WELCOME

• Presenter Information
• Purpose
  *Increasing public awareness of how the government and courts work*
  *An informed public is the best defense of the rule of law and a fair and impartial judiciary.*

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The Fourth Amendment in the Courts

The Digital Age & Privacy

Images linked for citations
**OBJECTIVES**

- Fill in Constitutional knowledge gaps
- Overview of the 4th Amendment
- Understand the nuances of the 4th Amendment
- Review past Supreme Court decisions regarding the 4th Amendment
- Try stepping into judicial shoes
- Hypothesize the future of the 4th Amendment

**Presenter Notes/Background Knowledge:**
Important to emphasize that typical average citizens often assume that the fourth amendment only applies to criminals. However, all of the amendments and rights provided to citizens in our Constitution are important to take an interest in and safeguard, especially as times change so rapidly in this digital age, something the Founding Fathers could have never anticipated.

*Images linked for citations*
Searching For What You Know

What is the purpose of the U.S. Constitution?

What are some important components of the U.S. Constitution?

Presenter Notes/Background Knowledge: The U.S. Constitution outlines the government structure and function for the nation. The Preamble to the Constitution provides information regarding why the Constitution was written. *We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.*

Examples of important components include: separation of powers, checks & balances, 3 branches (executive, legislative, judicial), power through the consent of the people, rule of law, 10 amendments...etc.

*Images linked for citations*
Searching For What You Know

• Judicial Review
  • The idea, fundamental to the US system of government, that the actions of the executive and legislative branches of government are subject to review and possible invalidation by the judiciary. Judicial review allows the Supreme Court to take an active role in ensuring that the other branches of government abide by the Constitution.
  • The text of the Constitution does not contain a specific provision for the power of judicial review. Rather, the power to declare laws unconstitutional has been deemed an implied power, derived from Article III and Article VI of the U.S. Constitution.
  • Established in the landmark decision of Marbury v. Madison (1803)

Presenter Notes/Background Knowledge:
It is important to address one particular element of our system that technically is not in the original Constitution but plays an important role in how our government functions and our daily lives.....judicial review

Judicial review is the ultimate check on the executive and legislative branches as it allows the Supreme Court to evaluate actions of the other two branches, and sometimes even reverse them.

This power was given to the Supreme Court 15 years after the ratification of the Constitution (in Marbury v. Madison)

Although...it is mentioned in primary sources (indicating conversations as well) prior to the writing & ratification of the Constitution (ex. Federalist 78). It was also brought up at the Constitutional Convention. Only 11 of the 55 delegates to the Constitutional Convention, according to Madison's notes, expressed an opinion on the desirability of judicial review. Of those that did so, nine generally supported the idea and two opposed. One delegate, James Wilson, argued that the courts should have the even broader power to strike down any unjust federal or state legislation. It may also be worth noting that over half of the thirteen original states gave their own judges some power of
judicial review.

*Images linked for citations*
Searching For What You Know

Bill of Rights Amendment Match Activity

**Presenter Notes/Background Knowledge:**
Now that we have a basic understanding of our Constitution, its’ goals and important elements, and the idea of judicial review, let’s dive deeper into one area of the Constitution where many of these components collide...the Bill of Rights (a.k.a. the first 10 amendments)

*See presenter answer key for match activity

*Images linked for citations*
Presenter Notes/Background Knowledge:
Now, let’s really narrow our focus to the 4th amendment.
Read it together: The right of the people to secure in their persons, house, 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.
What do you find interesting? What words or phrase stick out to you? What are some positives to this amendment and it’s language? What are the gaps?

