there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house "or curtilage" for the purpose of making a seizure.

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

There was no Fourth Amendment violation here. We think, therefore, that the wiretapping here disclosed did not amount to a search or seizure within the meaning of the Fourth Amendment.

Excerpt: Dissent, Justice Brandeis

The government wiretapped the phone lines; this was a massive investigation that produced a ton of evidence. The defendants were convicted of conspiring to violate the National Prohibition Act. Before any of the persons now charged had been arrested or indicted, the telephones by means of which they habitually communicated with one another and with others had been tapped by federal officers. To this end, a lineman of long experience in wiretapping was employed on behalf of the Government and at its expense. He tapped eight telephones, some in the homes of the persons charged, some in their offices. Acting on behalf of the Government and in their official capacity, at least six other prohibition agents listened over the tapped wires and reported the messages taken. Their operations extended over a period of nearly five months. The typewritten record of the notes of conversations overheard occupies 775 typewritten pages. By objections seasonably made and persistently renewed, the defendants objected to the admission of the evidence obtained by wiretapping on the ground that the Government's wiretapping constituted an unreasonable search and seizure in violation of the Fourth Amendment

We must translate the big principles in the Constitution to cover new contexts and new technologies that the Founders never could have imagined; the Court has done this in other areas of constitutional law. "We must never forget," said Mr. Chief Justice Marshall in *McCulloch v. Maryland* . . . , "that it is a constitution we are expounding." Since then, this Court has repeatedly sustained the exercise of power by Congress, under various clauses of that instrument, over objects of which the Fathers could not have dreamed. . . . We have likewise held that general limitations on the powers of Government, like those embodied in the due process clauses of the Fifth and Fourteenth Amendments, do not forbid the United States or the States from meeting modern conditions by regulations which, "a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive." . . . Clauses guaranteeing to the individual protection against specific abuses of power must have a similar capacity of adaptation to a changing world. . . .

New technologies threaten Fourth Amendment interests more than the technologies available at the Founding. 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. It could compel the individual to testify – a compulsion effected, if need be, by torture. It could secure possession of his papers and other articles incident to his private life – a seizure

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

effected, if need be, by breaking and entry. Protection against such 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. . . .

New technological advancements will surely continue to threaten Fourth Amendment interests even more than today’s available technologies; we must be sure to interpret the Fourth Amendment in ways that keep faith with the Founder’s vision, while also addressing these new challenges. 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 wiretapping. Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home. Advances in the psychic and related sciences may bring means of exploring unexpressed beliefs, thoughts and emotions. “That places the liberty of every man in the hands of every petty officer” was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed “subversive of all the comforts of society.” Can it be that the Constitution affords no protection against such invasions of individual security? . . .

Wiretapping is a massive invasion of privacy; in many ways, it is a greater threat to one’s privacy than general warrants or writs of assistance. The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded and all conversations between them upon any subject, and, although proper, confidential and privileged, may be overheard. Moreover, the tapping of one man’s telephone line involves the tapping of the telephone of every other person whom he may call or who may call him. As a means of espionage, writs of assistance and general warrants are but puny instruments of tyranny and oppression when compared with wiretapping.

We must not be too mechanical in how we interpret the Fourth Amendment. Time and again, this Court in giving effect to the principle underlying the Fourth Amendment, has refused to place an unduly literal construction upon it. . . .

We shouldn’t limit the Fourth Amendment’s protections to physical searches and seizures. Unjustified search and seizure violates the Fourth Amendment, whatever the character of the paper; whether the paper when taken by the federal officers was in the home, in

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

an office, or elsewhere; whether the taking was effected by force, by fraud, or in the orderly process of a court's procedure. From these decisions, it follows necessarily that the Amendment is violated by the officer's reading the paper without a physical seizure, without his even touching it, and that use, in any criminal proceeding, of the contents of the paper so examined – as where they are testified to by a federal officer who thus saw the document, or where, through knowledge so obtained, a copy has been procured elsewhere – any such use constitutes a violation of the Fifth Amendment. . . .

The Founders had a broad conception of the privacy interests protected by the Fourth Amendment. 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. . . .

Olmstead should win. Applying to the Fourth and Fifth Amendments the established rule of construction, the defendants' objections to the evidence obtained by wiretapping must, in my opinion, be sustained. It is, of course, immaterial where the physical connection with the telephone wires leading into the defendants' premises was made. And it is also immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well meaning but without understanding.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

MAPP V. OHIO (1961)

View the case on the National Constitution Center's website [here](#).

