

# F.O.R.C.E VIDEO SCRIPT - 4TH AMENDMENT/ SEARCH AND SEIZURE

**Voice Over:** Is your home really yours? Do you really own your property? Or does the government have a right to it? The Fourth Amendment protects American citizens from unreasonable search and seizure—emphasis on the word “unreasonable.” Because, in certain circumstances, you can be searched, and your property can be seized—and those circumstances have often been examined in our courts of law. Where have we landed? Professor Sheila Kennedy holds forth.

**Sheila:** There’s a really compelling history behind America’s Fourth Amendment. Before the American Revolution, British soldiers entered the homes of colonists at will, searching any person or place they wanted, often motivated by nothing more than political animosity. Resentment of that practice was a very significant cause of the revolution. Now to be fair, many Englishman also objected to the use of what were then called general warrants. These were warrants that authorized searches at the discretion of the authorities.

William Pitt addressed Parliament in 1763 and famously said, “The poorest man may in his cottage bid defiance to all the forces of the crown. 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 may not enter.” So it was a sentiment that was widely accepted by those who felt that these searches violated English, as well as colonial norms.

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When America won independence, revulsion against those practices led to the enactment of the Fourth Amendment, which provides that people have a right to be secure in their in their persons, houses, papers, and effects against unreasonable searches and seizures.

The Fourth Amendment requires that police, or other authorities, have a warrant issued upon probable cause to conduct such searches. The amendment effectively prohibited searches unless government had cause to believe that a crime that occurred and a very good reason to believe that a specific person or place contained evidence of that crime.

Furthermore, the reasonableness of the search was not supposed to be left to the discretion of an individual officer. A search warrant was to be issued by an impartial magistrate.

Now as we’ll see, of all the provisions of the Bill of Rights, there’s a good case to be made that the protections of the Fourth Amendment have suffered the greatest erosion.

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The Fourth Amendment in its entirety reads as follows: “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.”

Well, let’s begin by looking at that terminology. We’ve seen that, in practice, even the First Amendment’s dictate that “Congress shall make no law” hasn’t really been held to mean “no law.” That seemingly absolute language hasn’t kept lawmakers from legislating. So what do far less absolute terms like “unreasonable” and “probable cause” mean? Courts tend to define “reasonableness” in terms that we might argue are equally subjective: Would an objective observer consider a particular official action reasonable? Did an individual have a reasonable expectation of privacy that was violated by a warrant or search?

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Literally hundreds of academic papers have debated the meaning of the reasonableness requirement of the Fourth Amendment and courts continue to confront new questions that are raised as our technological innovations continue.

There's a case, *Kyllo versus the United States*, that involved police use of a new technology that allowed officers to stand across the street from a house and determine that the occupants were growing marijuana in the basement. Before the invention of that technology, police would have had to enter the home to conduct that search, and it was clear under the Fourth Amendment they would have had to get a warrant to allow them to enter onto the property and search it. The Supreme Court had to decide whether this use of new technology also constituted a search for Fourth Amendment purposes. They ruled that it did, and that a warrant based upon a determination that probable cause existed would be required.

The courts also had to decide whether placement of a GPS device on a suspect's automobile was a search requiring the issuance of a warrant. In *U.S. versus Jones*, the Supreme Court ruled that law enforcement personnel had to obtain a search warrant prior to installing a GPS unit or a similar tracking device on a vehicle. There were some exceptions; obviously, if an owner of the vehicle consents to the placement, a warrant isn't required. But there are also exceptions for automobiles at or crossing the border and for situations involving officer safety.

As complicated as some of today's Fourth Amendment issues can be, it helps to refer back to the reason for including the warrant requirement in the first place. The amendment is supposed to protect citizens against abuses of authority by erecting some procedural safeguards against overreaching and intimidation.

America, unlike totalitarian regimes, places the burden on government to show why it should be allowed to search rather than placing the burden on citizens to demonstrate why they should be left alone.

