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Tyler Clendenin
University of South Florida

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An Addictive Failure:
The War on Drugs and the Erosion of Fourth Amendment Rights

Tyler Clendenin

Mentor: Dr. Steven Tauber

Spring 2011

Introduction and Overview

This work seeks to demonstrate how the prohibitive policy of the war on drugs has eroded the scope of Fourth Amendment protections. It is important for citizens to know the protections afforded to them through the Fourth Amendment by understanding its intent, to recognize when a decision or initiative deviates from this intent, and to defend these protections when confronted with government abuse of power. This work will address these issues in four chapters devoted to the history and intent of the Fourth Amendment, the development of the Fourth Amendment through important Supreme Court cases, the political sphere's influence on the erosion of the scope of the Fourth Amendment, and an analysis of observable Supreme Court case trends and sociopolitical inconsistencies that suggests an alternative solution to the current punitive focus of the war on drugs. Unlike the rationale of the war on drugs, this alternative solution will not accept an erosion of the Fourth Amendment as an acceptable expense.

The first chapter of this work will concentrate on the historical perspective of the Fourth Amendment ranging from the time of early British common law to the adoption of the Fourth Amendment by the Framers. It will demonstrate that negative attitudes toward unreasonable search and seizure extend many hundreds of years prior to the Fourth Amendment, rooted in resentment of the arbitrary abuse of power by monarchs until the first symbolic statement against such power occurred in the writing of the Magna Carta. The chapter will demonstrate that the Magna Carta enabled those who spoke against the abusive power of the Crown to appeal to protections against that power as a return to a precedent established by the charter. The abusive power of the Crown often manifested in the form of the general warrant, which allowed Royal agents to search the homes and seize materials of British citizens at the Crown's whim.

The first chapter will also examine the influential cases involving John Wilkes and John Entick. John Wilkes was the author of the controversial “Number 45” issue of the *North Briton*, which criticized the King, and John Entick was one of the printers of the issue. The men were arrested by a general warrant issued by an agent of the Crown, and this provided the legal opportunity to condemn the warrants for their far-reaching and abusive power. Lord Camden’s opinion did just that when he stated that the power a warrant grants should be proportional to the clarity of the law authorizing that power. His ruling also called for the Crown to pay damages to Wilkes and Entick.

This ruling against the power of the Crown and the general warrant was internationally celebrated and certainly did not escape the watchful eye of the colonies. Colonists in Massachusetts and New Hampshire had been subjected to general writs of assistance and the same resultant abuses of power, so it was certainly relevant to the situation in the colonies. James Otis Jr. was so inspired by Lord Camden’s ruling that he presented a fiery oration against the writs of assistance on the behalf of merchants at a proceeding concerning whether the writs should be renewed, and this speech greatly affected John Adams.

Adams characterized the speech as breathing life into the nation, and it was Adams’ writing of Massachusetts’ Constitution that most resembles the wording of the Fourth Amendment today. Thus, the Fourth Amendment was the embodiment of centuries of ideology prioritizing the rights of the individual and the restriction of government abuse of power, and this context is incredibly important in the interpretation of its intent.

The second chapter of this work will examine the development of the Fourth Amendment through the Supreme Court. While the Fourth Amendment has hundreds of years of historical

context behind its formulation, its wording is relatively short considering the number of issues it speaks to in today legal system. As a result, this second chapter will begin with the case that set the Framers' standard for the proper interpretation of the Fourth Amendment in *Boyd v. United States*. The Court in *Boyd* cited the opinion of Lord Camden, who had greatly influenced the Framers, and expounded upon his declaration requiring powers of warrants to have equally clear laws authorizing them by declaring that the Fourth Amendment should be liberally construed. Essentially, the Court in *Boyd* argued for a wide scope of Fourth Amendment protections that would honor the individual's right of personal security, liberty, and private property.

The cases in the second chapter will be divided thematically by addressing the Supreme Court's interpretation of the Fourth Amendment regarding probable cause, warrantless searches, technology, automobiles, voluntary consent to search and seizure, reasonable searches, the exclusion of illegally obtained evidence, and so on. These considerations are not explicitly described in the Amendment, so an examination of the Court's treatment of these issues is necessary to understand its progression. The reader will note that most landmark Fourth Amendment cases concern federal law's applicability to the state, alcohol during prohibition, and drugs from the late 1960s and beyond. The first chapter and *Boyd* will arm the reader with the necessary tools to recognize when the Court's rulings honor the original intent of the Fourth Amendment and when they fail to do so.

The third chapter will examine how the political sphere influenced the erosion of the scope of the Fourth Amendment by encouraging an unreasonable and unachievable punitive policy route. It will briefly address how alcohol prohibition and the war on drugs rely on the power of symbolism. Moral terms were employed in both prohibitive policies, but the war on drugs differs through it being successfully encompassed within the doctrine of national security.

Drugs were blamed for America's problems, and when President Nixon first declared war on them it represented the beginning of the political sphere's zealous pursuit of the eradication of drugs. By encompassing the war on drugs within the national security doctrine, the political sphere could portray patriotism as ceding personal liberties in times of war for the well-being of the country and thus secure public support.

The White House and Congress prioritized the reduction of supply in source and transit countries abroad to drive up the domestic price of drugs at home beyond a level that Americans could afford. When this approach failed, the focus shifted to include domestic enforcement. Drug czars, namely William Bennett of George H. W. Bush's administration, employed a harsh approach to the domestic enforcement of drug policy. Drug users were demonized and deemed morally deficient, and casual users who were able to consume responsibly and maintain a respectable life were considered "highly contagious" users because unlike the addict at rock bottom, their use could appeal to others.

The socioeconomic factors relating to drug use and sale were largely ignored. The funding for prevention, drug treatment, rehabilitation, and education paled in comparison to the money allocated for enforcement. The political sphere felt that a punitive approach could solve the drug problem, but every instance suggesting the failure of this policy was deemed a result of below average effort. The response was one-sided and encouraged escalation and tangible results from law enforcement measures – every politician wanted to be "tough" on drugs. This placed an extreme amount of pressure on law enforcement. When an individual purchases drugs, it violates the traditionally understood concept of a "crime" because the activity is consensual on the part of the purchaser and seller. There is no victim to corroborate law enforcement's

investigation and case, so meeting the expectations of the political sphere would require more intrusive measures and police work.

Enforcement agents could not meet the expectations of the political sphere without circumventing the Fourth Amendment or misrepresenting the facts of the case in order for their police work to appear to toe the line of constitutionally acceptable behavior. The probable cause standard of the Fourth Amendment was only as relevant as an officer's willingness to honestly represent the facts of the case. It was the officer's word against the demonized drug user or seller, and it was all too easy for officers to either get caught up in the drug trade or rationalize their misrepresentation of the facts as "for the greater good." Washington seemed to be sending the message that this was acceptable. Consequently, the political sphere was complicit in placing the wolves in charge of the sheep and this crippled the Fourth Amendment.

The final chapter will present a very noticeable trend in Supreme Court behavior to adopt a narrow construction of the Fourth Amendment during times when prohibition is emphasized and to prioritize a liberal construction of it when no prohibitive mandate exists. This suggests what seems obvious – Supreme Court Justices are not immune to the mandates and priorities of those involved in appointing them to their seat, and this is very evident when one examines Supreme Court decisions during the war on drugs. This chapter will present *Boyd* as the standard for an interpretation of the Fourth Amendment that honors the intent of the Framers. It will argue that decisions made to ease the burden of law enforcement during these times where prohibition was prioritized deviate from an interpretation of the Fourth Amendment that the Framers would support.

The chapter suggests that drug prohibition is inconsistent with a society that recognizes the addictive and dangerous effects of nicotine and alcohol but accepts their legality.

Consequently, the alternative solution of decriminalization and regulation is more consistent than the current path, and offers the opportunity to focus funding on prevention, education, treatment, and rehabilitation rather than incarceration. The well-being and health of the citizens of this country should be placed above politics, and this route provides for that possibility. The treatment of alcohol in post-prohibition America presents a possible path for the regulation of drugs to mimic. While such a plan is not perfect or without its expenses, it honors the intent of the Framers because the protections they envisioned the Fourth Amendment would provide will not be among those expenses.

Chapter I: Fourth Amendment History and the Framers's Intent

This chapter will describe the centuries of British common law preceding the Fourth Amendment that aid in determining the ways in which this rich history influences the Framers. As British subjects and intellectual, they would have been quite aware of the common law concerning search and seizure and unreasonable and arbitrary government abuses of power.

This chapter will begin with brief examples from the Anglo-Saxon and Anglo-Norman era detailing the sanctity of a man's home and the laws relating to its protection. It will describe trends for monarchs to arbitrarily abuse power by circumventing and thus weakening the laws of the land. The Magna Carta represents the first symbolic charter against unreasonable arbitrary abuses of power by responding to the actions of King John. The Magna Carta would then be later referenced by the influential Sir Edward Coke, who would give the text some relevancy to search and seizure matters by arguing that the charter represented a legal precedent that reformers could appeal to against the abuses of the Crown.

The influence of the reformers culminates in the legal decision of Lord Camden in regards to the case of John Wilkes and his printers, who were subjected to arrest via general warrants on the charge of libel. This chapter will explore the ways in which Lord Camden's condemnation of the general warrants used by the Crown and his favorable ruling for Wilkes impacted the perception of general warrants internationally. The case was famous in the colonies, and was referenced by James Otis Jr. in his fiery condemnation of the general writs of assistance the Crown used there. This chapter will describe how this speech by James Otis influenced John Adams, who later constructed the Massachusetts state Constitution that so closely resembled the final wording of the Fourth Amendment.

The result of these influences was the construction of the Fourth Amendment, which encompassed the perception of British common law and the intent of early reformers by prioritizing the protection of the individual against the arbitrary and excessive abuses of power by the government.

The Building Blocks: Early British Common Law

Anglo-Saxon and Anglo-Norman times detailed laws protecting one from the offense of hamsocn or “invasio domus,” the forcible entry into a man’s home.¹ A man who, in the course of protecting his home from this offense, killed an intruder was not expected to have to pay any compensating fine or suffer any penalty. Additionally, whoever committed this offense in the time of King Edmund’s reign (940-48) forfeited all his property and even his life if the King desired it. In the time of Alfred the Great (871-891) there were several examples where the king put to death judges whose mistaken rulings negatively affected his subjects. Among these mistakes were false warrants issued on false suggestion and the issuing of warrants of indictment “not special.”²

While little is known about the rule of law governing official search and seizure during Anglo-Saxon and Anglo-Norman times, there is very little reason to believe that authorities were limited by the safeguards we understand today when official search was necessary – the badge of agents provided all the required authority needed in their daily administrative duties.³ In spite of this, these two kings provide brief examples of the prioritization of the privacy of a man’s home and the condemnation of a false and vague warrant that resulted in the abuse of government power at the expense of the individual. These principles were expounded upon in the first symbolic statement against the arbitrary powers of the Crown – the Magna Carta.