SUMMARY

In *Mapp v. Ohio*, police officers entered Dollree Mapp's home without a search warrant and found obscene materials there. Mapp was convicted of possessing these materials, but challenged her conviction. *Mapp* was part of the Warren Court's revolution in criminal procedure, whereby the Court applied provisions of the Bill of Rights to criminal defendants and made those interpretations applicable against the states. In particular, this case found that the exclusionary rule, which prohibits prosecutors from using evidence acquired illegally in violation of the Fourth Amendment, applies to both federal and state governments.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Clark

More states have adopted the exclusionary rule today than in 1949. While in 1949 . . . almost two-thirds of the States were opposed to the use of the exclusionary rule, now . . . more than half of those since passing upon it, by their own legislative or judicial decision, have wholly or partly adopted or adhered to the [exclusionary] rule. . . .

Today, we apply the exclusionary rule against the states. We hold that all evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court. . . .

The exclusionary rule adds bite to the Fourth Amendment and protects the rights of the people; without this rule, the Fourth Amendment does very little, in practice. Were it otherwise, then . . . the assurance against unreasonable federal searches and seizures would be 'a form of words', valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so ephemeral and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing evidence as not to merit this Court's high regard as a freedom "implicit in 'the concept of ordered liberty.'" . . . To hold otherwise is to grant the right but in reality to withhold its privilege and enjoyment. Only last year the Court itself recognized that the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.' . . .

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Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
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We have already incorporated the Fourth Amendment against the states; by extending the exclusionary rule to abuses by state and local officers, we make this protection even stronger. Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise. Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment. Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice.

Excerpt: Dissent, Justice Harlan

The majority is applying the approach that we use to check abuses by national officials to abuses by state and local officers. [W]hat the Court is now doing is to impose upon the States not only federal substantive standards of 'search and seizure' but also the basic federal remedy for violation of those standards. For I think it entirely clear that the . . . exclusionary rule is but a remedy which, by penalizing past official misconduct, is aimed at deterring such conduct in the future.

I wouldn't apply the exclusionary rule to the states; many states don't currently use it. I would not impose upon the States this federal exclusionary remedy. . . . [A]t present one-half of the States still adhere to the common-law non-exclusionary rule, and one, Maryland, retains the rule as to felonies. . . .

The states play a key role in law enforcement, and we shouldn't force them to adopt the exclusionary rule; we should give them more flexibility, especially since different states face different law enforcement challenges; let's honor federalism. The preservation of a proper balance between state and federal responsibility in the administration of criminal justice demands patience on the part of those who might like to see things move faster among the States in this respect. Problems of criminal law enforcement vary widely from State to State. One State, in considering the totality of its legal picture, may conclude that the need for embracing the [exclusionary] rule is pressing because other remedies are unavailable or inadequate to secure compliance with the substantive Constitutional principle involved. Another, though equally solicitous of Constitutional rights, may choose to pursue one purpose at a time, allowing all evidence relevant to guilt to be brought into a criminal trial, and dealing with Constitutional infractions by other means. Still another may consider the exclusionary rule too

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

rough-and-ready a remedy, in that it reaches only unconstitutional intrusions which eventuate in criminal prosecution of the victims. Further, a State after experimenting with the [exclusionary] rule for a time may, because of unsatisfactory experience with it, decide to revert to a non-exclusionary rule. And so on. . . .

The Fourteenth Amendment is flexible; so, we should give states some flexibility in this area. [I]n implementing the Fourth Amendment, we occupied the position of a tribunal having the ultimate responsibility for developing the standards and procedures of judicial administration within the judicial system over which it presides. Here we review state procedures whose measure is to be taken not against the specific substantive commands of the Fourth Amendment but under the flexible contours of the Due Process Clause. I do not believe that the Fourteenth Amendment empowers this Court to mold state remedies effectuating the right to freedom from 'arbitrary intrusion by the police' to suit its own notions of how things should be done

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CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

KATZ V. UNITED STATES (1967)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Katz v. United States addresses whether the Fourth Amendment's prohibition on unreasonable searches and seizures applies to electronic eavesdropping and wiretapping of a public phone booth. Acting on a suspicion that Charles Katz was transmitting gambling information over the phone to clients in other states, federal agents attached an eavesdropping device to the outside of a public phone booth used by Katz. Based on recordings of his end of the conversation, Katz was convicted for illegal gambling. Katz argued that the government violated the Fourth Amendment by listening in on his conversation. As public phone booths and electronic communications became more common in American life, the Supreme Court had to determine whether and how to apply a constitutional text written in 1791 to the technological changes of modern life. Today, such questions persist as to when the government can obtain cell phone data from cell phone providers, and whether they can search a smartphone containing all the intimate details of one's life.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Justice Stewart

In Fourth Amendment cases, we must focus on people, not places.[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.

Even though Katz was in a public phone booth, he sought to keep his conversation private.The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office, in a friend's apartment, or in a taxicab, a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication. . . .

The government may violate the Fourth Amendment even if it doesn't conduct a physical search or seizure. [O]nce it is recognized that the Fourth Amendment protects people—and not simply 'areas'—against unreasonable searches and seizures it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure. . . .

The government eavesdropping here represents a “search and seizure” under the Fourth Amendment. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance. . . .

