

The Breakfast Club

Constitutional Minute for 28 March 2023

Right #10: Right to be Secure Against Unreasonable Searches

“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.” (Emphasis added)

In America’s founding period an unreasonable search was evidenced by having the King’s Custom Agents barging into your home in the middle of the night, flashing their General Warrant (called “*Writs of Assistance*”) issued by the King, giving them the right to search any residence or other place for illegal smuggled contraband any time of the day or night. That was an “unreasonable search.”

James Otis made quite a name for himself in a Massachusetts courtroom in February 1761. Otis had been appointed by the Royal Governor to defend the Writs as Advocate-General, an appointment he refused, resulting in a charge of desertion. Instead, he took the case of the defendants and argued against the legality of Writs of Assistance. What was Otis’ basis for “illegality?” The writs had been signed by the King, how could they be illegal? Such writs violated natural law, was his reply. They represented “the most destructive” [law] “that ever was found in an English law-book,” nothing more than “the worst instrument of arbitrary power.” Despite his oratorical and logical skill, Otis lost the case; the court upheld Writs of Assistance; but public protests eventually led to their disuse.

An unknown, 25-year-old lawyer named John Adams heard Otis that day in court and reconstructed Otis’ five-hour argument from memory, which is the only reason we today know anything that Otis said, his notes of the day did not survive.ⁱ Later in life, Adams called Otis “a flame of fire ,... American Independence was then and there born....Then and there was the first...opposition to the arbitrary claims of Great Britain.”

Today, we do not fear “Writs of Assistance;” but due to the advance of technology, we must still concern ourselves over searches, particularly ones which threaten the “castle doctrine.”ⁱⁱ

For instance, if police suspect me of growing illegal marijuana plants in my home, is it proper for them to set up thermal cameras outside my home to detect the use of grow lamps? They are not entering my home without a warrant, but are they searching it?

In [Kyllo v. United States, 533 U.S. 27 \(2001\)](#), Antonin Scalia argued for a 5-4 majority that this constituted an improper search under the 4th Amendment. To show how finely the court sometimes draws lines, Associate Justice Stevens argued in dissent that the thermal cameras rely on exterior wall temperature differences, do not actually “see through” the wall, and are therefore not “entering” the home.

The central issue here is called a “Reasonable Expectation of Privacy.” The courts have said you have such a right, but when and where can you insist that the right be respected?

Places in which a person generally has a reasonable expectation of privacy include:ⁱⁱⁱ

- A person's residence (e.g., apartments, houses, motor homes, house boats, etc.);
- Locations where an individual has permission to stay as an overnight guest (e.g., property other than their primary residence, hotels, or at friend's house);
- Certain areas of a motor vehicle (like a locked trunk or closed container);
- Specific public places (e.g., a public restroom stall); and
- Property and/or personal belongings that one is in possession of, but does not actually own.

But even here there are exceptions and nuance. If you are stopped on a public street for some traffic violation, a policeman does not have the authority to search your vehicle if he merely suspects you of carrying drugs in the car. If he brings a drug-trained dog to your vehicle and the dog alerts, this gives him probable cause to search your vehicle without first running to the magistrate for a warrant. If the subsequent search turns up nothing, but he is still suspicious and follows you home and then he brings the same drug dog to your front porch, and the dog alerts, does this give him the authority to conduct a warrantless search of the home? No, says the court.^{iv} Once again, the Castle Doctrine at work.

A "reasonable expectation of privacy" is always in tension with the concept of "probable cause."^v But when the conditions of "probable cause" are unquestionably met, it always trumps privacy.

Another interesting search issue involves the sanctity of your body, your "person" in 4th Amendment-speak. If you have the misfortune to be shot, but survive, may the police compel you to undergo surgery to remove the bullet so they can use its markings to determine the gun from which it came? Some of you might have guessed by now the answer is "No," and there is, once again, a court case to back us up: *Winston v. Lee*, 470 U.S. 753 (1985) Note: this was a Virginia case.

Can you be compelled to reveal your password or pin so police can search your phone? It depends on where you live. This area of law is very much in flux right now. See [here](#) for more.

For further reading:

[The Fourth Amendment in Flux: The Roberts Court, Crime Control, and Digital Privacy](#), 2016, by Michael C. Gizzi and R. Craig Curtis.

[The Evolution of the Fourth Amendment](#), 2010, by Thomas N. McInnis

[The Bill of Rights; Original Meaning and Current Understanding](#), Eugene W. Hickok, Jr, ed. 1991.

Next week: Right #11: The Right to a Grand Jury Indictment (like the 1st Amendment there's a lot in the 4th Amendment!).

Prepared by: Gary R. Porter, Executive Director, Constitution Leadership Initiative, Inc. for The Breakfast Club.
Contact: gary@constitutionleadership.org; 757-817-1216

ⁱ Otis' more famous essay: "[The Rights of the British Colonies Asserted and Proved](#)," did survive; it is worth a read.

ⁱⁱ The "Castle Doctrine" refers back to ancient saying "my home is my castle."

ⁱⁱⁱ List taken from: <https://www.legalmatch.com/law-library/article/illegal-searches.html>

^{iv} <https://supreme.justia.com/cases/federal/us/569/1/>

^v For an explanation of Probable Cause, see: <https://www.legalmatch.com/law-library/article/probable-cause-searches.html>