¹Colman, R. V. (1981). “Hamsocn: Its Meaning and Significance in Early English Law.” *The American Journal of Legal History*. Vol. 25 No. 2, pg. 95-6.

²Lasson, N. B. (1937). *The history and development of the fourth amendment to the United States Constitution*. Baltimore: Johns Hopkins Press, quoted in pg. 49-50. Hereafter shortened and referred to as *Fourth Development*.

³*Fourth Development* pg. 22

A Statement Against Extralegal Action: The Magna Carta

The early thirteenth century English Charter known as the Magna Carta was a response to the extralegal action of King John.⁴ King John often took the law into his own hands for his own pleasure, at times totally disregarding the legal procedures of the day by sending forces to imprison subjects or seize their property. The Magna Carta sought to bolster the legal principles and procedures that King John so boldly circumvented and undermined by affirming the validity of the law. Article 39 essentially reads as a direct response to these actions: “No free man shall be taken or [and] imprisoned or disseised or outlawed or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or [and] by the law of the land.⁵”

While the reader might recognize the early foundation for the due process clause in this quote, this particular article does not directly address the Fourth Amendment as we understand it today. While Article 39 of the Magna Carta would be reexamined hundreds of years after its writing and greatly influence the perception of issues relating to search and seizure, this connection had not yet been made in the thirteenth century era that it was issued.

Continuing King John’s trend: General Search Power and Citizen Response

It was not until the close of the fourteenth century that the idea of issuing general warrants granting unrestricted powers was considered an arbitrary abuse of subjects’ liberties by some in Parliament. Emerging ideas of reform permeated the common law as a response to egregious parliamentary and Crown action, such as when innkeepers in passage ports were required to search guests for imported “false money.⁶” Innkeepers turned the money over to

⁴Miller, E. (1962). “Review: The Background of Magna Carta.” *The Northerners: A Study in the Reign of King John* by J.C. Holt *Past and Present*. No. 23, pg. 73.

⁵*Fourth Development* quoted from pg. 20.

⁶*Fourth Development* referring to statute 9 Edw. III, St. II, ch.11 on pg. 23

customs agents, and eventually another act was necessary just to control the abuses suffered at the hands of those agents.⁷

Later acts would give general searching powers to different organized trades in order to enforce regulations. This was evident in Henry VI granting the company of Dyers in London the power to search for and seize cloth dyed with logwood.⁸ A few years later, during the time of Henry VIII, a similar act would pass giving governing authorities “full power and authority to search for all manner of oils brought in to be sold, in whose they be, and as often as the case shall require.”⁹ The reader should note a recurring issue in each of these acts – the power given to authorities for search is not limited by time constraints or any explicit expiration date for which the power ceases to exist. At this time searchers were also not required to secure permission for every subsequent search; the acts calling for these general searches provided authorities with limitless opportunities to invade the privacy of citizens.¹⁰

In 1566, the Court of Star Chamber ushered in the era of requiring licensing for books and restrictions on printing – regulations that could never be properly enforced.¹¹ The Star Chamber empowered wardens or any two members given authority by them the capacity to open all packs, trunks, and books brought into the country, or at any place where they suspected a violation of the laws of printing. It is important to note that everything was left to the discretion of the bearer of the warrant because persons and places were not necessarily specified in them; no oaths, probable cause, or evidence was necessary to secure these warrants, and often the

⁷*Fourth Development* referring to 4 Hen. IV, ch. 21 Act that prohibited the farming of offices, their occupation by deputy, and the acceptance of gifts from merchants on pg. 23

⁸*Fourth Development* pg. 24

⁹*Fourth Development* referring to 3 Hen. VIII, ch. 14 on pg. 24

¹⁰*Fourth Development* pg. 26

¹¹Cheyney, E. P. (1913). “The Court of Star Chamber.” *The American Historical Review*. Vol. 18 No. 4, pg. 736.

general warrants were based on the faintest of rumors in order to secure real evidence to support a charge.¹²

A 1596 Privy Council warrant was especially important in the history of egregious search and seizure actions. Instead of a search based on action arousing suspicion, a warrant was issued to obtain information to see whether or not a citizen possessed something incriminating. The search in this example precedes any charged offense.¹³ At times warrants were issued to search for and arrest every person suspected of libels, like the general writ of assistance (which would eventually outrage the colonists) that derived from a statute in 1662 for the improved enforcement of customs laws.¹⁴ Evidence as early as 1621 demonstrates some members of Parliament recommending that the use of such warrants should be limited.¹⁵

*Cooper v. Boot*¹⁶ sheds light on why writs of assistance had some in Parliament worried about their frequent use. In his ruling, Lord Mansfield declared that the “writ of assistance...is no warrant” because “it is general and leaves all to the discretion of the customs-house officers.¹⁷” This implies that those wary of writs of assistance felt that a firmer directive based on something other than the agents own discretion was necessary to prevent an abuse of power.

The Magna Carta, The Petition of Right, and the Crown’s Response

The abusive potential for these warrants is perfectly illustrated through the actions of Charles I. He employed warrants and named persons to arrest at his own whim. The Petition of Right in 1628 prevented further abuse by the King by denying his right to arrest his subject

¹²*Fourth Development* pg. 26

¹³*Fourth Development* pg. 26

¹⁴*Fourth Development* pg. 28

¹⁵*Fourth Development* pg. 29

¹⁶Amar, A. R. (1996). “The Fourth Amendment, Boston, and The Writs of Assistance.” *Faculty Scholarship Series*. Paper 1000. Case taken from pg. 58 referring to 4 Dougl. 338, 99 Eng. Rep. 911 (K. B. 1785).

¹⁷Smith, M. H. (1978). *The Writs of Assistance Case*. Berkeley and Los Angeles: University of California Press, Ltd., pg. 38.

without cause, declaring such actions as contrary to the Magna Carta and the laws of England.¹⁸

It was during this time that Sir Edward Coke, a respected authority and legal mind amongst the public in his day, made a significant contribution to the perception of rights against unreasonable search and seizure based on Article 39 of the Magna Carta.¹⁹ He was influenced by Robert Beale, clerk of the Privy Council, who first linked the Magna Carta to having one's home secured by right.²⁰ He interpreted from the text that the Magna Carta provided for the existence of warrants for the established legal principles of the time. Even if this judgment was an error on the part of Coke and those who agreed with his stance, it had an undeniable impact on reform. Instead of arguing for search and seizure rights as a new, progressive ideology, Coke's interpretation of Article 39 allowed him to argue that the desired reform had a precedent in the pages of the Magna Carta.²¹

The Privy Council responded by authorizing violence to collect taxes and even legitimized actions like searching for different documents in the homes and personal property of those who spoke against the King in parliament.²² Sir Edward Coke had his own documents rifled through on his deathbed by officials. Since he was a key opponent of the King's actions, officials believed they would find seditious papers in his home. The Privy Council also wanted to prevent him from preparing any work that would speak against the King's initiatives.²³ While the Long Parliament in 1640 eliminated certain employers of general warrants and questionable

¹⁸Foster, E. R. (1974). "Petitions and the Petition of Right." *The Journal of British Studies*. Vol. 14 No. 1, pg. 21. A Petition of Right was a parliamentary means of seeking justice from the throne for grievances the monarch had committed against his subjects.

¹⁹*Fourth Development* pg. 21

²⁰Levy, L. W. (1999). "Origins of the Fourth Amendment." *Political Science Quarterly*. Vol. 114 No. 1, pg. 80. Hereafter referred to as *Fourth Origins*.

²¹Sklansky, D. A. (2000). "The Fourth Amendment and Common Law." *Columbia Law Review*. Vol. 100 No. 7, pg. 1762.

²²*Fourth Development* pg. 30 The Petition of Right did not alleviate the King's desire to collect taxes for revenue.

²³*Fourth Development* pg. 31

search methods such as the Court of the Star Chamber and its tribunal, once it was established it essentially disregarded personal liberties like its predecessors.²⁴

As the rights of the individual became an even greater socially significant question, the influential decisions of Chief Justice Hale offered much to Fourth Amendment ideology. Hale found general warrants seeking to apprehend all persons suspected of a crime as void and declared the existence of such warrants was not a protection against claims of false imprisonment. He stated that a warrant was only valid if it named a particular place to search and offered a justifiable reason to a magistrate; essentially, Hale objected to the one executing the warrant acting as his own judge (notice the early probable cause implications).²⁵ This implied that general warrants provided no additional power beyond what would be available by common law.

In the face of this apparent progress against the general warrant, parliament stunted the possibility of further reform via the Licensing Act of 1662 that limited the press. The act was later criticized by parliament not for its restrictive nature, but for being prone to favoritism in its enforcement and generally inefficient.²⁶ The act expired when Charles II chose not to call parliament in 1679, but the King did not want to lose the power to limit the press that it had provided. He sought advice from the twelve judges of England, asking them to convene and determine whether or not the press could be regulated as effectively by common law as by the statute. They eventually ruled that it was illegal to publish or write any material without a license signaling consent from the King.²⁷

²⁴*Fourth Development* pg. 32

²⁵Davies, T. Y. (1999). "Recovering the Original Fourth Amendment." *Michigan Law Review*. Vol. 98 No. 3, pg. 578-9. Hereafter referred to as *Recovering Fourth*.

²⁶Sirluck, E. (1960). "Areopagitica and a Forgotten Licensing Controversy." *The Review of English Studies*, New Series. Vol. 11 No. 43, pg. 260.

²⁷*Fourth Development* pg. 38 Chief Justice Scroggs was known to attempt to appear agreeable to the crown, explaining how the judges could have come to the conclusion that common law could justify their decision that anything written and published sans license was illegal.

After the Revolution of 1688, King William made several progressive decisions in regards to the freedom of his subjects. He abolished “hearth-money²⁸” on the basis that it oppressed citizens by “...exposing every man’s house to be entered into, and searched by persons unknown to him.²⁹” By this point the freedom from unreasonable search and seizure had crystallized in the public perception to the degree that citizens sought to protect it. Their knowledge of the implications of parliamentary actions was extensive enough to realize when it was being threatened. This was evident in the response to Walpole’s proposed “Excise Scheme” in 1733.³⁰ The implicit search provisions of the idea enraged the public to such a degree that he was forced to withdraw the bill.³¹

The John Wilkes Case

In 1762, a chain of events occurred in England that greatly influenced the colonists. John Wilkes began anonymously publishing a series of pamphlets called the *North Briton*. The series served as a platform to criticize ministers and different policies of government. The series continued until he released the controversial “Number 45” of the series, which attacked the King’s Speech in part because it had praised a poorly regarded cider tax.³² Secretary of State Lord Halifax responded by ordering messengers to search for all responsible for the release of the issue and to seize them with their documents.³³ Through Lord Halifax’s general warrant, forty-nine individuals were apprehended and arrested in three days. When Wilkes was eventually discovered as the creative mind behind the issue, he refused to obey the summons.

²⁸Marshall, L. M. (1936). “The Levying of the Hearth Tax, 1662-1688.” *The English Historical Review*. Vol. 51 No. 204, pg. 628. Hearth-money was a 2 shilling tax paid in half-yearly installments on all domestic hearths. Hereafter this reference will be referred to as *Hearth Tax*.