Excerpt: Concurrence, Justice Harlan

Harlan lays out the two-part “reasonable expectation of privacy” test that the Court would adopt for Fourth Amendment cases. As the Court's opinion states, 'the Fourth Amendment protects people, not places.' The question, however, is what protection it affords to those people. Generally, as here, the answer to that question requires reference to a 'place.' My understanding of the rule that has emerged from prior decisions is that there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.' Thus a man's home is, for most purposes, a place where he expects privacy, but objects, activities, or statements that he exposes to the 'plain view' of outsiders are not 'protected' because no intention to keep them to himself has been exhibited. On the other hand, conversations in the open would not be protected against being overheard, for the expectation of privacy under the circumstances would be unreasonable.

Katz wins. The critical fact in this case is that '(o)ne who occupies it, (a telephone booth) shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume' that his conversation is not being intercepted. The point is not that the booth is 'accessible to the public' at other times, but that it is a temporarily private place whose momentary occupants' expectations of freedom from intrusion are recognized as reasonable. . . .

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

Excerpt: Dissent, Justice Black

The Court is rewriting the Fourth Amendment's text; this is wrong. I do not believe that it is the proper role of this Court to rewrite the [Fourth] Amendment in order 'to bring it into harmony with the times' and thus reach a result that many people believe to be desirable. . . .

Black offers a textualist argument. The Fourth Amendment says that '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.'

The Fourth Amendment protects physical things like bodies, houses, and papers; the Fourth Amendment's text doesn't cover non-physical things like eavesdropping. The first clause protects 'persons, houses, papers, and effects, against unreasonable searches and seizures . . . ' These words connote the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both. The second clause of the Amendment still further establishes its Framers' purpose to limit its protection to tangible things by providing that no warrants shall issue but those 'particularly describing the place to be searched, and the persons or things to be seized.' A conversation overheard by eavesdropping, whether by plain snooping or wiretapping, is not tangible and, under the normally accepted meanings of the words, can neither be searched nor seized.

Black continues the same line of argument. In addition the language of the second clause indicates that the Amendment refers not only to something tangible so it can be seized but to something already in existence so it can be described. Yet the Court's interpretation would have the Amendment apply to overhearing future conversations which by their very nature are nonexistent until they take place. . . . I must conclude that the Fourth Amendment simply does not apply to eavesdropping. . . .

The Court's broad conception of privacy is inconsistent with the Fourth Amendment's text; the Court's approach gives too much power to the courts. [B]y arbitrarily substituting the Court's language, designed to protect privacy, for the Constitution's language, designed to protect against unreasonable searches and seizures, the Court has made the Fourth Amendment its vehicle for holding all laws violative of the Constitution which offend the Court's broadest concept of privacy. . . . No general right is created by the Amendment so as to give this Court the unlimited power to hold unconstitutional everything which affects privacy. Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.

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CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

TERRY V. OHIO (1968)

View the case on the National Constitution Center's website [here](#).

SUMMARY

Police officers stopped three men on the street whom they suspected were planning a burglary. The officers did not have a warrant for the search; they merely suspected the three men after observing them lingering and possibly “casing” a location. This level of suspicion would probably have also been insufficient to obtain a warrant. Upon stopping the men, the police also conducted a search of their bodies—a “frisk”—to ensure that there were no weapons on their persons. The officers discovered concealed weapons on two of them. After being sentenced to three years in prison, the petitioner (Terry)—one of the three men—appealed his case, arguing that his search was a violation of his Fourth Amendment rights. *Terry v. Ohio* involves a police tactic that remains controversial to this day: the stop and frisk. In this case, the Court concluded that the Fourth Amendment did not prohibit police from stopping a person they have reasonable suspicion to believe had committed a crime, and frisking that person if they reasonably believe that person to be armed.

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Warren

The Fourth Amendment applies here; the constitutional question is whether the search or seizure was unreasonable. Unquestionably petitioner was entitled to the protection of the Fourth Amendment as he walked down the street in Cleveland. The question is whether in all the circumstances of this on-the-street encounter, his right to personal security was violated by an unreasonable search and seizure. . . . Reflective of the tensions involved are the practical and constitutional arguments pressed with great vigor on both sides of the public debate over the power of the police to ‘stop and frisk’—as it is sometimes euphemistically termed—suspicious persons.

The Court must strike the right balance between giving police officers some flexibility, while also guarding against the dangers of police abuses and heightened police-community tensions. On the one hand, it is frequently argued that in dealing with the rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess. . . . On the other side the argument is made that the authority of the police must be

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CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

strictly circumscribed Acquiescence by the courts in the compulsion inherent in the field interrogation practices at issue here, it is urged, . . . can only serve to exacerbate police-community tensions in the crowded centers of our Nation's cities.

Judges must approach these complex situations with humility. In this context we approach the issues in this case mindful of the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street. . . . No judicial opinion can comprehend the protean variety of the street encounter, and we can only judge the facts of the case before us. . . .