Images linked for citations
Historical Significance

• History of “every man’s house is his castle” in English law
• In order to enforce tax laws, English authorities used **writs of assistance**
  • Used against colonial smuggling
  • Very broad & generic warrant
  • Warrant stayed active for lifetime
• Founders believed this protection from government intrusion was a natural right

Presenter Notes/Background Knowledge:
This amendment came directly from the colonists experiences both in England with English law and then dealing with England as colonists
It articulates both the rights of persons and the responsibilities of law enforcement

In the colonies, smuggling afforded the leading examples of the necessity for protection against unreasonable searches and seizures. In order to enforce the revenue laws, English authorities made use of writs of assistance, which were general warrants authorizing the bearer to enter any house or other place to search for and seize “prohibited and uncustomed” goods, and commanding all subjects to assist in these endeavors. Once issued, the writs remained in force throughout the lifetime of the sovereign and six months thereafter. When, upon the death of George II in 1760, the authorities were required to obtain the issuance of new writs, opposition was led by James Otis, who attacked such writs on libertarian grounds and who asserted the invalidity of the authorizing statutes because they conflicted with English constitutionalism. Otis lost and the writs were issued and used, but his arguments were much cited in the colonies.

There is often debate today as to whether the Founders meant for the two clauses of the 4th amendment to be read together or not.

*Images linked for citations*
Fourth Amendment Overview

Presenter Notes/Background Knowledge:

*Play from the beginning of the video to 3:29 for an overview of the 4th amendment, warrants, and terms like “unreasonable” and “probable cause”
Early Interpretations & Exceptions

- **Mapp v. Ohio (1961)**
  - Exclusionary Rule
- **Terry v. Ohio (1968)**
  - Stop & Frisk
  - Only reasonable suspicion burden at schools

**Common Exceptions**

- Consent search
- Arrest connection
- Plain View Doctrine (Coolidge v. NH; Horton v. CA)

**Presenter Notes/Background Knowledge:**

The 4th Amendment has been interpreted many different ways and the Supreme Court has made some landmark decisions regarding application of the 4th amendment. Three big precedents leading up to “modern times” were Mapp v. Ohio (1961), Terry v. Ohio (1968), and N.J. v. T.L.O. (1985)

**Mapp v. Ohio** – established the exclusionary rule stating that evidence seized unlawfully, without a search warrant, could not be used for criminal prosecutions in state courts.

**Terry v. Ohio** – upheld the “stop and frisk” practice of law enforcement as constitutional. Allowed when reasonable to suspect the person to be armed and involved in a crime.

**N.J. v. T.L.O.** – Examined the 4th amendment application in public schools, acknowledging balancing student’s rights to privacy against the need of maintaining a safe environment for all students on campus. As such, school authorities do not need to obtain a warrant or have probable cause that a crime occurred before searching a student. Rather, the reasonableness of a search, under all circumstances, will determine its legality. The Court established the following test to determine the reasonableness of a search: whether the search was 1) justified at its inception and 2) as the search was conducted, was it reasonably related in scope to the circumstances that justified the
interference in the first place.
Locker searches have been ruled okay because it is the school’s property

In addition to these rulings, the Supreme Court has consistently ruled the following exceptions to the 4th Amendment:
~Consent search (a person agrees to a search without a warrant and waives 4th amendment rights)
~Arrest connection (usually upheld as officer trying to prevent destruction of evidence and to prevent access to a weapon)
~Plain View Doctrine (objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure without a warrant or that, if the officer needs a warrant or probable cause to search and seize, his lawful observation will provide grounds therefor. The plain view doctrine is limited, however, by the probable cause requirement: officers must have probable cause to believe that items in plain view are contraband before they may search or seize them.
The Court has analogized from the plain view doctrine to hold that, once officers have lawfully observed contraband, the owner’s privacy interest in that item is lost, and officers may reseal a container, trace its path through a controlled delivery, and seize and reopen the container without a warrant (solidified in Coolidge v. N.H. and Horton v. CA)

Important to stress that there are of course a lot of unique scenarios, gray areas, and “what about” type stories that have to be examined on a case by case basis. The purpose of this slide is not to get lost down that conversation hole but to show that the courts have had to try and apply the 4th amendment over the years as different situations presented themselves.

Images linked for citations
Technology Complicates the 4th Amendment

• DISCUSSION
  • How do you think technological advancements muddy the 4th amendment?
  • Do you (or people in society as a whole) expect privacy when it comes to technology?
  • As technology progresses, do you think 4th amendment interpretations should get more narrow or broad?