²⁹*Hearth Tax* pg. 630

³⁰*Fourth Development* pg. 40-1

³¹*Fourth Development* pg. 41

³²*Fourth Development* pg. 43

³³*Fourth Development* pg. 43

The messengers responded by taking him up in his chair and later returned to break open his drawers to seize his papers.³⁴

Wilkes had not entered into this fight unprepared. He sued the government for false imprisonment on the basis that the general warrant issued to justify his and his printers' arrests was void of any such power. The matter was brought before Chief Justice Pratt, who sided with Wilkes and awarded monetary damages to those imprisoned by the general warrant. Pratt declared that his ruling against the power of the warrant was the greatest issue he had dealt with in his practice.³⁵ Wilkes' initial suit against Undersecretary Wood for superintending the warrant's execution won him 1000 pounds. Wilkes received an additional 4000 pounds years later in a suit filed against Lord Halifax. Leach, a printer of the *North Briton*, was also awarded 400 pounds when he filed his suit against the government. It was appealed but upheld in *Money v. Leach*.³⁶

In the end, government expense totaled more than 100000 pounds.³⁷ Wilkes' case was highly influential and internationally celebrated – it certainly did not escape America's watchful eye.³⁸ The message against general warrants was clear: “no degree of antiquity can give sanction to a usage bad in itself.”³⁹

Lord Halifax was not so discouraged by the ruling that he did not try to exploit it and work around the specificity requirements of warrants. He issued a warrant specific as to whom to arrest but general as to what papers to seize. John Entick, the subject of the warrant, sued and

³⁴*Fourth Development* pg. 43

³⁵*Fourth Development* pg. 45

³⁶*Fourth Origins* pg. 88 *Wilkes v. Wood*, Wilkes filed suit against Undersecretary Wood. Punitive Damages had been ruled possible by an earlier cause *Huckle v. Money*

³⁷*Fourth Origins* pg. 88

³⁸Maier, P. (1963). “John Wilkes and American Disillusionment with Britain.” *The William and Mary Quarterly*. Third Series. Vol. 20 No. 3, pg. 375. Colonists were even naming places after Wilkes.

³⁹*Fourth Development* pg. 47 Judges Yates and Anson in *Money v. Leach*

received 300 pounds in damages. The case was later argued before the Court of Common Pleas, and in 1765, Pratt (now dubbed Lord Camden) delivered a landmark opinion in English liberty.⁴⁰

Lord Camden argued that if the government was allowed to issue these types of warrants, the secret cabinets and bureaus of every subject would be open to search and inspection on the whim of the secretary who merely suspected a person to be in some way responsible for libel. He concluded that the more power a warrant grants, the more clear the law that warrants that power should be. It is important to note that Lord Halifax's foray into exploitive loopholes to justify the arrest was unsuccessful and that the focus was on ensuring a check to government abuses of power. Furthermore, Lord Camden's decision implied that evidence seized on the authority of general warrants could not be used without violating the right against self-incrimination.⁴¹

The Colonies and the Writs of Assistance

In America, colonists were familiar with general warrants. Since colonial law derived from and often copied British law, the colonists were subjected to general warrants as well. While Sir Edward Coke and other British historical figures were able to use the Magna Carta as a means for legitimizing search and seizure reform as a return to a precedent, the Fourth Amendment in America would renounce colonial precedents.⁴² The search and seizure implications of tax laws, like the Excise Tax, resulted in similar hostile sentiments in America.⁴³

The issue of general warrants escalated in importance when the Royal Governor Shirley of Massachusetts issued ex officio writs of assistance, a type of general warrant that caused much

⁴⁰Loewy, A. H. (1983). "The Fourth Amendment as a Device for Protecting the Innocent." *Michigan Law Review*. Vol. 81 No. 5, pg. 1238. Hereafter referred to as *Fourth Protection*

⁴¹*Fourth Protection* pg. 1239

⁴²*Fourth Origins* pg. 82

⁴³*Fourth Origins* pg. 83 Sam Adams: "the most pernicious attack upon English liberty that was ever attempted."

controversy in the colonies. Since 1745, the colonies were subjected to British officials that essentially operated as gangs. They had access to general warrants provided by the governor that allowed them into private homes as well as taverns and inns. The writs of assistance were more inflammatory than the general warrants used to arrest Wilkes, as the general warrants in his instance were limited to that case.⁴⁴ The writs of assistance were particularly outrageous because they were not limited in scope or time. Employers of the writ of assistance did not even return them – each writ was valid through the entire lifetime of the sovereign that issued it.⁴⁵ This essentially provided every official with a writ of assistance absolute power to use at his own discretion.

In Massachusetts it was not unusual for officials to forcibly enter buildings based on their title alone. Such actions technically had no legal justification, as enactments regarding collectors from the Crown went unopposed for a long time. Resistance to the officials and the writs Governor Shirley provided them with eventually increased. In response to this criticism, the governor recommended that officers seeking writs of assistance apply for them at the Superior Court of the province. The Superior Court obliged and by 1755 it was comfortably issuing the writs.⁴⁶

This practice continued until events in 1760 complicated the matter. Sir Francis Bernard was named governor of Massachusetts; he was known as a reliable officer friendly to the Crown. The second matter of great importance was the death of Chief Justice Sewell of the Superior Court. Sewell had granted writs of assistance but was known to doubt their legality.⁴⁷ Former Governor Shirley had promised the next vacancy to the liberal-leaning James Otis Sr., but

⁴⁴Hickman, E. (1932). "Colonial Writs of Assistance." *The New England Quarterly*. Vol. 5 No. 1, pg. 84. The writs are founded upon an act of Charles II in 1662. Hereafter referred to as *Colonial Writs*.

⁴⁵*Fourth Development* pg. 54

⁴⁶*Colonial Writs* pg. 84

⁴⁷*Fourth Development* pg. 57

Governor Bernard preferred Thomas Hutchinson, a man he knew would side with Britain in controversial issues. Hutchinson was awarded the seat, but he was not very popular because of his pro-Crown views.⁴⁸ The year ended with the death of George II; this was particularly important because all writs of assistance expired six months after the death of the sovereign.⁴⁹

Consequently, by 1761 all writs of assistance had expired. James Otis Jr. and Oxenbridge Thacher, prominent liberals of the time, led a group of Boston merchants in a hearing in court concerning the granting of new writs (only Massachusetts and New Hampshire had experienced the writs, and Boston merchants wanted to address the disparity).⁵⁰ Jeremiah Gridley, representing the customs officers, argued that the statute of 1662 provided for writs of assistance issued through the English Court of Exchequer, the statute of William gave officers in America the same powers as in England, and that a provincial statute in Massachusetts gave the Superior Court all the jurisdiction of the two aforementioned British constructs. He concluded that the court was bound through these things to issue the writs.⁵¹

This set the stage for an argument by James Otis Jr. that would proceed to influence men in the audience like John Adams, who later wrote that "...Mr. Otis's oration against the Writ of Assistance breathed into this nation the breath of life."⁵² Otis argued that since general warrants had no foundation in common law, the writs of assistance mentioned by statute should be regarded as special like the writs provided for in the act of 1660, especially since the latter statute Gridley referred to did not clearly define the writ.⁵³ He also argued that even if the statute did authorize general warrants, the fact that it was passed in the time of Charles II, who was known

⁴⁸*Fourth Development* pg. 57

⁴⁹Farrell, J. M. (2006). "The Writs of Assistance and Public Memory: John Adams and the Legacy of James Otis." *The New England Quarterly*. Vol. 79 No. 4, pg. 535. Hereafter referred to as *Otis Legacy*.

⁵⁰Frese, J. R. (1957). "James Otis and Writs of Assistance." *The New England Quarterly*. Vol. 30 No. 4, pg. 497. Hereafter referred to as *James Otis*.

⁵¹*Fourth Development* pg. 58

⁵²*Fourth Development* pg. 59

⁵³*Otis Legacy* pg. 536

for his arbitrary abuse of power, suggested that it violated the Magna Carta.⁵⁴

Thacher argued that according to the explicit wording of the statute of 1662, valid writs of assistance had to be issued from the English Court of Exchequer, and that Parliament had provided the power for this court only to issue it. He concluded that Gridley's argument could not bridge the gap between the statute of 1662's express wording and the Superior Court's claim to the same jurisdiction as its English counterparts. Thacher's argument was persuasive enough that Hutchinson sought legal advice from England.⁵⁵ However, instead of questioning the liberally-minded Chief Justice Pratt, he wrote to the agent of the province in England, who affirmed the power of the Superior Court.

This unpopular decision and the actions of the Superior Court led to legislative response. The legislative body in America felt that if the provincial statute in Massachusetts had influenced the decision to affirm the jurisdiction of the Superior Court, then it could use that same power to withdraw the statute to possibly affect the decision. Governor Bernard defeated these attempts by the legislation, and legislation responded by reducing the salaries of the members of the Superior Court.⁵⁶

By 1765, England had begun to lose control. The Sugar Act of 1764 followed by the Stamp Act of 1765 furthered America's progress on the path to independence. Hutchinson's part in the writs of assistance case was not forgotten by Americans when they rioted against the Stamp Act and promptly destroyed his house. The eventual repeal of the Stamp Act could not stem American resentment, as unfriendly crowds began congregating around houses to prevent officers from making searches.⁵⁷

⁵⁴*Fourth Development* pg. 59

⁵⁵*James Otis* pg. 497

⁵⁶*Fourth Development* pg. 66-7

⁵⁷*Fourth Development* pg. 68

Frustrated officials wrote to England for help to legitimize their ability to perform searches and prosecute those who would obstruct it, but the attorney general and solicitor general held that the writs of assistance used by customs officers were invalid and that no prosecution was necessary.⁵⁸

Crown forces in America decided to keep this ruling a secret, and the Townshend Acts of 1767 sought to remedy a possible legal disaster. The acts gave the highest court in each colony the role of the Court of Exchequer in England.⁵⁹ Now writs of assistance were possible in all thirteen colonies. Only Massachusetts and New Hampshire continued to issue them while the other colonies stalled.⁶⁰ Citizens did not make administration of the law easy – riots and several colonial courts made customs officers either fear making a seizure or weakened their authority by questioning the legality of the writs. Chief Justice Allen of Pennsylvania declared he had no legal authority to issue them, and even after he was confronted with a copy of the writ and the Act of Parliament that made it possible, he would not yield to granting anything outside of “particular writs whenever they are applied for on oath.”⁶¹

A South Carolina judge explained his court’s refusal to issue the writ by stating it violated the safety of the subject secured by the Magna Carta. Georgia judges would only authorize search warrants for specific occasions if supported by an affidavit, while Virginia issued writs that were obnoxiously specific to the customs office.⁶² Over the span of a few years American rhetoric finally matched reality when the Declaration of Independence was written, for it inspired the construction of state constitutions.⁶³

⁵⁸*James Otis* pg. 504

⁵⁹Chaffin, R. J. (1970). “The Townshend Acts of 1767.” *The William and Mary Quarterly*, Third Series. Vol. 27 No. 1, pg. 92