This situation doesn't trigger the Fourth Amendment's warrant requirement; instead, we must ask whether the officer's conduct was unreasonable. If this case involved police conduct subject to the Warrant Clause of the Fourth Amendment, we would have to ascertain whether 'probable cause' existed to justify the search and seizure which took place. However, that is not the case. . . . [W]e deal here with an entire rubric of police conduct—necessarily swift action predicated upon the on-the-spot observations of the officer on the beat—which historically has not been, and as a practical matter could not be, subjected to the warrant procedure. Instead, the conduct involved in this case must be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures. . . .

One key interest involved is crime prevention/detection. One general interest is of course that of effective crime prevention and detection; it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest. . . .

Another key interest is the safety of the police officer. When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm. . . .

The Court lays out the scope of a permissible search in this context, focused on the safety of the police officer and others in the area. Our evaluation of the proper balance that has to be struck in this type of case leads us to conclude that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.

Excerpt: Concurrence, Justice Harlan

We must limit stop-and-frisk searches to reasonable efforts to investigate a suspected crime. Any person, including a policeman, is at liberty to avoid a person he considers dangerous. If and when a policeman has a right instead to disarm such a person for his own protection, he must first have a right not to avoid him but to be in his presence. That right must be more than the liberty (again, possessed by every citizen) to address questions to other persons, for ordinarily the person addressed has an equal right to ignore his interrogator and walk away; he certainly need not submit to a frisk for the questioner's protection. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.

These can be dangerous situations for police officers; the limited frisk must be immediate and rapid if the officer suspects a crime of violence, as in this case. Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet. . . .

Excerpt: Dissent, Justice Douglas

It's not clear how the stop-and-frisk in this case is consistent with the Fourth Amendment. [I]t is a mystery how [this] 'search' and that 'seizure' can be constitutional by Fourth Amendment standards, unless there was 'probable cause' to believe that (1) a crime had been committed or (2) a crime was in the process of being committed or (3) a crime was about to be committed. . . .

The Court's approach gives police officers too much power; the majority is rewriting the Fourth Amendment; only the American people have that power to do that through the Article V amendment process. To give the police greater power than a magistrate is to take a long step down the totalitarian path. Perhaps such a step is desirable to cope with modern forms of lawlessness. But if it is taken, it should be the deliberate choice of the people through a constitutional amendment. Until the Fourth Amendment, which is closely allied with the Fifth, is rewritten, the person and the effects of the individual are beyond the reach of all government

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

agencies until there are reasonable grounds to believe (probable cause) that a criminal venture has been launched or is about to be launched. . . .

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CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
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CARPENTER V. UNITED STATES (2018)

View the case on the National Constitution Center's website [here](#).

SUMMARY

In *Carpenter v. United States*, the Supreme Court once again addressed whether the Fourth Amendment's prohibition on unreasonable searches and seizures applied to modern technology—in this case, to cell phones and smartphones. Can the government subpoena third-party telecommunications providers to provide your physical location, transmitted on an almost ongoing basis to the company cell sites? Is the Fourth Amendment well suited to the Internet Age, where most of our possessions and documents can be found in “the cloud” and in the possession of third-party technology companies?

[Read the Full Opinion](#)

Excerpt: Majority Opinion, Chief Justice Roberts

The Court has consistently translated the Fourth Amendment in ways that address new contexts and new technologies. As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to “assure [] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.” For that reason, we [previously] rejected . . . a “mechanical interpretation” of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. Because any other conclusion would leave homeowners “at the mercy of advancing technology,” we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. . . .

The question in this case is how to apply the Fourth Amendment to cell phone location information. The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. . . . Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled. . . . [I]n 1979 [when a prior case was decided], few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements. . . .

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CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

The Court will not apply the third-party doctrine to cell phone location data; people have a legitimate expectation of privacy in information about their physical movements; when the government obtains cell phone location information from cell phone companies, such government action qualifies as a “search” for Fourth Amendment purposes. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user’s claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology . . . or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through [cell phone site data]. The location information obtained from Carpenter’s wireless carriers was the product of a search. . . .

When the government obtains cell phone location data, it raises massive privacy concerns. As with GPS information, the time-stamped data provides an intimate window into a person’s life, revealing not only his particular movements, but through them his “familial, political, professional, religious, and sexual associations.” These location records “hold for many Americans the ‘privacies of life.’” . . . A cell phone faithfully follows its owner beyond public thoroughfares and into private residences, doctor’s offices, political headquarters, and other potentially revealing locales. Accordingly, when the Government tracks the location of a cell phone it achieves near perfect surveillance, as if it had attached an ankle monitor to the phone’s user.

Cell phone location information can even cover periods of time before an investigation begins. Moreover, the retrospective quality of the data here gives police access to a category of information otherwise unknowable. . . . Unlike with the GPS device . . . police need not even know in advance whether they want to follow a particular individual, or when. Whoever the suspect turns out to be, he has effectively been tailed every moment of every day for five years . . .

