

CLASSROOM DISCUSSION MATERIALS

LESSON

The Origins of the Fourth Amendment

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.

—Fourth Amendment to the U.S. Constitution

Much American law comes from England. The original 13 colonies brought laws from England. Many of the rights that Americans cherish first developed in England. Yet one the most basic rights, the right to be free from unreasonable government searches, developed in America in reaction to English practices in the 18th century.

What we today would consider unreasonable government searches and seizures were common in 18th century England. The legal basis for such searches and seizures was the general warrant. This court document named no specific person, place, or thing to be searched or seized. Instead, it simply allowed customs officers, tax collectors, and other agents of the king to look anywhere and take anything at their discretion.

Although the English Parliament and courts did place some limits on general warrants, the real effort to abolish them occurred in America. After the American Revolution, the Fourth Amendment of the Bill of Rights guaranteed Americans that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.”

The General Warrant

The idea that “a man’s house is his castle” existed early in English history. Many court cases spoke of the right of a person to be protected in his home from arbitrary invasions by the government. Even so, during the Middle Ages, Parliament began to enact general warrant laws. In 1335, Parliament authorized “good men” to search for counterfeit coins in the houses of the king’s subjects. During the 16th century, craft guild officers with “reasonable cause of suspicion” could enter anyone’s home looking for illegally made goods.

In the 17th century, Parliament passed laws allowing government agents to search for and seize religious or political publications considered “seditious . . . scandalous . . . popish . . . contrary to the doctrine and discipline of the Church of England . . . against the state . . . malignant . . . [or] offensive.”

The first important legal challenge to arbitrary government searches took place in 1604. In this case, the judges did declare that the owner of a house should be protected from these searches. But the court did not extend the protection to guests and others staying in a person's house. The court ruled: "The house of any one, is not a castle or privilege but for himself." Moreover, the court stated that even the owner could not be secure from searches in "cases where the king is party." Since the king represented virtually all government authority, the case did little to protect even the homeowner from arbitrary searches.

In 1649, King Charles I was beheaded after a civil war between the king's men and the forces of Parliament. The rule of Parliament replaced the monarchy. Despite this change in government, the practice of generalized searches continued. One critic condemned Parliament's agents as invaders who break "in pieces the commoner's doors, burst open their locks . . . ransack their houses, plunder, rob, steal, and feloniously bear away their proper goods and livelihoods."

After the monarchy was restored in 1660, officials had to swear before a judge that they had cause for a general warrant. In some cases, general warrants could only be used for daytime searches. Excessive force was prohibited. Sometimes, a time limit on the warrant was imposed. Still, the general warrants did not name specific persons, places, or objects to be searched for or seized.

Writs of Assistance

Under the Fraud Act of 1662, a type of general warrant called a "writ of assistance" granted government customs officers broad search and seizure powers. Writs of assistance typically authorized these officers "to break into any shop or place suspected" and "to break open doors, chests, trunks, and other packages" in their search for untaxed goods smuggled into the country. Each writ of assistance was good from the day it was issued until six months after the death of the king.

The most famous attack against the writs of assistance occurred not in England itself, but in the English colony of Massachusetts Bay. Charles Paxton, a customs officer in Boston, received a writ of assistance from the Massachusetts Superior Court in 1755. Following the death of King George II in 1760, Paxton and several other customs officers applied for new writs. A group of Boston merchants, however, challenged the application in court.

In February 1761, legal arguments for the case began in Massachusetts Superior Court. James Otis, the king's chief lawyer in Boston, resigned his position to help represent the Boston merchants. Otis condemned general warrants by reminding the court of the Englishman's ancient right of privacy:

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 while he is quiet he is

well guarded as a prince in his castle. This writ, if it should be declared legal, would totally annihilate this privilege.

Otis continued by declaring that writs by their nature were temporary, “but these monsters in the law live forever.” In his conclusion, Otis urged the court “to demolish this monster of oppression, and to tear into rags this remnant of . . . tyranny.”

A young John Adams was present at the argument delivered by Otis and described the argument as breathing “into this nation a breath of life.” Adams said that the arguments were the “first scene of opposition to the arbitrary claims of Great Britain” and that it was “then and there the child Independence was born.” This event deeply influenced Adams and brought him to an intellectual awakening. Almost 20 years later, Adams had the opportunity to help end general warrants when he was called on to write the search and seizure statute for the state of Massachusetts.

After Otis’ argument, the judges suspended the case until they could check on the practice of issuing writs of assistance in England. In November, the court met again and decided unanimously in favor of granting the writs to Paxton and the other Boston customs officers. Over the next few years, the arguments against writs of assistance raised by James Otis contributed to the growing list of grievances that finally resulted in the American Revolution.

‘Wilkes and Liberty!’