⁶⁰*Fourth Origins* pg. 90

⁶¹*Fourth Origins* pg. 90

⁶²*Fourth Origins* pg. 91

⁶³*Fourth Origins* pg. 92

State Constitutions and the Formulation of the Fourth Amendment

Individual state constitutions brought different ideologies to the forefront in regards to search and seizure practices. Virginia's Declaration of Rights labeled general warrants as grievous and oppressive, stating they "ought not" to be granted.⁶⁴ Pennsylvania's recognized a right of the people in positive terms rather than just condemning general warrants. It also required specificity and was the first to require that an informer swear he had "sufficient foundation" for specific information regarding the things described.⁶⁵ Delaware was the first to deem "illegal" all warrants not meeting the constitutional requirement for specificity.⁶⁶ The Massachusetts model was the most important, as it is the one the Fourth Amendment closely resembles. The Massachusetts model was the work of John Adams, the man who had been so inspired by Otis Jr.'s speech in 1761.⁶⁷

After the revolution Massachusetts stuck to its provision and commitment to specific warrants. Rhode Island (which had no state constitution) and New Jersey (which had a constitution that did not address search and seizure) mandated specific warrants through legislation. In remaining states, general warrants were still used but it was an increasing trend for specific ones to be employed in instances regarding theft.⁶⁸ *Frisbie v. Butler* in Connecticut furthered progress by concluding that warrants had to be limited to places a judge suspected should be searched and that arrests must be limited to those found with stolen goods. It also emphasized probable cause based on magistrate suspicion, not on the suspicion of the officer.⁶⁹ Essentially, it recognized the importance of not making a wolf the shepherd.

⁶⁴*Fourth Origins* pg. 92

⁶⁵*Fourth Origins* pg. 93-4

⁶⁶*Fourth Origins* pg. 94

⁶⁷*Recovering Fourth* pg. 685

⁶⁸*Fourth Origins* pg. 96

⁶⁹*Fourth Origins* pg. 96

Ironically, the discussion of civil liberties in Congress and related proposals were tools used by the Anti-Federalists to defeat the prospect of national government. Richard Henry Lee wanted to complicate the ratification process by introducing a Bill of Rights.⁷⁰ The Articles of Confederation required thirteen state legislatures to approve Lee's proposals while only nine state conventions would put the Constitution into effect.⁷¹ James Madison responded by trying to placate members of his own party as well as the Anti-Federalists through a series of amendments that would safeguard individual liberties. Original elements in Madison's search and seizure provision included the commanding "shall not be violated" as opposed to the earlier "ought not," the latter allowing for exceptions. Probable cause was also an important contribution. Madison had drawn from the positive assertions from Pennsylvania and Massachusetts.⁷²

After making its way through the House Committee of Eleven, the Fourth Amendment read 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."⁷³ However, it provided no remedy for illegal search and seizure, or how to handle the introduction of evidence obtained illegally. Much depended then, as it does now, on the interpretation of probable cause.⁷⁴

⁷⁰Boyd, S. R. (1979). "Antifederalists and the Acceptance of the Constitution: Pennsylvania, 1787-1792." *Plubius*. Vol. 9 No.2. Republicanism, Representation, and Consent: Views of the. pg. 128-9.

⁷¹*Fourth Origins* pg. 96

⁷²*Fourth Origins* pg. 99

⁷³*Fourth Origins* pg. 99 quoting the Fourth Amendment

⁷⁴*Fourth Origins* pg. 101

Concluding Remarks:

The history of the Fourth Amendment demonstrates that negative attitudes toward unreasonable search and seizure extend many hundreds of years prior to its writing. This history suggests a trend for reformers and the Framers to prioritize the protection of the rights of the individual against arbitrary abuses of government power. William Pitt's speech to Parliament in 1763 stressed the importance of this prioritization: "The poorest man may, in his cottage, bid defiance to all 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."⁷⁵

The wording of the Amendment is relatively brief considering the centuries of influence that resulted in its formulation. The historical trend of reform and intent of the Framers to protect the individual and restrict government abuse of power are important contextual considerations for determining what was meant by an "unreasonable" search, probable cause, and the importance of warrants. These questions will be examined in the Supreme Court cases that contributed to the development of the Fourth Amendment in the next chapter. The historical context of this chapter is important to this work because it will allow the reader to recognize when Supreme Court decisions honor the intent of the Framers and when they deviate from this standard by prioritizing efficient enforcement measures at the expense of Fourth Amendment protections. This is especially relevant to the war on drugs, which has asked citizens to choose between freedom and security while trading liberty for efficiency in enforcing the government initiative.

⁷⁵*Fourth Development* pg. 49-50

Chapter II: The Supreme Court's Development of the Fourth Amendment

The first chapter of this work detailed the historical influences of the Fourth Amendment and how that history illuminates the intent of the Framers. This intent is best described as a prioritization of the rights and protections of the individual citizen against the arbitrary abuses of government power, culminating in the Fourth Amendment. However, the Fourth Amendment presents many questions not addressed in the explicit wording of the text. How does one define or establish probable cause? How should we treat illegally obtained evidence? What sort of contact does the law allow between citizens and officers short of arrest? Can an individual waive their Fourth Amendment rights or consent to a search and what would the determining factors for establishing this possibility look like? Are warrantless searches reasonable, and how does the suspicion and belief of law enforcement factor in to making this determination?

The Supreme Court cases in this chapter will address these questions and develop the modern understanding of the Fourth Amendment. While the answers to these questions cannot be found in the words of the Fourth Amendment, it is the task of the Supreme Court to understand the intent of the Framers and interpret the scope of the Fourth Amendment in such a way that the ruling and rationale of a case honors it. In spite of this commitment, the reader will recognize in many of these cases a general trend, especially since the late 1970s and 1980s, of the Court to erode Fourth Amendment rights by limiting the scope of its protections.

Reasonable Expectations of Privacy: Property in Dwellings and Businesses

While the language of the Fourth Amendment is not explicit enough to cover every issue that has occurred centuries after its writing, it is sufficient enough to describe the obvious protection of one's dwelling from unreasonable search and seizure. But what is a dwelling? Is it limited to the structure itself? Does it apply to the land surrounding one's home? Can the Court circumvent the search and seizure protections by simply compelling the production of evidence from the defendant? Does the explicit mention of "houses" in the Fourth Amendment suggest a lower expectation of privacy in a structure dedicated for business purposes? Are corporate entities provided the same Fourth Amendment protections as individuals?

In *Boyd v. United States*¹ (1886), the Supreme Court took a wide view of Fourth Amendment protections by declaring that the Fourth Amendment should be liberally construed.² The District Attorney in this case made use of a Congressional statute subjecting those accused of defrauding the government of duties to the mandatory production of records for the prosecution of the case.³ If the accused did not comply then the allegations of the District Attorney would be accepted as fact.⁴ The Court cited the opinion of Lord Camden, the legal authority that greatly influenced the Framers, stating that his ruling in regards to Wilkes' case extended the protections of the Fourth Amendment beyond the forcible entry into the home to a citizen's indefeasible right to personal security, liberty, and private property.⁵ The compulsion of a person's papers falls within what these rights would condemn; this successfully linked the Fifth Amendment to the Fourth Amendment as a means for shedding light on what constituted an "unreasonable search and seizure" in matters of self-incrimination.⁶ The ruling was especially

¹*Boyd v. United States*, 116 U.S. 616 (1886).

²116 U.S. 616, 617

³116 U.S. 616, 618

⁴116 U.S. 616, 620

⁵116 U.S. 616, 630

⁶116 U.S. 616, 633

significant because it denied the government's ability to circumvent Fourth Amendment standards by simply requiring the defendant to provide evidence for his own conviction.

In *Silverthorne Lumber Co. v. United States*⁷ (1919), the Court furthered the *Boyd* ruling by declaring that corporations are protected from unreasonable search and seizure regardless of the Fifth Amendment's applicability to them⁸, provided that the defense of Fourth Amendment concerns occurred in the argument rather than raised as a side issue upon indictment.⁹

However, the Court sought to distinguish between these reasonable expectations of privacy through Fourth Amendment protections and unreasonable expectations of privacy that society does not recognize. In 1924, the Court described one such unreasonable expectation of privacy in *Hester v. United States*¹⁰. The defendant alleged that two officers trespassed on his property in order to secure evidence of moonshine in vessels near his home in accordance with the National Prohibition Act. The Court held that when the actions of the defendant (namely fleeing from the scene and abandoning these vessels) disclosed the location of the moonshine, their examination of the contents did not constitute a seizure.¹¹ The reason was simple – the Fourth Amendment protections in one's "persons, houses, papers, and effects" do not apply to the open fields outside one's home, which is where this encounter occurred.¹²

This established the "open-fields" exception to the Fourth Amendment. In 1984, this exception was reinforced in *Oliver v. United States*¹³. The open-fields exception prevented the petitioner from maintaining a reasonable expectation that the marijuana he was growing a mile away from his home was protected under the meaning of the Fourth Amendment.¹⁴ The Court

⁷*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1919).

⁸251 U.S. 385, 392

⁹251 U.S. 385, 391-2

¹⁰*Hester v. United States*, 265 U.S. 57 (1924).

¹¹265 U.S. 57, 58

¹²265 U.S. 57, 59

¹³*Oliver v. United States*, 466 U.S. 170 (1984)

¹⁴466 U.S. 170, 177

furthered the open-fields doctrine by declaring that the exception was universal and could not be examined on a case by case basis without disadvantaging law enforcement in the balance of public and private interest.¹⁵

In 1988, the Court's ruling in *California v. Greenwood*¹⁶ also spoke to the area immediately outside a citizen's home when it held that garbage outside it was also not protected within the meaning of the Fourth Amendment. Since garbage left outside signals the intent to transfer it to a third party, and any member of the public or animal could rifle through it, society does not recognize a reasonable expectation of privacy in trash.¹⁷

In the balance of enforcement needs and private interests, the Court has recognized differences in the expectations of privacy between a free citizen and a prisoner. In *Stroud v. United States*¹⁸ (1919), the Court held that prisoners do not have the same reasonable expectations of privacy afforded to a free individual in his home. Incriminating evidence can be discovered in the standard practice and discipline of the institution that all prisoners are subjected to, and this discovery through these standard procedures does not violate the prisoner's protection against unreasonable search and seizure (as long as no threats or coercion occurred).¹⁹

At times there is a need for law enforcement to monitor a company's handling of restricted substances. The Court has recognized this need in the balance of enforcement efforts and private interests. This law enforcement need is not trumped by the company's possession of a permit defining legal handling of the substance when agents wish to investigate where the company is violating the permit's terms. This scenario occurred during alcohol prohibition in *Dumbra v. United States*²⁰ (1925). The defendant owned a permit that allowed the manufacture

¹⁵466 U.S. 170, 181

¹⁶*California v. Greenwood*, 486 U.S. 35 (1988).