To obtain cell phone location information, the government must generally get a warrant supported by probable cause. The Government’s acquisition of the cell-site records was a search within the meaning of the Fourth Amendment. . . . [T]he Government must generally obtain a warrant supported by probable cause before acquiring such records. . . .

Excerpt: Dissent, Justice Kennedy

The Court has already established the third-party doctrine. The Court has twice held that individuals have no Fourth Amendment interests in business records which are possessed, owned, and controlled by a third party. This is true even when the records contain personal and sensitive information. So when the Government uses a subpoena to obtain, for example, bank records, telephone records, and credit card statements from the businesses that create and

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

keep these records, the Government does not engage in a search of the business's customers within the meaning of the Fourth Amendment.

In this case, the government acted properly under a law passed by Congress. In this case petitioner challenges the Government's right to use compulsory process to obtain a now-common kind of business record: cell-site records held by cell phone service providers. The Government acquired the records through an investigative process enacted by Congress. Upon approval by a neutral magistrate, and based on the Government's duty to show reasonable necessity, it authorizes the disclosure of records and information that are under the control and ownership of the cell phone service provider, not its customer. . . .

The Court's ruling unsettles well-established precedent; the Court should have just applied the third-party doctrine to cell phone location information. In concluding that the Government engaged in a search, the Court unhinges Fourth Amendment doctrine from the property-based concepts that have long grounded the analytic framework that pertains in these cases. In doing so it draws an unprincipled and unworkable line between cell-site records on the one hand and financial and telephonic records on the other. According to today's majority opinion, the Government can acquire a record of every credit card purchase and phone call a person makes over months or years without upsetting a legitimate expectation of privacy. But, in the Court's view, the Government crosses a constitutional line when it obtains a court's approval to issue a subpoena for more than six days of cell-site records in order to determine whether a person was within several hundred city blocks of a crime scene. That distinction is illogical and will frustrate principled application of the Fourth Amendment in many routine yet vital law enforcement operations. . . .

People have less of a reasonable expectation of privacy in their own movements than they did thirty years ago. A person's movements are not particularly private. . . . Today expectations of privacy in one's location are, if anything, even less reasonable than . . . 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media. . . .

The cell-site records here don't disclose nearly as much intimate information as the bank and telephone records already covered by the third-party doctrine. What persons purchase and to whom they talk might disclose how much money they make; the political and religious organizations to which they donate; whether they have visited a psychiatrist, plastic surgeon, abortion clinic, or AIDS treatment center; whether they go to gay bars or straight ones; and who are their closest friends and family members. The troves of intimate information the Government can and does obtain using financial records and telephone records dwarfs what can be gathered from cell-site records. . . .

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Primary Source

Cell phones have complex effects on crime and law enforcement; elected legislatures are in a better position to balance the interests involved than courts; in this case, I'd defer to the procedure set out by Congress. Technological changes involving cell phones have complex effects on crime and law enforcement. Cell phones make crimes easier to coordinate and conceal, while also providing the Government with new investigative tools that may have the potential to upset traditional privacy expectations. How those competing effects balance against each other, and how property norms and expectations of privacy form around new technology, often will be difficult to determine during periods of rapid technological change. In those instances, and where the governing legal standard is one of reasonableness, it is wise to defer to legislative judgments like the one embodied in § 2703(d) of the Stored Communications Act. . . .

Excerpt: Dissent, Justice Thomas

The cell phone location information at issue in this case didn't belong to Carpenter; it belonged to the cell phone companies; therefore, the government didn't even search Carpenter's person, house, papers, or effects. This case should not turn on “whether” a search occurred. It should turn, instead, on whose property was searched. The Fourth Amendment guarantees individuals the right to be secure from unreasonable searches of “their persons, houses, papers, and effects.” . . . By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint. . . .

The Court is wrong to continue to apply the reasonable expectation of privacy test; it has no basis in the Fourth Amendment's text and history, and it empowers courts to make policy judgments. The . . . fundamental problem with the Court's opinion . . . is its use of the “reasonable expectation of privacy” test, which was first articulated by Justice Harlan in *Katz v. United States*, 389 U.S. 347, 360–361 (1967) (concurring opinion). The Katz test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, Katz will continue to distort Fourth Amendment jurisprudence. . . .

Justice Harlan simply invented the reasonable expectation of privacy test; there is no basis for it in constitutional text, history, or doctrine. At the founding, “search” did not mean a violation of someone's reasonable expectation of privacy. The word was probably not a term of art, as it does not appear in legal dictionaries from the era. And its ordinary meaning was the same as it is today: “[t]o look over or through for the purpose of finding something; to explore; to

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

examine by inspection; as, to search the house for a book; to search the wood for a thief.” The word “search” was not associated with “reasonable expectation of privacy” until Justice Harlan coined that phrase in 1967. The phrase “expectation(s) of privacy” does not appear in the pre-*Katz* federal or state case reporters, the papers of prominent Founders, early congressional documents and debates, collections of early American English texts, or early American newspapers. . . .