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The Fourth Amendment rests on the premise that individuals are entitled to be left alone unless there's good reason or probable cause to intrude on their privacy. It would violate the Fourth Amendment if police stationed themselves on a public street and demanded that every third passer-by submit to a drug test, even if it could be demonstrated that a high percentage of those who lived in that neighborhood used drugs. The Fourth Amendment was put in place to protect citizens against "fishing expeditions": searches for something incriminating that are based solely on hunches, animosity, or cultural stereotypes.

The need for "probable cause," either to issue a warrant or, increasingly, to conduct a warrantless search, raises a pretty obvious question: What is probable cause? One definition is "a reasonable amount of suspicion, supported by circumstances sufficiently strong to justify a prudent and cautious person's belief that certain facts are probably true."

Courts will sometimes require what they call an "articulable basis" for suspecting that a crime has been committed. For example, if you're following a car on a highway and you see an arm swinging from the trunk, you have probable cause to conduct a search. Unfortunately, most behaviors that trigger a search are considerably less clear-cut than that.

I'll provide additional resources to help flesh out what the courts have said are the elements supporting a finding of probable cause.

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There are increasing exceptions to the requirement the police obtain a warrant before they conduct a search. One such exception is that a warrant won't be required in cases where an arrest is being made and the officer sees something in plain view while executing the arrest warrant.

In situations involving automobiles, the "plain view" doctrine also provides an exception. For example, if a police officer makes what we call a "non-pretextual" stop—that is, he has a good reason to stop that car either for exceeding the speed limit or otherwise breaking traffic laws—and in the process of writing a ticket sees a marijuana cigarette or other kind of contraband on the back seat, it would obviously not be practical to require the officer to obtain a search warrant. The car would be long gone.

Police are also authorized to conduct warrantless “protective sweeps.” While making arrests, officers can search the immediate surroundings to ensure that nothing in the immediate vicinity poses a danger: Nobody’s hiding in the hall closet ready to come out and get them. And rather obviously, police can search premises if they have the voluntary consent of somebody who has authority to grant that consent.

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Now if you watch TV shows, especially detective shows, you may hear the term “Terry searches.”

In a case called *Terry versus Ohio*, the Warren Court held by an eight-to-one majority that when police observe conduct that under the circumstances would arouse reasonable suspicion that criminal activity is underway, they may briefly detain those observed for the purposes of investigating further. If the circumstances viewed objectively by a reasonable officer would justify the belief that the individual is armed and poses a danger, the officer may pat down the outside of the individual’s clothing to feel for a weapon.

The ruling in *Terry* was used to justify stop-and-frisk policies that have been widely criticized. The rules, which evidence suggests have often been ignored, provide that an officer can’t automatically frisk everyone lawfully stopped under *Terry*. In addition to reasonable suspicion that criminal activity is underway, the officer also has to be able to articulate a reasonable suspicion that the subject is armed and dangerous. Just a blanket officer safety excuse won’t justify the risk. The officer must be able to articulate why officer’s safety was at risk. Pat downs don’t justify a full search like reaching inside a person’s pocket or purse unless a weapon is detected during the pat down.

While considered a seizure, an investigatory stop doesn’t need to be supported by probable cause. Instead, it can be justified by that same “reasonable and articulable suspicion” that the person stopped has committed a crime or is about to do so.

Warrants also aren’t required in situations where an officer is preventing the destruction of evidence in what are termed “exigent circumstances.” Exigent circumstances have been defined as emergency situations that require swift action to prevent imminent danger to life or serious damage to property or to forestall the imminent escape of a suspect.

If you watch those television shows, you’ve also heard a good deal about the Exclusionary Rule. The Exclusionary Rule is intended to provide a disincentive for police misconduct. It’s supposed to prevent the government from using evidence that has been gathered in violation of the Constitution.

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In a case called *Mapp versus Ohio*, the Supreme Court ruled that the exclusionary rule applies to evidence gained from an unreasonable search or seizure in violation of the Fourth Amendment.