¹⁷486 U.S. 35, 40

¹⁸*Stroud v. United States*, 251 U.S. 15 (1919)

¹⁹251 U.S. 15, 21

²⁰*Dumbra v. United States*, 268 U.S. 435 (1925)

and sale of wine on his premises for non-beverage purposes, but this did not provide the defendant with a reasonable expectation that his premises could not be searched via warrant for illegally possessed wines.²¹

Valid Warrants, Specificity, and Timing

The language of the Fourth Amendment also presented the Supreme Court with questions relating to expired warrants and the level of detail in warrants. How much detail is necessary to “particularly describe” a place to be searched? When can Fourth Amendment objections be raised? Is it ever too late in the proceedings to raise Fourth Amendment questions? Can a valid search warrant secure evidence that justifies charging the suspect for a different offense than the one charged that validated the search?

In 1921, the Court during the prohibition era addressed two of these questions in *Gouled v. United States*²². The Court held that Fourth Amendment concerns should never be overruled as occurring too late, and that they should be considered by the trial judge even if another judge has denied the objections.²³ The Court allowed for papers obtained by a valid search warrant to justify the charge of another offense, but papers sought by the government for only evidential value of an additional offense is unconstitutional.²⁴

In *Steele v. United States*²⁵ (1925), the Court during prohibition ruled that a description of a place in a warrant as vague as the term “garage” enabled law enforcement to search the entire building and every floor connected to the garage by an elevator.²⁶ The Court characterized the description on the warrant as if its only purpose was to serve as a road map to the place intended

²¹268 U.S. 435, 437

²²*Gouled v. United States*, 255 U.S. 298 (1921)

²³255 U.S. 298, 305-12

²⁴255 U.S. 298, 310

²⁵*Steele v. United States*, 267 U.S. 498 (1925)

²⁶267 U.S. 498, 503

for search rather than part of the protections provided by the Fourth Amendment to restrict search to a particular area described. As long as it allows the officer to identify the place for search, the description is sufficient.²⁷

In 1931, as prohibition was dwindling in support, the ruling in *Go-Bart Imp. Co. v. United States*²⁸ veered away from the vague pro-law enforcement approach in *Steele*. It held that a warrant that failed to meet the specific requirement of stating an offense verified by something other than an officer's claim is invalid on its face, and any search based on this warrant is unreasonable – even if the facts were sufficient to justify an arrest without a warrant.²⁹ In the span of six years the Court shifted from the casual treatment of vague warrants to the condemnation of them in instances where warrantless arrests would have sufficed. This suggests a desire by the Court to deter the employment of invalid warrants because of the punitive measures taken against them in this case.

In the same era of dwindling prohibition support, the Court ruled one year later in *Sgro v. United States*³⁰ that expired search warrants could not merely be re-dated and reissued, but instead required a new proceeding supported by new and current proof of probable cause.³¹ If the warrant could simply be re-dated, it would be a blank check of enforcement power.

In these instances relating to the specificity requirement of warrants and timing issues, the Court either relaxed these burdens when law enforcement efficiency was prioritized or strengthened them when it sought to deter the use of invalid warrants or government circumvention of Fourth Amendment protections.

²⁷267 U.S. 498, 503

²⁸*Go-Bart Imp. Co. v. United States*, 282 U.S. 344 (1931)

²⁹282 U.S. 344, 355-6

³⁰*Sgro v. United States*, 287 U.S. 206 (1932)

³¹287 U.S. 206, 210-11

Reasonable Belief, Suspicion, and Probable Cause

While the language of the Fourth Amendment calls for probable cause to exist in order to merit the issuance of a warrant and condemns “unreasonable” search and seizure, these protections are only as relevant as the Court’s interpretation and definition of these words. How is probable cause determined? What relationship does it have to suspicion, anonymous tips, informant tips, and reasonable belief, and how is reasonable belief even determined?

Tips and complaints of alcohol use and sale often occurred in the era of alcohol prohibition. In 1932, when support for prohibition had greatly weakened, the *United States v. Lefkowitz*³² examined whether a warrant for arrest issued upon the complaint that a room served as a place for soliciting liquor orders justified the search and seizure of incriminating evidence in the room. The Court stated that a liberal construction of the Fourth Amendment honoring the intent of the Framers required the finding that the complaint arousing suspicion was not sufficient to justify the search.³³ The scope and protection of the Amendment is not limited to a literal reading.³⁴

In *Taylor v. United States*³⁵ (1932), the Court set an even higher standard when it ruled that suspicion of a prohibition violation, confirmed by odor of whiskey and peeping through a chink in a fence adjacent to the dwelling was not enough to justify breaking into the defendant’s garage to seize evidence.³⁶ In the same year, the Court ended the relatively confusing practice of one affiant swearing to the truth of another affiant’s statement to secure a warrant. In *Grau v. United States*³⁷, the Court held that the evidence necessary to secure a search warrant should

³²*United States v. Lefkowitz*, 285 U.S. 452 (1932)

³³285 U.S. 452, 464

³⁴285 U.S. 452, 467

³⁵*Taylor v. United States*, 286 U.S. 1 (1932)

³⁶286 U.S. 1, 5

³⁷*Grau v. United States*, 287 U.S. 124 (1932)

match the competency required before a trial by jury that would lead a man to believe an offense was committed.³⁸

By 1959, the Court deciding *Draper v. United States*³⁹ had shifted to the degree where it held that an agent was legally entitled to consider “hearsay” in the determination of probable cause and whether he had reasonable grounds to believe the petitioner had committed a violation under narcotics law.⁴⁰ While the Court in *Draper* allowed for hearsay in the determination of meeting the probable cause requirement, the 1980s would see the abolishment of anything other than a fluid concept of probable cause. In 1983, the Court held in *Illinois v. Gates*⁴¹ abandoned the test subjecting anonymous tips to veracity and reliability standards as the sole means of determining probable cause via tips.⁴² Instead, a “totality of the circumstances” approach allowing the magistrate to make a practical decision regarding the circumstances of the case was adopted.⁴³

While a “fluid approach” sounds progressive, the rules the Court eliminated in *Illinois v. Gates* were designed to hold probable cause to a standard of reliability. Since a probable cause finding allows enforcement to proceed in securing a warrant or to engage in a search, the elimination of this standard eases the restrictions on enforcement to perform these actions. This new approach subjects citizens to possible arbitrary findings of probable cause because these decisions would be determined by whatever a judge could rationalize as “common sense.”

³⁸287 U.S. 124, 128

³⁹*Draper v. United States*, 358 U.S. 307 (1959)

⁴⁰358 U.S. 307, 311-2

⁴¹*Illinois v. Gates*, 462 U.S. 213 (1983)

⁴²462 U.S. 213, 233

⁴³462 U.S. 213, 230-1

Warrantless Searches: Immobile Structures and People

While the Fourth Amendment states that the issuance of a warrant must be based on probable cause and particularly describe the individual, place, or thing to be searched, the explicit wording of the text does not call for a universal warrant requirement. Consequently, the Court has recognized the constitutional validity of warrantless searches of people and places in particular circumstances.

In *Agnello v. United States*⁴⁴ (1925), the Court held that officers do not need a warrant to search someone that has been lawfully arrested while committing a crime or the place where the arrest was made.⁴⁵ However, a search incident to an arrest does not extend to the arrested individual's home blocks away, even if the officer believes that evidence is concealed in the dwelling.⁴⁶ Two years later, the Court held in *Marron v. United States*⁴⁷ that the ability to make a search incident to an arrest also extended to the apprehension of individuals engaged in a conspiracy to maintain the unlawful sale of liquor; in the process of this search items not described in a warrant could be lawfully seized.⁴⁸

The 1980s once again saw an expansion of search powers by law enforcement. In 1982, the Court held in *Washington v. Chrisman*⁴⁹ that the Fourth Amendment did not protect contraband within plain view of an officer.⁵⁰ The officer in this case apprehended a student he believed was drinking underage. Since it is not unreasonable for an officer to accompany and monitor an individual placed under arrest, the officer was entitled to follow the student back to

⁴⁴*Agnello v. United States*, 269 U.S. 20 (1925)

⁴⁵269 U.S. 20, 30

⁴⁶269 U.S. 20, 31-3

⁴⁷*Marron v. United States*, 275 U.S. 192 (1927)

⁴⁸275 U.S. 192, 196

⁴⁹*Washington v. Chrisman*, 455 U.S. 1 (1982)

⁵⁰455 U.S. 1, 9

his room when he requested identification and to seize the contraband the student had in plain view from his vantage point at the doorway.⁵¹

In *New Jersey v. TLO*⁵² (1985), the Supreme Court addressed another incident involving a student, but this case centered on the expectations of privacy afforded to students and the role of public school officials. The Court held that public school officials cannot claim Fourth Amendment immunity like parents when they search students.⁵³ However, in the school setting no warrant is required and a search of a student is valid as long as the initial search was related in scope to the circumstances that prompted interference in the first place.⁵⁴

The “plain-view” exception established in the 1980s greatly impacts the Fourth Amendment. In *Agnello*, the Court ruled that a search incident to an arrest could not be extended blocks away from the individual’s home. However, when the student in *Washington v. Chrisman* went to secure his identification in compliance with the request of the officer, the encounter did take him to the student’s dwelling. When the officer recognized marijuana and drug paraphernalia from his viewpoint at the doorway, the “plain-view” doctrine allowed him to proceed into the student’s room and seize the contraband. Whatever protections *Agnello* might have offered as a precedent disappeared because the student was too quick to comply with the wishes of an officer.

Automobiles and the Fourth Amendment

The explicit language of the Fourth Amendment obviously does not mention automobiles, which were not in use when it was written. How then does the Fourth Amendment

⁵¹455 U.S. 1, 6

⁵²*New Jersey v. TLO*, 469 U.S. 325 (1985)

⁵³469 U.S. 325, 336

⁵⁴469 U.S. 325, 341

apply to automobiles? Does their search require a warrant? Are they to be given the same protections afforded to homes?