The Fourth Amendment is primarily about property, not privacy. Of course, the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well. But the Fourth Amendment’s attendant protection of privacy does not justify *Katz*’s elevation of privacy as the sine qua non of the Amendment. . . . In shifting the focus of the Fourth Amendment from property to privacy, the *Katz* test also reads the words “persons, houses, papers, and effects” out of the text. . . .

Excerpt: Dissent, Justice Gorsuch

The Court established the reasonable expectation of privacy test and the third-party doctrine in the 1960s and 1970s. In the late 1960s this Court suggested for the first time that a search triggering the Fourth Amendment occurs when the government violates an “expectation of privacy” that “society is prepared to recognize as ‘reasonable.’” Then, in a pair of decisions in the 1970s applying the *Katz* test, the Court held that a “reasonable expectation of privacy” doesn’t attach to information shared with “third parties.” By these steps, the Court came to conclude, the Constitution does nothing to limit investigators from searching records you’ve entrusted to your bank, accountant, and maybe even your doctor.

What is left of the Fourth Amendment if we extend the third-party doctrine to cover data that we share with internet providers and cell phone companies? What’s left of the Fourth Amendment? Today we use the Internet to do most everything. Smartphones make it easy to keep a calendar, correspond with friends, make calls, conduct banking, and even watch the game. Countless Internet companies maintain records about us and, increasingly, for us. Even our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed—now reside on third party servers. . . .

To determine whether a search or seizure triggers the Fourth Amendment, we traditionally asked whether the house, paper, or effect belonged to the challenger; in other words, we asked whether it was theirs under the law; just because we share our papers or effects with someone else doesn’t necessarily mean that we no longer have a Fourth Amendment interest in them. True to those words and their original understanding, the traditional approach asked if a house, paper or effect was yours under law. . . . [T]he fact that a third party has access to or possession of your papers and effects does not necessarily

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.5 Primary Source

eliminate your interest in them. Ever hand a private document to a friend to be returned? Toss your keys to a valet at a restaurant? Ask your neighbor to look after your dog while you travel? . . . Entrusting your stuff to others is a bailment. A bailment is the “delivery of personal property by one person (the bailor) to another (the bailee) who holds the property for a certain purpose.” A bailee normally owes a legal duty to keep the item safe, according to the terms of the parties’ contract if they have one, and according to the “implication[s] from their conduct” if they don’t. . . .

Fourth Amendment doctrine already recognizes this insight. Our Fourth Amendment jurisprudence already reflects this truth. In *Ex parte Jackson*, 96 U.S. 727 (1878), this Court held that sealed letters placed in the mail are “as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles.” The reason, drawn from the Fourth Amendment’s text, was that “[t]he constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be.” It did not matter that letters were bailed to a third party (the government, no less). The sender enjoyed the same Fourth Amendment protection as he does “when papers are subjected to search in one’s own household.”

These old principles may help us solve new issues like those arising from cell phone location information. These ancient principles may help us address modern data cases too. Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. . . . [F]ew doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest. . . .

It is possible that cell phone location information qualifies as a “paper” or “effect” under the Fourth Amendment. It seems to me entirely possible a person’s cell-site data could qualify as his papers or effects under existing law. . . .

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Case Brief

FOURTH AMENDMENT SUPREME COURT CASES

The Supreme Court usually considers Fourth Amendment cases starting with a basic question, “Was there a search or a seizure?” If so, the Court must ask whether the search or seizure was reasonable. If not, then the search or seizure violates the Fourth Amendment. In this activity, you will explore landmark decisions by the Supreme Court interpreting the Fourth Amendment.

You will work with a group to review one of the following cases:

- [*Olmstead v. United States* \(1928\)](#)
- [*Mapp v. Ohio* \(1961\)](#)
- [*Katz v. United States* \(1967\)](#)
- [*Terry v. Ohio* \(1968\)](#)
- [*Carpenter v. United States* \(2008\)](#)

Read excerpts from your assigned case from the *Founders' Library* and complete the chart below as if your role is to brief the case like a constitutional lawyer.

My Case:

Facts: Who are the people (parties) associated with the case? What was the dispute between them?

Issue: What is the constitutional issue in the case? What constitutional provision is at issue? What is the constitutional question that the Supreme Court has to answer?

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.5 Case Brief

Rule: What was the outcome in the case? How did the justices vote? What was the Court's ruling? What sort of rule does the Court come up with to resolve the issue?

Application: How did this change the way that the Court interprets the Fourth Amendment?

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.6 Test Your Knowledge

THE FOURTH AMENDMENT: PRIVACY IN A DIGITAL AGE, POLICING IN AMERICA, AND PROTECTION FROM UNREASONABLE SEARCHES AND SEIZURES

Complete the questions in the following quiz to test your knowledge of basic ideas and concepts covered in this module.