Presenter Notes/Background Knowledge:
Understand that the word “technology” in this discussion can mean many things which will be examined in depth later. Participants can also answer with the mindset of technological advancements for the citizen and/or advancements for law enforcement use.

After discussion conclusion, inform participants that you will now examine some cases that have already come before the Supreme Court regarding technology and the 4th amendment.

Images linked for citations
The 4th Amendment in the Courts

Olmstead v. U.S. (1928)

The Question: Does use of evidence in private telephone conversations intercepted via wiretapping violate the 4th amendment?

The Conclusion: No. Wiretapping was not an illegal search or seizure.
* There was no search or seizure
* Evidence was secured by sense of hearing
* No entry of the house or offices

Presenter Notes/Background Knowledge:

Case Summary (from Oyez)
Roy Olmstead was a suspected bootlegger. Without judicial approval, federal agents installed wiretaps in the basement of Olmstead’s building (where he maintained an office) and in the streets near his home. Olmstead was convicted with evidence obtained from the wiretaps. This case was decided along with Green v. United States, in which Green and several other defendants were similarly convicted, based on illegally obtained wire-tapped conversations, for conspiracy to violate the National Prohibition Act by importing, possessing, and selling illegal liquors. This case was also decided with McInnis v. United States.

Question:
Does use of evidence in private telephone conversations intercepted via wiretapping violate the 4th amendment?

Conclusion (5-4 for U.S.):
No. The Court held that neither the Fourth nor Fifth Amendment rights of the recorded parties were violated. The use of wiretapped conversations as incriminating evidence did not violate their Fifth Amendment protection against self incrimination because they were not forcibly or illegally made to conduct those conversations. Instead, the conversations
were voluntarily made between the parties and their associates. Moreover, the parties' Fourth Amendment rights were not infringed because mere wiretapping does not constitute a search and seizure under the meaning of the Fourth Amendment. These terms refer to an actual physical examination of one's person, papers, tangible material effects, or home - not their conversations. Finally, the Court added that while wiretapping may be unethical no court may exclude evidence solely for moral reasons. When criticized for his opinion, Justice Taft mocked his foes as he wrote to a friend: "If they think we are going to be frightened in our effort to stand by the law and give the public a chance to punish criminals, they are mistaken, even though we are condemned for lack of high ideals." This case was reversed by Katz v. U.S. (1967).

*Images linked for citations*
The 4th Amendment in the Courts


The Question: Does the 4th Amendment protection require police to obtain a search warrant in order to wiretap a public pay phone?

The Conclusion: Yes. "The Fourth Amendment protects people, not places"

*Introduction of the idea of a "reasonable" expectation of privacy

Presenter Notes/Background Knowledge:

Case Summary (from Oyez)

Acting on a suspicion that 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 conversations, Katz was convicted under an eight-count indictment for the illegal transmission of wagering information from Los Angeles to Boston and Miami. On appeal, Katz challenged his conviction arguing that the recordings could not be used as evidence against him. The Court of Appeals rejected this point, noting the absence of a physical intrusion into the phone booth itself. The Court granted certiorari.

Question:

Does the 4th Amendment protection require police to obtain a search warrant in order to wiretap a public pay phone?

Conclusion (7-1 for Katz):

Yes. The Court ruled that Katz was entitled to Fourth Amendment protection for his conversations and that a physical intrusion into the area he occupied was unnecessary to bring the Amendment into play. "The Fourth Amendment protects people, not places," wrote Justice Potter Stewart for the Court. A concurring opinion by John Marshall Harlan
introduced the idea of a 'reasonable' expectation of Fourth Amendment protection.

*Images linked for citations*
The 4th Amendment in the Courts


The Question: Does a warrantless use of a tracking device on a vehicle to monitor movements on public streets violate the 4th Amendment?

The Conclusion: Yes. This involves a trespass onto personal property and upheld the notion of a reasonable expectation of privacy.