In *Carroll v. United States*⁵⁵ (1925), the Court held that determining whether the search of a car was unreasonable required a balancing of public interests and the rights of the individual.⁵⁶ It recognized a tendency for Congress to treat the search of dwellings and stores differently than the search of automobiles, especially since the latter could be quickly moved outside the jurisdiction of wherever a warrant was sought.⁵⁷ Therefore, the warrantless search and seizure of an automobile does not violate the Fourth Amendment as long as it was made upon probable cause – a belief reasonably arising from the circumstances known to the officer that the vehicle contains contraband.⁵⁸ The Court ruled similarly in *United States v. Lee*⁵⁹ two years later regarding boats; a searchlight that enables the discovery of illegal contraband on boats is not unconstitutional and the evidence procured from this discovery is admissible.⁶⁰

By 1976, the Court had expanded the legal search of automobiles to impounded vehicles as well. In *South Dakota v. Opperman*⁶¹ (1976), the Court held that the reasonable expectation of privacy in automobiles is diminished by its public mode of travel; therefore, vehicles are constantly taken into police custody when they are crashed or damaged to maintain the flow of traffic.⁶² Inventory pursuant to these standard police procedures is reasonable when the motive is to protect the car and secure its contents rather than investigatory in nature.⁶³ In 1982, the Court held in *United States v. Ross*⁶⁴ that the “automobile exception” established in *Carroll* also

⁵⁵*Carroll v. United States*, 267 U.S. 132 (1925)

⁵⁶267 U.S. 132, 149

⁵⁷267 U.S. 132, 153

⁵⁸267 U.S. 132, 149

⁵⁹*United States v. Lee*, 274 U.S. 559 (1927)

⁶⁰274 U.S. 559, 563

⁶¹*South Dakota v. Opperman*, 428 U.S. 364 (1976)

⁶²428 U.S. 364, 368

⁶³428 U.S. 364, 372-6

⁶⁴*United States v. Ross*, 456 U.S. 798 (1982)

applies to searches of cars based on informant tips. A warrantless search of the vehicle in this situation is reasonable as long as the facts could justify a warrant.⁶⁵ The subsequent constitutional search applies to every part of the car and its contents as long as the object and scope of the search is limited to places where probable cause dictates it may be found.⁶⁶

In a case in Florida, the defendant argued that since the central need for warrantless searches of vehicles relies on their mobility, an immobilized car that is impounded no longer has that element and should require a warrant to search. Instead of abandoning the rationale in *South Dakota v. Opperman* in the face of this rationale, the Court held in *Florida v. Meyers*⁶⁷ (1984) that any subsequent search of an impounded vehicle is constitutionally acceptable when based on probable cause.⁶⁸ In *California v. Carney*⁶⁹ (1985), the Court again refused to consider an exception to warrantless searches of automobiles, even in the case of mobile homes.⁷⁰ Any vehicle, whether it is a mobile home or a sports car, has a reduced expectation of privacy due to the regulation of vehicles capable of traveling on highways.⁷¹

While the Court has consistently ruled that the warrantless search of a vehicle is constitutionally acceptable, in the late 1970s and 1980s the Court extended this principle to cases where defendants were able to establish that their vehicles were not mobile in the way *Carroll* described. An impounded vehicle is not a threat to escape the jurisdiction of the place a warrant for its search would be secured. In the instance of mobile homes, the Court tipped the balance of private and law enforcement interests towards the latter by holding that the reasonable expectations of privacy in that dwelling equal those of any other vehicle.

⁶⁵456 U.S. 798, 809

⁶⁶456 U.S. 798, 820

⁶⁷*Florida v. Meyers*, 466 U.S. 380 (1984)

⁶⁸466 U.S. 380, 382

⁶⁹*California v. Carney*, 471 U.S. 386 (1985)

⁷⁰471 U.S. 386, 394

⁷¹471 U.S. 386, 393

The Fourth Amendment and Investigatory Detention

While the Fourth Amendment protects citizens from unreasonable search and seizure, what does it mean to be “seized?” Is every contact between an officer and a citizen a seizure? Can a person be detained for investigatory purposes in circumstances where the probable cause necessary to make an arrest is lacking? If so, what merits an investigatory detention? If investigatory detention is short of an arrest, how are the actions of law enforcement limited throughout its execution?

In 1968, the Court described in *Terry v. Ohio*⁷² what merited an investigatory detention. The Court defined a “seizure” under the Fourth Amendment as whenever an officer accosts an individual and restrains his freedom to walk away.⁷³ While a seizure under the Fourth Amendment must derive from probable cause, the Court held that probable cause is unnecessary to justify an officer’s reasonable search and frisk of an individual for weapons if he believes him to be armed and dangerous.⁷⁴ In *United States v. Martinez-Fuerte*⁷⁵ (1976), the Court extended these new principles in *Terry* stops to vehicles in the form of checkpoints. The rationale of the ruling weighed public and private interests and held that the need for such checkpoints is great while their Fourth Amendment intrusion is limited.⁷⁶ Since these checkpoints are not “searches” in the Court’s view, their utility justifies the expense of constitutionally protected interests of the individual.⁷⁷

In 1979, *Delaware v. Prouse*⁷⁸ corroborated *United States v. Martinez-Fuerte* by offering checkpoints and roadblock stops as a reasonable alternative for arbitrary spot checks of particular

⁷²*Terry v. Ohio*, 392 U.S. 1 (1968)

⁷³392 U.S. 1, 16

⁷⁴392 U.S. 1, 20-7

⁷⁵*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)

⁷⁶428 U.S. 543, 557-60

⁷⁷428 U.S. 543, 560-2

⁷⁸*Delaware v. Prouse*, 440 U.S. 648 (1979)

drivers.⁷⁹ While the Court did rule that officers cannot stop a vehicle without probable cause suggesting the driver is committing a violation or employ these arbitrary stops to procure evidence in plain view⁸⁰, it still managed to present law enforcement with the solution to this unfortunate Fourth Amendment protection through use of the aforementioned techniques.

In the same year, *Brown v. Texas*⁸¹ offered some limitation on *Terry* stops; probable cause might not be necessary for the brief detention of a suspect, but that detention must be based on reasonable suspicion that the individual is involved in criminal activity.⁸² In 1989, the standards for this reasonable suspicion were greatly weakened in *United States v. Sokolow*⁸³ by the Court. The Court held that tests seeking to distinguish between searches based on drug courier profiles and those based on ongoing criminal activity create unnecessary difficulty in simple Fourth Amendment concepts.⁸⁴ The *Terry* ruling established an agent's right to briefly detain an individual for questioning when reasonable suspicion allows it, but the Court in this case held that reasonable suspicion could borrow from drug profiles to arrive at a level meriting detention.⁸⁵ Factors like paying with cash or traveling long hours for brief trips that could easily be consistent with the actions of an innocent traveler were now considerations in law enforcement's establishment of reasonable suspicion.⁸⁶

In 1997, the rationale in *Terry* was again extended in *Maryland v. Wilson*⁸⁷ when the Court held that in the face of danger an officer may order passengers out of a car; such an order does not change the situation of a passenger already detained via a traffic stop, so the only

⁷⁹440 U.S. 648, 663

⁸⁰440 U.S. 648, 661

⁸¹*Brown v. Texas*, 443 U.S. 47 (1979)

⁸²443 U.S. 47, 51

⁸³*United States v. Sokolow*, 490 U.S. 1 (1989)

⁸⁴490 U.S. 1, 7-8

⁸⁵490 U.S. 1, 10

⁸⁶490 U.S. 1, 9

⁸⁷*Maryland v. Wilson*, 519 U.S. 408 (1997)

disadvantage to a passenger is that he no longer has access to concealed weapons.⁸⁸ When contraband comes into plain view by the actions of a passenger ordered out of a car, an officer may lawfully seize it.⁸⁹

However, the Court did at times reign in the power of police to make investigatory stops. The Court had accepted the legality of an officer's own police work leading to the necessary reasonable suspicion to make a brief stop, but in *Florida v. JL*⁹⁰ (2000) searches based on anonymous tips were held outside the bounds of *Terry*. Without predictive information to test an anonymous tip's credibility (whether it proves correct or not) there is no reasonable basis for suspecting the defendant of unlawful conduct.⁹¹

While the Court chose to place searches relying on anonymous, uncorroborated tips outside the bounds of *Terry*, it did not place limits on the expansion of law enforcement power in regards to detaining a suspect as a result of the officer's own suspicion. In fact, in *Illinois v. McArthur*⁹² (2001) the Court held that officers could even detain a citizen outside his home to prevent him from entering the dwelling and potentially compromising evidence until a warrant to search the place was secured.⁹³ Since probable cause is so difficult for a citizen to contest, McArthur's own arguments were ignored.⁹⁴ In 2007, the Court continued the trend of expanding police power by ignoring the subjective intent of officers in *Brendlin v. California*⁹⁵ – whether an officer's own motivations are dishonest and coercive or fall outside the scope of those verbally conveyed to an individual is irrelevant.⁹⁶

⁸⁸519 U.S. 408, 414

⁸⁹519 U.S. 408, 415

⁹⁰*Florida v. JL*, 529 U.S. 266 (2000)

⁹¹529 U.S. 266, 271

⁹²*Illinois v. McArthur*, 531 U.S. 326 (2001)

⁹³531 U.S. 326, 334

⁹⁴531 U.S. 326, 334-5

⁹⁵*Brendlin v. California*, 551 U.S. 249 (2007)

⁹⁶551 U.S. 249, 253-5

The only thing that matters is whether the officer manifested the objective intent to display authority to Brendlin that he was not free to terminate the encounter and leave.⁹⁷

Investigatory detention is an incredibly powerful tool of law enforcement. Since it falls short of an arrest, the brief detention of individuals can fall short of the probable cause requirement and instead relies on reasonable suspicion. However, reasonable suspicion is quite difficult for citizens to contest outside of circumstances like anonymous tips because the onus is on the defendant to prove that the officer's rationale is lacking or misleading. This provides law enforcement with more opportunities for discovery with fewer standards surrounding the conduct of police behavior as long as officers can explain their actions as deriving from reasonable suspicion or exigent circumstances.

Technology and the Fourth Amendment

Obviously, the language of the Fourth Amendment does not address the advances in technology that the Framers could not have possibly foreseen. However, this technology provides the government with the tools to perform more advanced searches without resorting to the physical intrusion of a citizen's private property that came to the Framers' minds when they constructed the Fourth Amendment. As a result, the Court was forced to interpret the Fourth Amendment's intent as it relates to technology – is it restricted to the physical intrusion of property or does it encompass the non-physically intrusive means that technology affords?