The rule has deterred improper police conduct, but it also has been seriously eroded. In 2016, in a case called *Utah versus Strieff*, the court held that the evidence obtained from an unlawful police stop would not be excluded because the court said the link between the stop and the evidence’s discovery was “attenuated” by the discovery of an outstanding warrant during the stop.

Here are the facts:

The *Strieff* case arose from a 2006 incident in which the police received an anonymous tip that drugs were being sold out of a Salt Lake City house. After observing the property for suspicious activity for the next week, an officer stopped and detained *Strieff* as he was leaving the house. The officer ran *Strieff*’s identification and discovered he had an outstanding arrest warrant for a traffic violation. *Strieff* was then searched. Incident to his arrest, methamphetamines and drug paraphernalia were found, and he was charged with a drug related offense.

*Strieff* argued that the evidence discovered on him should be suppressed because the police officer had no reasonable suspicion to stop him in the first place.

Under the Exclusionary Rule, when a police officer unlawfully stops an individual, the evidence obtained illegally is considered tainted and it can't be used at trial. In this case, the court recognized that the original stop was improper but found that discovery of the warrant attenuated the impropriety.

The case has been widely criticized. And among the resources that I will share with you are a number of other examples of incidents in which there have been arguments about the appropriate approach under the Fourth Amendment.

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Arguments over application of the Fourth Amendment have been a particularly prominent part of arguments over America's Drug War. The enforcement of marijuana laws in particular has generated some of the justice system's starkest racial disparities.

"The War on Marijuana in Black and White," a landmark report from the ACLU, detailed the staggering racial bias and financial waste involved in the fight against use of a drug widely considered less harmful than alcohol.

In the United States between 2001 and 2010, a black person was almost four times more likely to be arrested for marijuana possession than a white person, despite the fact that there are approximately equal rates of use among whites and blacks. In some states and counties, blacks were eight, ten or even fifteen times more likely to be arrested.

In addition to its patent unfairness, the war on drugs, like marijuana, caused a massive waste of resources with states spending billions of dollars and devoting thousands of hours of police work to it.

The courts have also become much more willing to allow drug testing in the public schools. Students generally have fewer constitutional protections than adult citizens do, and the courts have long recognized a duty of school officials to act in ways that protect the physical safety and further the education of the students under their supervision. However, there are limits to random drug testing in the schools. Students involved in sports and extracurricular activities may be subject to random testing, while testing of students in the classroom requires at least some degree of what we call individualized suspicion.

Now, individualized suspicion is a less rigorous standard than probable cause, but it does require identification of a specific individual. In many cases, the schools evade even the modest limits on testing by responding to positive results by requiring treatment or contacting the students' parents rather than referral to the criminal justice system.

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Another common Fourth Amendment issue is profiling. Profiling is a perfectly acceptable thing when it is based on behavior. It's unconstitutional and a violation of the Fourth Amendment when it's based on identity. If police stop and question a person in an airport because she's just purchased a one-way ticket with cash and has no luggage, that stop is based on behavior.

If a local Village Pantry is robbed by a young Latino male and the sheriff searches all the young Latino males in the neighborhood, those searches violate the Constitution.

Finally, let's talk about sobriety checkpoints. Those checkpoints represent an explicit exception to the Fourth Amendment. The Supreme Court recognized the existence of a threat to public safety, especially on holidays when drunk driving is very common, and set out rules that have to be followed in order to make the acknowledged infringement on individual liberties as minimal as possible. Since sobriety checkpoints are by definition random, they're not based on probable cause, and they have to be brief. The justification for this exception to the Fourth Amendment is that people operating a motor vehicle while impaired pose an imminent and significant threat to others.

When police in Indianapolis instituted drug stops, patterned on the rules governing sobriety checkpoints, the court ruled that those stops did violate the Fourth Amendment because the purpose of the drug stops was to search for drugs in the car.

Police used drug-sniffing dogs to go around the car. The purpose in effect was to conduct a “fishing expedition.” And that is precisely the sort of thing the Fourth Amendment was created to prevent. Had the drug stops been instituted to prevent people from driving while under the influence of drugs, just as the sobriety checkpoints were focused on getting people off the road who were a danger to others, the results would probably have been different. And again, I will give you additional references to flesh out these very contentious issues.