Presenter Notes/Background Knowledge:

Case Summary (from Oyez)
Antoine Jones was arrested on Oct. 24, 2005, for drug possession after police attached a tracker to Jones's Jeep -- without judicial approval -- and used it to follow him for a month. A jury found Jones not guilty on all charges save for conspiracy, on which point jurors hung. District prosecutors, upset at the loss, re-filed a single count of conspiracy against Jones and his business partner, Lawrence Maynard. Jones owned the "Levels" nightclub in the District of Columbia. Jones and Maynard were then convicted, but a three-judge panel of the U.S. Court of Appeals for the D.C. Circuit ruled that the Supreme Court specifically stated in a 1983 case regarding the use of a beeper to track a suspect that the decision could not be used to justify 24-hour surveillance without a warrant.

Question:
Does a warrantless use of a tracking device on a vehicle to monitor movements on public streets violate the 4th Amendment?

Conclusion (Unanimous):
Yes. Justice Antonin Scalia delivered the opinion of the Court. The Court affirmed the judgment of the lower court, and held that the installation of a GPS tracking device on Jones' vehicle, without a warrant, constituted an unlawful search under the Fourth
Amendment. The Court rejected the government's argument that there is no reasonable expectation of privacy in a person's movement on public thoroughfares and emphasized that the Fourth Amendment provided some protection for trespass onto personal property. Justice Sonia Sotomayor wrote a concurring opinion, agreeing that the government had obtained information by usurping Jones' property and by invading his privacy. However, she further reasoned that the Fourth Amendment was not only concerned with trespasses onto property. She stated that a Fourth Amendment search occurs whenever the government violates a subjective expectation of privacy that society recognizes as reasonable, which is particularly important in an era where physical intrusion is unnecessary to many forms of surveillance.
Justice Samuel Alito concurred in the judgment but criticized the framing of the question in terms of trespass to property. He believed that such a construction of the problem strained the language of the Fourth Amendment and that it would be better to analyze the case by determining whether the Government violated Jones' reasonable expectations of privacy.

*Images linked for citations*
The 4th Amendment in the Courts

Additional Cases: Technology & The 4th Amendment

- **U.S. v. Miller** (1976)
- **Smith v. Maryland** (1979)
- **Arizona v. Hicks** (1987)
- **FL v. Riley** (1989)
- **Kyllo v. U.S.** (2001)
- **City of Ontario v. Quan** (2010)
- **Riley v. CA** (2014)

**Presenter Notes/Background Knowledge:**

In between and after Olmstead, Katz, and Jones, the Supreme Court has had to wrestle with technological advancements, digital privacy, and how it all aligns with the 4th Amendment. These are some of those cases.

- **U.S. v. Miller** – no right to privacy with digital bank records
- **Smith v. Maryland**- installing pen registers is not a “search” and therefore do not require warrants
- **U.S. v. Knotts**- the use of a radio transmitter on a car to track movements was permissible
- **U.S. v. Karo**- a beeper/tracking device to monitor something placed unknowingly in an object (owner gives consent) does not violate 4th amendment
- **Arizona v. Hicks**- police still need probable cause to use the plain view doctrine
- **FL v. Riley**- police do not need a warrant to observe an individual’s property from public air space
- **Kyllo v. U.S.**- using thermal imaging to observe inside a home does require a warrant; without, it would violate 4th amendment
- **U.S. v. Wong**- transfers the plain view doctrine to computers (i.e. if something illegal is right on the screen vs. searching through files)
- **City of Ontario v. Quan**- related to going through employee text messages on a work phone
- **Riley v. CA**- police cannot search a suspects phone after an arrest without a warrant
Check for Understanding

Presenter Notes/Background Knowledge:

*See presenter answer key for quiz activity

*Images linked for citations
**Presenter Notes/Background Knowledge:**

Now that we have gone through a detailed history of the 4th amendment, particularly related to its complexities as technology advances, let’s step into the role of the Supreme Court in regards to one of their most recent cases regarding the 4th amendment and digital privacy.

All necessary background information is contained within the next slide.