In 1928, *Olmstead v. United States*⁹⁸ addressed the technology question in the new realm of electronic surveillance. The Court held that the construction of the Fourth Amendment could not be extended beyond the practical meaning of “persons, houses, papers, and effects” to forbid

⁹⁷551 U.S. 249, 255-8

⁹⁸*Olmstead v. United States*, 277 U.S. 438 (1928)

hearing and sight.⁹⁹ As a result, the Court held that the government was allowed to use an incriminating telephone conversation overheard via wiretap because it was voluntarily conducted and did not compel him to be a witness against himself.¹⁰⁰ The Court also noted that the tapping connections were made in the basement of a large office building in a public street, emphasizing that the structure the connection was made in is relevant to Fourth Amendment protections but the conversation itself is not.¹⁰¹

In *Katz v. United States*¹⁰² (1967), the Court essentially overruled the *Olmstead* ruling. It admitted that subsequent decisions to *Olmstead* eroded the trespass doctrine in that case and can no longer be considered controlling as a precedent.¹⁰³ The Court in *Katz* held that when the government electronically listened to and recorded the petitioner's words, a search and seizure occurred within the meaning of the Fourth Amendment because it violated the privacy justifiable relied on while using the telephone.¹⁰⁴

However, the Court returned to the doctrine of characterizing non-physically intrusive technology measures as outside the protection of the Fourth Amendment in the 1980s. In *California v. Ciraolo*¹⁰⁵ (1986), the Court held that the test to determine a reasonable expectation of privacy is not established by an individual's intent to conceal his activity; the consideration hinges on whether the government's intrusion infringes upon the Fourth Amendment.¹⁰⁶ Accordingly, the Court held that an officer's observation of a home or yard by helicopter in navigable airspace does not constitute an infringement of the protections provided by the Fourth

⁹⁹277 U.S. 438, 465

¹⁰⁰277 U.S. 438, 462

¹⁰¹277 U.S. 438, 466

¹⁰²*Katz v. United States*, 389 U.S. 347 (1967)

¹⁰³389 U.S. 347, 353

¹⁰⁴389 U.S. 347, 350-3

¹⁰⁵*California v. Ciraolo*, 476 U.S. 207 (1986)

¹⁰⁶476 U.S. 207, 212

Amendment.¹⁰⁷

In 2001, The Court drew from *Katz* in *Kyllo v. United States*¹⁰⁸ to determine whether the Fourth Amendment applied to the thermal imaging of a citizen's home. As demonstrated in the *Katz* ruling in regards to telephone conversations, a search occurs when an individual manifests a subjective expectation of privacy that society is willing to recognize as reasonable.¹⁰⁹ Obtaining information by sense-enhancing technology otherwise unavailable without entering into the home constitutes a search – especially when the technology used is not available to the general public.¹¹⁰ While the Court determined that the use of thermal imaging falls within the protections of the Fourth Amendment, it did not condemn its use as long as a warrant was secured prior to its employment.¹¹¹

The use of technology and the Fourth Amendment protections afforded to citizens essentially balances the reasonable expectation of privacy against the intrusive nature of the technology that is used. The distinction between a reasonable and unreasonable expectation of privacy seems to hinge on whether the technology provides information otherwise unavailable without entering the home. The Court places backyards within the curtilage of a citizen's home, but yards are not protected under the Fourth Amendment from aerial view, even if a fence is erected. With lower standards of probable cause resulting from the previously discussed *Illinois v. Gates* case in the 1980s, the only thing standing between a complete imaging of a citizen's home through use of technology is a magistrate's common sense ruling that probable cause exists. The threats to the Fourth Amendment deriving from this combination are obvious.

¹⁰⁷476 U.S. 207, 213

¹⁰⁸*Kyllo v. United States*, 533 U.S. 27 (2001)

¹⁰⁹533 U.S. 27, 27-8

¹¹⁰533 U.S. 27, 33-5

¹¹¹533 U.S. 27, 40-1

Voluntary Consent and Waiving Fourth Amendment Rights

The language of the Fourth Amendment and its construction by the Courts offers the citizen an idea of the ways that it protects the individual, but can these protections be waived? Can an individual consent to a search that would otherwise be unreasonable? How is voluntary consent even determined?

The Court briefly addressed the question of consent in *Amos v. United States*¹¹² (1921). The Court held that if an individual's spouse allows officers into the home without a warrant for the purposes of making a search, that spouse's actions cannot be interpreted as the waiver of the individual's constitutional protections against unreasonable search and seizure.¹¹³

In 1973, the Court described in *Schneekloth v. Bustamonte*¹¹⁴ some criteria for establishing voluntary consent. The state must demonstrate that a search based on voluntary consent occurred without the influences of expressed or implied coercion.¹¹⁵ The question of voluntariness must be determined from all of the circumstances, and while an individual's knowledge of his right to refuse to voluntarily comply with police is one factor to consider, it is not a prerequisite for establishing voluntary consent.¹¹⁶ In *United States v. Mendenhall*¹¹⁷ (1980), the Court again advocated a totality of the circumstances approach to establishing voluntary consent with the additional emphasis that the Fourth Amendment's intent was not to remove all contact between citizen and officer.¹¹⁸ As a result, a citizen's contact with police is only involuntary if his freedom of movement is restrained by physical force or show or authority.¹¹⁹

¹¹²*Amos v. United States*, 255 U.S. 313 (1921)

¹¹³255 U.S. 313, 317

¹¹⁴*Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)

¹¹⁵412 U.S. 218, 248

¹¹⁶412 U.S. 218, 249

¹¹⁷*United States v. Mendenhall*, 446 U.S. 544 (1980)

¹¹⁸446 U.S. 544, 554

¹¹⁹446 U.S. 544, 553

In 1991, the Court held in *Florida v. Bostick*¹²⁰ that citizens could not claim that officer contact on a bus constituted a seizure by noting the cramped confines of a bus. The defendant argued that the definition put forth in *United States v. Mendenhall* required that contact between an officer and a citizen on a bus be labeled a seizure since the bus offered no place else for him to go once the officers identified themselves.¹²¹ However, the Court held that cramped confines are a natural result of bus travel rather than a special circumstance directly resulting from the presence of police, so a per se rule labeling all bus contact between officers and citizens as a seizure could not be adopted.¹²²

In 1996, the Court held in *Ohio v. Robinette*¹²³ that the Fourth Amendment does not require a lawfully seized defendant to be advised that he is “free to go” for his consent to be voluntarily.¹²⁴ The Court referenced the *Schneckloth* ruling, holding that a totality of the circumstances approach is what defines voluntariness, rather than the presence or absence of a defendant being informed of his right to leave.

Voluntary consent is an important tool for law enforcement. The decision of the Court in post-1970 cases to not mandate that officers inform citizens of their right to refuse to cooperate presents serious questions to Fourth Amendment protections. Citizens with less education and a greater fear of police will not assume that complying with an officer’s request to make a search is optional. Officers can also mislead citizens by implying that cooperation is actually in their best interest, and those unaware of their rights should not find their Fourth Amendment protections vacated due to ignorance.

¹²⁰*Florida v. Bostick*, 501 U.S. 429 (1991)

¹²¹501 U.S. 429, 436

¹²²501 U.S. 429, 439

¹²³*Ohio v. Robinette*, 519 U.S. 33 (1996)

¹²⁴519 U.S. 33, 39-40

The Exclusionary Rule

The Fourth Amendment specifies protections against unreasonable search and seizure, but how should evidence obtained by an unreasonable search and seizure be handled? Is the illegally obtained evidence admissible or inadmissible in Court? What circumstances call for the exclusion of evidence and are there exceptions? If illegally obtained evidence should be suppressed, does that mean the exclusionary rule is encompassed within constitutional protections or does it have another purpose? These are questions the Court would have to address.

In 1904, even after the favorable *Boyd* ruling, the Court held in *Adams v. New York*¹²⁵ that documents produced by illegal search and seizure were still admissible in legal proceedings. Ten years passed before the Court recognized in *Weeks v. United States*¹²⁶ a tendency for those executing criminal laws to obtain conviction by means of unlawful seizures and enforced confessions. The Court held that if private documents can be illegally seized and used against a citizen accused of an offense, then the protections offered by the Fourth Amendment are of no value.¹²⁷ As a result, the Court adopted the “exclusionary rule,” which at that time excluded illegally obtained evidence in federal but not in state proceedings.¹²⁸

The *Weeks* ruling required the exclusion of illegally obtained evidence in federal courts to give the Fourth Amendment meaning, but in *Burdeau v. McDowell*¹²⁹ (1921) the Court held that illegally obtained evidence was admissible if a private citizen procured it and turned it over to the government (as long as the government was not involved in the procurement process).¹³⁰

This distinction seemed to characterize the value of the Fourth Amendment in terms of who

¹²⁵*Adams v. New York*, 192 U.S. 585 (1904)

¹²⁶*Weeks v. United States*, 232 U.S. 383 (1914)

¹²⁷232 U.S. 383, 393

¹²⁸232 U.S. 383, 398

¹²⁹*Burdeau v. McDowell*, 256 U.S. 465 (1921)

¹³⁰256 U.S. 465, 476

committed the intrusion. If both instances involve unreasonable search and seizure, how is the value of the Fourth Amendment protected when one is sanctioned and one is not when the injury to the one convicted by the evidence is the same?

In 1927, the Court addressed in *Byars v. United States*¹³¹ the potential exclusionary implications of state action. The Court held that if a federal officer participates with state officers in a search, the question of the legal use of evidence in this joint action must be considered as if the federal agent acted alone.¹³² Therefore, the exclusionary rule would apply to join state and federal searches. The ruling in *Gambino v. United States*¹³³ during the same year elaborated on the *Byars* ruling – whenever an officer is acting solely on behalf of the United States, illegally obtained evidence is inadmissible under the exclusionary rule because this represents federal action.¹³⁴

The first independent linking of the Fourth Amendment to the state occurred in 1949, when the Court held in *Wolf v. Colorado*¹³⁵ that the arbitrary intrusion into privacy by the police is prohibited by the Due Process Clause of the Fourteenth Amendment. However, the state was still not subjected to the exclusionary rule because the Fourteenth Amendment did not impose this restriction on the states.¹³⁶

In *Mapp v. Ohio*¹³⁷ (1961), the Court abandoned the different treatment of admissible evidence in state and federal courts. The Court here did what the *Wolf* ruling would not by holding that the Fourth and Fourteenth Amendment protections against arbitrary intrusions of privacy also called for the same sanction of exclusion in state and federal courts.¹³⁸ Holding the

¹³¹*Byars v. United States*, 237 U.S. 28 (1927)

¹³²237 U.S. 28, 32

¹³³*Gambino v. United States*, 275 U.S. 310 (1927)

¹³⁴275 U.S. 310, 314

¹³⁵*Wolf v. Colorado*, 338 U.S. 25 (1949)

¹³⁶338 U.S. 25, 28-33

¹³⁷*Mapp v. Ohio*, 367 U.S. 643 (1961)

¹³⁸367 U.S. 643, 655

state to lesser standards encourages disobedience to the federal Constitution and places it outside the bounds of common sense.¹³⁹

While the *Mapp* ruling finally eliminated the state and federal distinctions of the exclusionary rule, the Court in *United States v. Calandra*¹⁴⁰ (1974) did not extend the exclusionary rule to grand jury proceedings. When determining whether to employ the exclusionary rule in this instance, the potential injury to the grand jury should be weighed against the potential benefits of extending the rule.¹⁴¹ The purpose of the exclusionary rule is to deter police misconduct, and the deterrence implications of extending the exclusionary rule to proceedings that do not finally determine guilt or innocence are limited.¹⁴²

The exclusionary rule adopted in *Weeks* and later expanded in *Mapp* subjected law enforcement to a universal standard designed to protect individual rights – if the evidence was illegally obtained then it is inadmissible. However, in 1984 law enforcement asked the Court to recognize a good faith exception to the exclusionary rule. In *United States v. Leon*¹⁴³ (1984), the Court held that the decision to exclude evidence must be weighed against impeding the justice system’s ability to discover truth in a way that might generate disrespect for the law by allowing some guilty defendants to go free.¹⁴⁴ The exclusionary rule was adopted to deter police misconduct, so the scope of it should be limited to cases where officers err rather than judges.¹⁴⁵ Therefore, the exclusionary rule is applicable if officers mislead judges, execute a warrant so deficient that common sense would indicate it is invalid, or engage in other misconduct, but not if judges err.¹⁴⁶ This “good faith exception” is another instance of the Court easing the burdens

¹³⁹367 U.S. 643, 657

¹⁴⁰*United States v. Calandra*, 414 U.S. 338 (1974)

¹⁴¹414 U.S. 338, 349

¹⁴²414 U.S. 338, 349

¹⁴³*United States v. Leon*, 468 U.S. 897 (1984)

¹⁴⁴468 U.S. 897, 907

¹⁴⁵468 U.S. 897, 917

¹⁴⁶468 U.S. 897, 923

of law enforcement in the 1980s. This “good faith exception” is another instance of the Court easing the burdens of law enforcement in the 1980s.