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The role of the police and the rules that constrain them have become very, very contentious. Americans are right now having a national debate about police training, police behavior, and the incidence of police misconduct. One aspect of that debate concerns something called “qualified immunity,” and my guess is you’re going to hear a lot more in the near future of qualified immunity, so let’s talk about it.

A bit of background: the Ku Klux Klan Act of 1871 was a Reconstruction-era effort to address what one court termed the reign of terror imposed by the Klan on black citizens and their white sympathizers in the Southern states. That law is now better known to practicing lawyers, especially civil rights lawyers, as Section 1983. It gives citizens the right to sue state and local officials for depriving them of their constitutional rights and a right to collect damages and legal fees if they prevail. If police search or seize you in violation of the Fourth Amendment, you should be able to sue them.

Now, that’s great—except for the fact that the Supreme Court began to eviscerate the law more than fifty years ago. And they did that with a doctrine called qualified immunity. As the judge in one recent case noted, it might just as well be called “absolute immunity.” Nothing in the text of the 1871 statute says anything about immunity, not a single word. But the Court imported common-law protections in 1967 to shield officials who they felt were operating in good faith under difficult circumstances. Then in 1982, the Court went further. To be held liable, it’s not enough to prove that a police officer violated someone’s constitutional rights. That right that was violated must be so clearly established that any reasonable official would have understood that what he’s doing violates that right. In effect, that meant there had to have been a case on point, except there will never be a case on point unless there is already one in existence. This is sometimes referred to as “Catch-22 meets Section 1983.”

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Numerous justices across the ideological spectrum—Anthony Kennedy, Antonin Scalia, Clarence Thomas, Sonya Sotomayor—have criticized the Qualified Immunity doctrine, but the court has so far appeared unwilling to do anything about it. As its term concluded in 2020, the court refused to hear any of the eight cases offering an opportunity to reconsider the doctrine.

Lawsuits for damages are a crucial method for protecting everyone’s constitutional rights. Qualified Immunity, protection against a damages verdict, is what lawyers call an “affirmative defense.” It can prevent the court from assessing damages even if the officer clearly committed unlawful acts.

In a case from 1982, Harlow versus Fitzgerald, the court established the modern application of the doctrine. Ignoring the precedents that examined the subjective good faith of the officer who was being sued, the court adopted a new objective test. After Harlow, a plaintiff had to show that the defendant police officer’s conduct violated clearly established statutory or constitutional rights about which a reasonable person would have known.

Since Harlow, the court has required plaintiffs to cite an already existing judicial decision with substantially similar facts. As a result, as one lawyer recently wrote, “the first person to litigate a specific harm is out of luck since the first time around the right violated won’t be clearly established, by definition.”

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There was a recent decision by the U.S. Court of Appeals for the Ninth Circuit that illustrated this point. In that case, a SWAT team fired tear gas grenades into a plaintiff's home and caused extensive damage. And while the divided three-judge panel all agreed that the SWAT officers had in fact violated the plaintiff's Fourth Amendment rights, it nonetheless granted qualified immunity to the officers because it determined that the precedents the plaintiffs relied upon, didn't clearly establish a violation at the appropriate level of specificity.

Justice Sonia Sotomayor has called Qualified Immunity a one-sided approach that transforms the doctrine into an absolute shield for law enforcement officers. Her criticism, in an opinion which Justice Ruth Bader Ginsburg joined, pointed out that the doctrine sends an alarming signal to law enforcement officers and the public. It tells those officers they can shoot first and think later. And it tells the public that palpably unreasonable conduct will often go unpunished.

Sheila: The doctrine of Qualified Immunity is currently complicating our efforts to ensure that the police follow the rules, because it insulates reckless police from the consequences of obviously wrongful behavior. When an officer fails to be punished for behavior that outrages citizens, that's often the reason.

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