*Images linked for citations*
In April 2011, police arrested four men in connection with a series of armed robberies. One of the men confessed to the crimes and gave the FBI his cell phone number and the numbers of the other participants. The FBI used this information to apply for three orders from magistrate judges to obtain "transactional records" for each of the phone numbers, which the judges granted under the Stored Communications Act, 18 U.S.C. 2703(d). That Act provides that the government may require the disclosure of certain telecommunications records when "specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." The transactional records obtained by the government include the date and time of calls, and the approximate location where calls began and ended based on their connections to cell towers—"cell site" location information (CSLI).

Based on the cell-site evidence, the government charged Timothy Carpenter with, among other offenses, aiding and abetting robbery that affected interstate commerce, in violation of the Hobbs Act, 18 U.S.C. 1951. Carpenter moved to suppress the government’s cell-site evidence on Fourth Amendment grounds, arguing that the FBI needed a warrant based on probable cause to obtain the records.

**The Question:** Does the warrantless search and seizure of cell phone records, which include the location and movements of cell phone users, violate the Fourth Amendment?

**Presenter Notes/Background Knowledge:**
All necessary background information is contained within the slide
Conclusion on the next slide
The 4th Amendment in the Courts


The Conclusion: Yes. Tracking person's movements and location through extensive cell-site records is far more intrusive than the precedents might have anticipated.

* 4th Amendment applies to property interests and reasonable expectations of privacy.
* Third-party doctrine doesn’t apply to cell-site location information.

Presenter Notes/Background Knowledge:
The Conclusion (from Oyez)
The government's warrantless acquisition of Carpenter's cell-site records violated his Fourth Amendment right against unreasonable searches and seizures. Chief Justice John Roberts authored the opinion for the 5-4 majority. The majority first acknowledged that the Fourth Amendment protects not only property interests, but also reasonable expectations of privacy. Expectations of privacy in this age of digital data do not fit neatly into existing precedents, but tracking person's movements and location through extensive cell-site records is far more intrusive than the precedents might have anticipated. The Court declined to extend the "third-party doctrine"—a doctrine where information disclosed to a third party carries no reasonable expectation of privacy—to cell-site location information, which implicates even greater privacy concerns than GPS tracking does. One consideration in the development of the third-party doctrine was the "nature of the particular documents sought," and the level of intrusiveness of extensive cell-site data weighs against application of the doctrine to this type of information. Additionally, the third-party doctrine applies to voluntary exposure, and while a user might be abstractly aware that his cell phone provider keeps logs, it happens without any affirmative act on the user's part. Thus, the Court held narrowly that the government generally will need a warrant to access cell-site location information.

Justice Anthony Kennedy filed a dissenting opinion, in which Justices Clarence Thomas and...
Samuel Alito joined. Justice Kennedy would find that cell-site records are no different from the many other kinds of business records the government has a lawful right to obtain by compulsory process. Justice Kennedy would continue to limit the Fourth Amendment to its property-based origins.

Justice Thomas filed a dissenting opinion, emphasizing the property-based approach to Fourth Amendment questions. In Justice Thomas’s view, the case should not turn on whether a search occurred, but whose property was searched. By focusing on this latter question, Justice Thomas reasoned, the only logical conclusion would be that the information did not belong to Carpenter.

Justice Alito filed a dissenting opinion, in which Justice Thomas joined. Justice Alito distinguishes between an actual search and an order "merely requiring a party to look through its own records and produce specified documents"—with the former being far more intrusive than the latter. Justice Alito criticizes the majority for what he characterizes as "allow[ing] a defendant to object to the search of a third party's property," a departure from long-standing Fourth Amendment doctrine.

Justice Gorsuch filed a dissenting opinion in which he emphasizes the "original understanding" of the Fourth Amendment and laments the Court's departure from it.