Two years after James Otis argued against the writs of assistance in Massachusetts, a member of Parliament became the victim of a general warrant. John Wilkes was a “burr under the saddle” of King George III and his ministers. Wilkes founded and wrote a journal, *The North Briton*, which mercilessly ridiculed the king’s government headed by Lord Bute. In April 1763, Bute resigned from office partly because of Wilkes’ constant criticisms.

George Grenville replaced Bute as the king’s new prime minister. When King George sent a speech to Parliament, Wilkes saw an opportunity to embarrass the new government. Taking care to note that the king’s speech was actually written by the prime minister, as was the custom, Wilkes wrote a scathing article in *The North Briton*. He accused the Grenville government of lying, resorting to bribery, and becoming “the tools of despotism and corruption.” King George, however, took these words as a personal insult and urged his ministers to arrest “that devil Wilkes.”

Using their own authority as the king’s secretaries of state, Lords Halifax and Egremont issued a general warrant. The warrant called for the arrest of the authors of the “seditious and treasonable paper, entitled *The North Briton*.”

On the morning of April 30, agents carrying the general warrant arrested Wilkes and took him to the home of Lord Halifax. Halifax and Egremont attempted to

question Wilkes, but he refused to cooperate. Soon, Wilkes found himself locked away in the Tower of London.

In the meantime, the agents of Halifax and Egremont searched Wilkes' home and seized a sackful of his writings. The agents also searched the houses of Wilkes' printers and others associated with *The North Briton*. In addition to Wilkes, nearly 50 other persons were arrested. One of those taken into custody was at one time Wilkes' master printer, but he had not been employed by *The North Briton* for several months. All of these searches, seizures, and arrests resulted from the single general warrant issued by Halifax and Egremont.

Early in May, Wilkes appeared before Chief Justice William Pratt of the Court of Common Pleas. Wilkes denounced his arrest under the general warrant and demanded that the court decide once and for all "whether English liberty shall be a reality or a shadow."

Chief Justice Pratt was sympathetic to Wilkes' arguments against the general warrant. But he decided to release Wilkes on the grounds that as a member of Parliament, he was immune from arrest. After his release, Wilkes was escorted home by thousands of Londoners cheering and shouting, "Wilkes and liberty!"

Wilkes was not finished with those who had caused his arrest. He and several others caught up in the general warrant dragnet sued everyone responsible for it, except the king. Chief Justice Pratt again agreed with Wilkes in his lawsuit against Lord Halifax. Pratt ruled that general warrants were "contrary to the fundamental principles of the constitution." The chief justice ordered Lord Halifax to pay Wilkes 1,000 English pounds.

The lawsuits brought against Halifax and other members of the government did not end the use of general warrants in England. The courts concluded that general warrants issued simply on the authority of government officials, as in Wilkes' case, were illegal. But general warrants, including writs of assistance, would be permitted if they were based on acts of Parliament. Despite an attempt in Parliament in 1766 to abolish these warrants altogether, they remained alive in England. It took a revolution across the Atlantic 10 years later to kill the general warrant.

State Protections Against Searches and Seizures

In 1763, the same year as the Wilkes case, England won the French-Indian War. This war was actually part of a far larger war, the Seven Years War. Although victorious in America, England was deeply in debt. Thus began the road to the American Revolution, as the British stepped up colonial taxes, customs enforcement and searches, and what most American colonists believed to be oppression.

As the revolution began, colonial legislatures began to pass laws ensuring the people's rights, including the right to protection from general warrants. On May 6, 1776 Virginia passed the Virginia Declaration of Rights stating:

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

Later in 1776, Pennsylvania adopted a statute that read:

People have a right to hold themselves, their houses, papers, and possessions free from search or seizure; and therefore warrants without oaths or affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described, are contrary to that right, and ought not to be granted.

The Declaration of Independence, approved on July 4, 1776, contained a list of grievances against the king. One grievance addressed the general warrant and power of the king's officials: "He [the king] has erected a multitude of New Offices, and sent hither swarms of Officers to harrass our people, and eat out their substance."

In 1780, John Adams wrote a Massachusetts statute against illegal searches and seizures, which later became the foundation for the Fourth Amendment. It read:

XIV. Every subject has a right to be secure from all unreasonable searches and seizures, of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected places, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure: And no warrant ought to be issued, but in cases, and with the formalities, prescribed by the laws.

Other states including North Carolina, Vermont, Maryland, and New Hampshire also created constitutional provisions against general warrants, which served as precedent for the Fourth Amendment. The new U.S. national government, created under the Articles of Confederation, did not have a bill of rights. Its powers were so limited that none was required. It was up to the individual states to protect the rights of their citizens. The need for a national bill of rights changed when a new constitution created a stronger national government.