1. The text of the Fourth Amendment asserts that the people are secure in their persons, houses, papers and effects, from what types of searches and seizures?
 - a. Any
 - b. Unreasonable
 - c. Warrantless
 - d. Inconvenient
2. According to the text of the Fourth Amendment, warrants that are issued must _____
 - a. Describe the place to be searched and the persons or things to be seized
 - b. Have the signature of the president
 - c. Be kept secret, so that no one can see what's written on them
 - d. Be executed during the day to prevent unnecessary disturbances
3. Which of these technologies have been at the center of a Supreme Court case involving the Fourth Amendment?
 - a. Cell phones
 - b. GPS devices
 - c. Phone booths
 - d. All of the above
4. In colonial America, what royal orders gave officials the power to break into people's homes to search for anything, anytime, and for any reason?
 - a. Judicial appeals
 - b. Mayflower Compact
 - c. The Writs of Assistance
 - d. Charter Colony
5. Which Boston lawyer argued against arbitrary searches by the British government, leading John Adams to later write, "Then and there, the child Independence was born"?

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.6 Test Your Knowledge

- a. James Otis
 - b. John Hancock
 - c. Samuel Adams
 - d. Josiah Quincy
6. What was the defense of the Englishmen John Wilkes, after he had been arrested under the charge of criticizing the king, also known as “seditious libel”?
- a. The things that he said about the king were taken out of context.
 - b. The general warrants and search that led to his arrest were unconstitutional.
 - c. He was innocent of all charges.
 - d. He had been paid by someone else for criticizing the king.
7. Americans celebrated the legal victory of John Wilkes against the issue of general warrants by _____.
- a. Having parties
 - b. Naming towns in his honor
 - c. Naming people after him
 - d. All of the above
8. What is a court order obtained from a judge who is convinced that there is probable cause to support a search of a particular person or place?
- a. Official permission
 - b. A search warrant
 - c. Search and seizure clause
 - d. Subpoena
9. During the era of Prohibition, the police gathered evidence on Roy Olmstead, a suspected bootlegger, by _____.
- a. Breaking down his door and searching his papers
 - b. Watching him with a pair of binoculars
 - c. Placing a tracking device on his car
 - d. Wiretapping his phone and listening to his conversations
10. In the case of *Olmstead v. United States*, the Supreme Court ruled that the evidence used to convict Roy Olmstead _____.
- a. Was unconstitutional
 - b. Proved that he was not working as a bootlegger
 - c. Did not violate the Fourth Amendment because there was no physical trespass
 - d. Was constitutional because such wiretapping had been used for centuries

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.6 Test Your Knowledge

11. Which Supreme Court justice, who dissented in the *Olmstead* case, wrote about how future technologies might allow for intrusive searches without physical trespass?
 - a. Louis Brandeis
 - b. William Howard Taft
 - c. Roy Olmstead
 - d. John Marshall Harlan

12. The Supreme Court case of *Katz v. United States* (1967) focused on what piece of technology that is rarely used today?
 - a. Early cell phones
 - b. Smartphones
 - c. Phone booths
 - d. Laptops

13. In ruling in favor of Katz in 1967, the Supreme Court ruled that he did have a reasonable expectation of privacy when he made his call, and stated that _____.
 - a. He had not been gambling after all
 - b. The Fourth Amendment doesn't apply to gamblers when they lose their bets
 - c. The Fourth Amendment protects people, not places
 - d. The bets he made had been legal

14. Which of the following was part of the test that Justice John Marshall Harlan II offered in his concurrence in the *Katz* case?
 - a. Did the individual have a subjective expectation of privacy?
 - b. Did the individual know the language of the Fourth Amendment?
 - c. Was the expectation of privacy once that society would recognize as reasonable?
 - d. Both A and C

15. When an individual gives information or data to someone else—like a private company—they generally abandon their reasonable expectation of privacy in that information or data. When the government tries to obtain this information, it is not considered a search for Fourth Amendment purposes. Therefore, the government is not required to get a warrant before getting access to it. This is known as _____.
 - a. The third-party doctrine
 - b. Overturning the Fourth Amendment
 - c. Carrying charges
 - d. Middleman doctrine

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures 11.6 Test Your Knowledge

16. In the 2012 case of *Jones v. United States*, Jones argued that his Fourth Amendment rights had been violated when _____.
- The government wiretapped his phone
 - The police attached a GPS tracking device to his car
 - British soldiers broke into his home
 - Someone published his private diary on the internet
17. In the 2014 case of *Riley v. United States*, the Supreme Court argued that _____.
- Police could search an arrested suspect's cell phone without a warrant
 - Cell phones contain all of the "privacies of life" and a warrant would generally be required to search it
 - Opening a cell phone is not different from opening a cigarette case
 - People don't keep their most important records on cell phones anyway
18. In answering the question of whether the government can track you 24 hours a day, seven days a week for an entire month using your cell phone data and your geolocation information, the Supreme Court in *Carpenter v. United States* (2018) said _____.
- The government can always track you, with or without a warrant
 - No, and all of the justices agreed with the outcome and reasoning in the case
 - It depends on the state you live in
 - No, but some justices dissented
19. Generally, courts will throw out evidence that the police got by violating the Fourth Amendment. This is known as _____.
- Bad judgment
 - The exclusionary rule
 - Probable cause
 - Unreasonable
20. Justice Louis Brandeis asserted that the purpose of the Fourth Amendment was to protect this right, which he said is the right most valued by civilized men.
- The right to use technology
 - The right to keep a diary
 - The right to be let alone
 - The right to debate politics