*Images linked for citations*
New Katz-Carpenter Test

1. Comprehensiveness
   Length of time & scope of data matters when determining a search

2. Intimacy
   A person is more likely to retain a reasonable expectation of privacy in third-party records if the information contained in them is particularly intimate or sensitive and revealing (like contained on phones vs. bank records)

3. Expense
   Would it be reasonable with more limited resources

4. Retrospectivity
   Can’t go back in time before even the suspicion began

5. Voluntariness
   Production of information is “inescapable and automatic” which doesn’t mean people are volunteering the information

Presenter Notes/Background Knowledge:
The Court’s decision in Carpenter lays the foundation for a new, five-factor Katz-Carpenter test for use in determining whether a warrant is required when the government seeks to obtain data from digital technologies.

To read more: https://www.brennancenter.org/sites/default/files/2021-03/Fourth-Amendment-Digital-Age-Carpenter.pdf

Images linked for citations
What Does The Future Hold? Warrant: Yes or No?

- Real time cell phone location data
- Smart car GPS data
- Automated license plate readers
- Surveillance drones
- Body worn technology
- Smart doorbells
- Internet browsing history

Presenter Notes/Background Knowledge:
Now that you have seen the evolution of the 4th Amendment and the challenging task the Supreme Court has had over the past 30+ years applying it to ever changing technology and digital privacy, let’s discuss some areas that the Supreme Court has NOT really had a solid opportunity to rule on yet...

Let’s get the opinions of the audience, even if yes, we are discussing this under generic circumstances and there will be a lot of “maybe if” or feelings like the circumstances surrounding the use of the technology in the case will matter.

Images linked for citations
The 4th Amendment & Me

Digital Privacy Advice (adapted from the National Law Review)

- Always weigh cost-benefit before providing personal information to a company/app
- Delete unused apps (they still collect data)
- Only share the following with apps that absolutely need them:
  - Geolocation Data
  - Contact Data
  - Camera/Photo Data
- Use passwords and change them often

Presenter Notes/Background Knowledge:

^This is an excellent time to draw a connection with your audience in terms of what they learned today, and how this may impact their daily lives.
*Pay attention to how the Supreme Court continues to interpret the 4th Amendment in regards to technology and digital privacy
*Vote for officials and/or judges that align with your views on how those interpretations should go
*While we hope you have no plans of committing any crimes and therefore many of these things won’t be applicable to you, as we move into a more and more digital society, it is always good practice to know your rights regarding digital privacy

Important to make clear that while these tips are useful and drawn from the National Law Review, this does not consist paid legal advice 😊


Images linked for citations
**LEARNING MORE/STAYING INFORMED**

- #SCOTUS
- Supreme Court Website
- SCOTUS BLOG
- ABA Annual Review of the Supreme Court's Term
- Oyez
- Civics in Real Life – produced by FJCC

**Presenter Notes/Background Knowledge:**

There will no doubt be many more 4th amendment and digital privacy issues to be decided in the future.

There are also lots of ways to stay up to date with what the Supreme Court is deciding. By law, the U.S. Supreme Court’s term begins on the first Monday in October and goes through the Sunday before the first Monday in October of the following year. The Court is, typically, in recess from late June/early July until the first Monday in October. The Court hears oral arguments in cases from October through April. From October through December, arguments are heard during the first two weeks of each month. From January through April, arguments are heard on the last two weeks of each month. During each two-week session, oral arguments are heard on Mondays, Tuesdays, and Wednesdays only (unless the Court directs otherwise).

Follow the cases by listening live to oral arguments, follow #SCOTUS on Twitter (posts about the Supreme Court, not run by the Court), SCOTUS Blog, or the Civics in Real Life Docket Series produced by the Florida Joint Center for Citizenship. After the Supreme Court session is over, you can also see summaries of the decisions put out by the ABA.

*Images linked for citations*
Presenter Notes/Background Knowledge:
The Lou Frey Institute promotes the development of enlightened, responsible, and actively engaged citizens.
The Institute works to accomplish its mission:
• Through civic education programs that encourage thoughtful debate and discussion about current policy issues;
• Through experiential learning programs that encourage the development of civic and political skills;
• By working to help strengthen the civic education capacity of Florida’s K-12 education system; and
• Through research, policy analysis, and advocacy.
THANK YOU!!