The Constitutional Convention and the Push for a Bill of Rights

In 1787, the Constitutional Convention was held. Meeting for several months, the delegates threw out Articles of Confederation and wrote a new constitution. The Constitution granted powers to the federal government, but it did not contain any protections for individual rights of the people. In fact, no discussion about adding a bill of rights occurred until a few days before the convention adjourned. When the motion was made to insert specific rights, it was defeated because the convention thought the state safeguards reserving rights to the people were sufficient. The discussion of placing a bill of rights into the Constitution was brief, and its omission turned out to give ammunition to those opposing the ratification of the Constitution, the Anti-Federalists.

As states held conventions to decide whether to ratify the Constitution, many called for a bill of rights to be placed in the Constitution to guarantee people's liberties. Advocates of the Constitution argued that a bill of rights was not necessary. They pointed out that the new government had limited powers and state constitutions protected individual rights. In addition, they argued that listing all people's rights was impossible, and any omission of a right would imply that people did not have that liberty.

These arguments did not convince the Anti-Federalists, led by Patrick Henry. The Anti-Federalists believed that without a bill of rights, the national government would have too much power and the president would grow into a king. People's fear of another powerful government, like the king's, drove the resistance against the Constitution and eventually ensured the enactment of the Bill of Rights.

To get the Constitution adopted, several states agreed to ratify the Constitution on the condition that the new Congress under the Constitution would introduce a bill of rights. The first state to make such an agreement was Massachusetts. The state proposed amendments to be considered by the Congress should the Constitution go into effect. This compromise led to Massachusetts being the sixth state to ratify the Constitution. On June 21, 1788, New Hampshire entered into a similar agreement and became the ninth and last state needed to ratify the Constitution.

The First Congress and the Bill of Rights

When the First Congress under the new Constitution met, Congressman James Madison of Virginia, a leader at the Constitutional Convention and later a U.S. president, made nine proposals for the Bill of Rights. On June 8, 1789, the first draft of the Fourth Amendment was introduced to Congress. The amendment was based on John Adams' search and seizure statute written into the Massachusetts Constitution.

On July 21, 1789 Madison's propositions were referred to a Committee of Eleven, which contained one member from each state that attended the

Constitutional Convention. The Committee of Eleven reviewed and revised the proposed amendments and sent them back to the House of Representatives.

On September 25, 1789, Congress approved the Bill of Rights and sent it to the states for ratification. A little more than two years later, on December 15, 1791, Virginia ratified the Bill of Rights, giving it the needed majority to go into effect. The ratification of the Bill of Rights caused the popularity of the Constitution to grow immediately. It softened those opposing the Constitution and persuaded the remaining states to ratify and support the Constitution.

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Like the other amendments in the Bill of Rights, the Fourth Amendment at first only protected against actions by the federal government. Following the Civil War, however, the 14th Amendment was adopted. Its due process clause stated: “No State . . . shall deprive any person of life, liberty, or property, without due process of law” Over time, the courts interpreted this clause to require that states respect the fundamental liberties that are “rooted in the tradition and conscience of our people.” The Fourth Amendment’s protection against unreasonable searches and seizures is one of these fundamental liberties. Hence, today, all government officials—federal, state, and local—must follow the Fourth Amendment.

For Discussion and Writing

1. The following is an excerpt from a speech given by William Pitt the Elder to Parliament in 1766. Based on his words, would Pitt have been a supporter or an opponent of general warrants? Why?

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; all his force dares not cross the threshold of the ruined tenement.
2. What does the phrase “a man’s house is his castle” mean? Was a man’s house his castle in old England? Why or why not?
3. Give two specific arguments that John Wilkes could make against the general warrant. Then give two specific arguments that Lord Halifax could make for the general warrant. Which do you find more persuasive? Why?

ACTIVITY

What's Wrong With This Warrant?

Form five small groups. Each group should do the following:

1. Carefully read the Fourth Amendment of the U.S. Bill of Rights.

The right of 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.

2. Read the warrant printed below looking for any violations of the Fourth Amendment. Make a list of Fourth Amendment violations and be prepared to discuss them with the rest of the class.

Warrant

To any sheriff, policeman, or peace officer in the county:

Proof having been made before me under oath by Officer Charles Paxton that there is probable cause to believe stolen property may be found at the location described below, you are hereby commanded to search the residences in the south side of this city. You are further commanded to seize to any objects or papers you believe might be connected with thefts that have occurred in this city. You are also authorized by me to use whatever means you believe are necessary to uncover stolen property that may be hidden in the residences described above. You are finally commanded to arrest any person who you believe may be a criminal.

Samuel P. Stonecase
Judge of the Court

There are probably five important things wrong with this arrest warrant. A reporter from each group should identify one problem and explain why it violates the Fourth Amendment.

Hold a group discussion on each violation. Conclude the activity by discussing this question: Why is it important to “particularly” (specifically) describe places, things and persons on search and arrest warrants?

Follow-up Activity

Groups should rewrite the warrant so that it meets the requirements of the Fourth Amendment.