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.6 Test Your Knowledge

Answer Key

1. B
2. A
3. D
4. C
5. A
6. B
7. D
8. B
9. C
10. C
11. A
12. C
13. C
14. D
15. A
16. B
17. B
18. D
19. B
20. C

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.7 Primary Source

JAMES OTIS

James Otis was a Massachusetts lawyer who rose to provincial fame in the 1760s as one of the most able defenders of colonial American rights, beginning with his argument in what became known as the *Writs of Assistance* case in 1761. Writs of assistance were general search warrants that British American courts began issuing to empower customs officials to combat smuggling. Agents would no longer need to obtain individual search warrants each time they sought to conduct a search, but instead could freely search vessels and homes without probable cause or express permission.

Otis was enlisted to challenge the writs in courts and his fiery arguments were recorded by a young John Adams. Otis lost the case but galvanized colonial resistance. Later in life, Adams would proclaim that “then and there the Child Independence was born.”

Excerpt

This writ of assistance conflicts with fundamental principles of law, including security against unlawful searches by government officials of one’s home. This Writ is against the fundamental Principles of Law.—The Priviledge of House. A Man, who is quiet, is as secure in his House, as a Prince in his Castle—notwithstanding all his Debts, & civil processes of any Kind.

...

I am appearing on behalf of my fellow Bostonians, concerned about their liberties. I was desired by one of the Court to look into the books, and consider the question now before them concerning writs of assistance. I have accordingly considered it, and now appear, not only in obedience to your order, but likewise in behalf of the inhabitants of this town, who have presented another petition, and out of regard to the liberties of the subject. And I take this opportunity to declare, that whether under a fee or not (for in such a cause as this I despise a fee) I will to my dying day oppose with all the powers and faculties God has given me, all such instruments of slavery on the one hand, and villany on the other, as this writ of assistance is.

This writ of assistance is the worst example of arbitrary power imaginable. It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that ever was found in an English law-book.

...

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.7 Primary Source

It leaves some of our most cherished liberties to the whims of petty officials; in particular, it violates our right to security from unlawful searches by government officials of our homes. Every one with this writ may be a tyrant; if this commission be legal, a tyrant in a legal manner also may control, imprison, or murder any one within the realm. In the next place, it is perpetual; there is no return. A man is accountable to no person for his doings. Every man may reign secure in his petty tyranny, and spread terror and desolation around him. In the third place, a person with this writ, in the daytime, may enter all houses, shops, &c. at will, and command all to assist him. Fourthly, by this writ not only deputies, &c., but even their menial servants, are allowed to lord it over us. Now one of the most essential branches of English liberty is the freedom of one's house. A man's house is his castle; and whilst he is quiet, he is as well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

...

Finally, it violates the British Constitution; therefore, it is void; and that's true even if Parliament tried to authorize it; the court should invalidate this writ. (This is a radical argument for its time. It flew in the face of the longstanding British commitment to the principle of parliamentary supremacy.) Thus reason and the constitution are both against this writ. Let us see what authority there is for it. Not more than one instance can be found of it in all our law-books; and that was in the zenith of arbitrary power, namely, in the reign of Charles II., when star-chamber powers were pushed to extremity by some ignorant clerk of the exchequer. But had this writ been in any book whatever, it would have been illegal. All precedents are under the control of the principles of law. Lord Talbot says it is better to observe these than any precedents, though in the House of Lords, the last resort of the subject. No Acts of Parliament can establish such a writ; though it should be made in the very words of the petition, it would be void. An act against the constitution is void.

***Bold sentences give the big idea of the excerpt and are not a part of the primary source.**

CONSTITUTION 101

Module 11: The Fourth Amendment: Privacy in a Digital Age, Policing in America, and Protections from Unreasonable Searches and Seizures
11.4 Activity Guide

JAMES OTIS, SPEECH ON THE WRITS OF ASSISTANCE

In this activity, you will learn more about the founding story of the Fourth Amendment and gain insight into the origins of the Fourth Amendment.

Read the primary source by James Otis (1761) and answer the following questions.

Who was James Otis?

What did he argue?

Define a “writ of assistance.”

How does Otis’s speech play into the Fourth Amendment story?

Name two state constitutions that influenced the Fourth Amendment? (optional)