In *Massachusetts v. Sheppard*¹⁴⁷ (1984), the Court corroborated the ruling in *United States v. Leon*. It held that when an officer takes every step that could reasonably be expected of him pursuant to securing a valid warrant, he is not also required to disbelieve a judge (who has assured him that the warrant authorizes the conduct of the search he has requested) in order to avoid the suppression of the evidence procured under the warrant.¹⁴⁸

In 2006, the Court in *Hudson v. Michigan*¹⁴⁹ allowed for even more intrusive enforcement measures without the threat of suppression via the exclusionary rule. The Court even comments on the way the Court has shift from the *Mapp* ruling. It indicated that the wide scope of the exclusionary rule that *Mapp* offered has long since been abandoned because subsequent case law rejected the reflexive application of the exclusionary rule that treats the identification of a Fourth Amendment violation as synonymous with its application.¹⁵⁰ This means that exclusion may not be based on the mere fact that a constitutional violation was a “but-for” (cause-in-fact) cause of obtaining evidence.¹⁵¹ As a result, a violation of the knock-and-announce requirement of police to announce their presence and provide residents with an opportunity to open the door prior to a search does not call for suppression of the evidence.¹⁵² The justification by the Court was that violating the twenty second window the knock-and-announce requirement affords is not the cause of discovering evidence that required five hours to find.

¹⁴⁷*Massachusetts v. Sheppard*, 468 U.S. 981 (1984)

¹⁴⁸468 U.S. 981, 990

¹⁴⁹*Hudson v. Michigan*, 547 U.S. 586 (2006)

¹⁵⁰547 U.S. 586, 591

¹⁵¹547 U.S. 586, 592

¹⁵²547 U.S. 586, 603

The exclusionary rule and subsequent suppression of evidence is the largest protection and deterrence against unreasonable search and seizure afforded to the citizen. The *Weeks* case first applied it to the states, and as the nation progressed from the prohibition era of the 1920s the Supreme Court expanded its application to the case in *Mapp*. The *Mapp* ruling, which represents the widest scope of the exclusionary rule, was abandoned and restricted in subsequent cases that prioritized the needs of law enforcement. An error by a judge, which would nevertheless injure a citizen, is now not enough to merit suppression. The Court has rejected the application of combination of the exclusionary rule in every instance of a Fourth Amendment wrong; when this is combined with a fluid probable cause standard, it places the citizen in an unenviable position. The onus is now on citizens to prove police misconduct to merit suppression of evidence, which is hardly an easy thing to do.

Concluding Remarks

The importance of Supreme Court cases is obvious; while the intent of the Framers can be determined via historical context, the wording of the Fourth Amendment presents the reader with many unanswered questions in modern society. It is the task of the Supreme Court to determine Framer intent and apply it to modern issues in a way that would honor it. Prior to the 1920s and between the 1920s and 1980s, the Court honored that intent. The trend was a steady expansion of Fourth Amendment rights through its liberal construction that set higher standards for police conduct and expanded the scope of the exclusionary rule.

However, as Court decisions approached the 1980s, this trend of liberal construction ended as the Court returned to the narrow construction of the Fourth Amendment adopted during the 1920s. Standards for probable cause and police conduct were weakened and the wide scope of the exclusionary rule was abandoned as the individual rights of the citizen took a back seat to the efficient enforcement of law. This prioritization does not honor the intent of the Fourth Amendment described in the first chapter of this work, and consequently represents an erosion of Fourth Amendment rights.

The next chapter of this work will examine the political influences of the war on drugs and the ways in which the initiative impacted the focus of Congress and the White House. It will explain the mitigating circumstances surrounding the Court's adoption of a narrow construction of the Fourth Amendment during the 1920s and the return to these principles in the 1980s. It will offer connections and context important to understanding the possible influences of the Court's rationale during these periods.

Chapter III: The War on Drugs – The Political Erosion of Fourth Amendment Protections

The previous chapter of this work examined how the Court honored or rejected the Framers' intent in developing the Fourth Amendment. It demonstrated a tendency for Court decisions in the late 1970s and 1980s to erode Fourth Amendment protections. Two political initiatives relating to the 1920s and the 1980s were alcohol prohibition and the declaration of the war on drugs. Since alcohol prohibition was one of the defining political initiatives of the early 1920s, a brief discussion of it will develop a deeper understanding of the war on drugs by exploring many of their shared features. Like alcohol prohibition, the proponents of the war on drugs employed symbolism and rhetoric to influence public opinion.

Eventually, the war on drugs was encompassed within the idea of what it meant to be a patriotic and responsible citizen – one who would forfeit some personal liberties when weighed against the “safety” and “interests” of the “country.” The symbolism and rhetoric would define the terms of the war and justify the grounds on which it would be fought. The costs were measured in dollars and the approach was simultaneously hard-line and circular. However, the greatest expense of the war on drugs was also the greatest inconvenience to its focus of harshly punitive enforcement– the protections provided by the Fourth Amendment.

The first chapter of this work established the Framers' intent in the Fourth Amendment, which was the protection of the individual against the arbitrary and excessive abuse of government power. The previous chapter identified the 1920s, but especially the 1980s, as a period where the Court eroded Fourth Amendment protections through a narrow construction of the Fourth Amendment. It is important to note that the majority of the cases responsible for narrowing the scope of the Fourth Amendment involved drugs. Therefore, this chapter will

largely focus on how the political sphere during the 1980s encouraged a shift towards a semi-martial state through a deferential attitude towards police rather than the individual via the war on drugs. This shift does not honor the intent of the Fourth Amendment and coincides with the Court's narrow interpretation of its scope in the 1980s, a connection that will be explored in the next chapter.

Lessons from the Past: Alcohol Prohibition

While the war on drugs is the focus of this work, it is not the first prohibitive measure taken by Congress to control a substance thought to be both dangerous and addicting. The ideology behind the war on drugs found a similar precedent in the National Prohibition Act of 1919, which forbade the sale of distilled liquors as well as malt and vinous liquors.¹ Sociologist Joseph Gusfield contended that the focus of prohibition was not the reduction of consumption of intoxicating liquors; rather, the reform was a symbol of conflict between a traditional nation centered in rural, Protestant, middle-class values and an emerging nation that identified with cosmopolitan, urban, and immigrant values.²

These Protestant values were expressed in moralistic terms by men like Billy Sunday, who preached after prohibition that “the reign of tears is over. The slums will soon be a memory...Hell will be forever for rent.”³ Billy Sunday (like many would after him as it relates to drugs) was making alcohol the scapegoat for the major problems of America and advocating prohibition as the means to solve them – the slums and even Hell would be empty because Americans would no longer subject themselves to the vice of alcohol and the problems associated with it.

Those who believed in these lofty possibilities were essentially utopian moralists who felt that eliminating the legal manufacture and sale of alcohol would solve the social and economic problems of American society.⁴ No precise measurements of public opinion existed during the era, but most agree prohibition enjoyed public support upon adoption and throughout the first

¹Murchison, K. M. (1994). *Federal Criminal Law Doctrine: The Forgotten Influence*. Durham and London: Duke University: Duke University Press, pg. 7. Hereafter shortened to *Federal Doctrine*.

²*Federal Doctrine* pg. 3

³Levine, H. G. & Reinerman, C. (1991). “From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy.” *The Milbank Quarterly*. Vol. 69 No. 3, pg. 463. Hereafter referred to as *From Prohibition*

⁴*From Prohibition* pg. 464

half of the 1920s.⁵ Interestingly, prohibition also coincided with a Court that adopted narrow constructions of the scope of the rights of the individual under the Fourth and Fifth Amendment.⁶ Chief Justice Taft was known as a drinker before prohibition, but after its adoption he abstained from alcohol and criticized those who did not follow in his footsteps. This coincided with his general legal philosophy, which was the strict enforcement of all criminal laws regardless of how they were perceived; alcohol prohibition was certainly no exception.⁷

While the First World War provided the necessary context for rallying support to pass prohibition, the Great Depression of 1929 was equally important to its repeal.⁸ Prohibitionists claimed for years that a special substance like alcohol could never be regulated like other commodities because of its addictive and dangerous nature.⁹ Consequently, Senator Morris Sheppard declared in 1930 that “there is as much chance of repealing the Eighteenth Amendment as there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail.¹⁰” However, the government was not ready for the food riots, Communist rallies, and angry marches typical of the Depression era, and it responded with an attempt to increase morale.¹¹ Those with wealth and power felt that repealing prohibition would demonstrate a receptiveness to the popular pressures and desires of the time, especially for those who viewed beer as a “great help in fighting off the mental depression which afflicts great multitudes.¹²”

The motivations and ideas behind alcohol prohibition and its repeal are important in understanding the war on drugs. The social influences that helped prohibition take root and later resulted in its repeal points to the importance of having public opinion on the side of an

⁵*Federal Doctrine* pg. 9

⁶*Federal Doctrine* pg. 19

⁷*Federal Doctrine* pg. 15

⁸*From Prohibition* pg. 464

⁹*From Prohibition* pg. 482

¹⁰*Federal Doctrine* pg. 10

¹¹*From Prohibition* pg. 465

¹²*From Prohibition* pg. 465

initiative. Chief Justice Taft offered the opinion that being a responsible citizen meant to be subservient to the law, not its critic. Politicians years later would borrow similar arguments and symbolism relating to the invulnerable status of drug prohibition and the danger of drugs to American society. The rhetoric and methods of persuasion employed nearly 50 years earlier were echoed many times over by the political sphere when it turned its attention to the next issue – drugs.

The War on Drugs: Origins and Symbols

While there is no definitive beginning to the war on drugs, President Nixon was the first to use the term in the 1970s.¹³ President Nixon decided to close a key U.S.-Mexican border crossing to try to convince Mexico to take action against illegal drug production.¹⁴ Actions like this crystallized the popular perception that other countries were largely responsible for America's drug problem, especially since drugs were most often associated with minorities who wanted to "undermine traditional moral values" and political stability.¹⁵

The war on drugs emphasized a policy of enforcement and sent the message that American society is inherently just and drug abuse is the cause of its problem.¹⁶ Any drug use, regardless of how much, how often, or the type, was attributed to deficient moral character.¹⁷ However, behind the arguments concerning morality and the blame passed to other countries was the need to legitimize the doctrine of the U.S. national security state.¹⁸ The war on drugs was

¹³Finkelman, P. (1993). "The Second Casualty of War: Civil Liberties and the War on Drugs." *Southern California Law Review*. Vol. 66 No. 4, pg. 1396. Hereafter referred to as *Second Casualty*.

¹⁴Falco, M. (1996). "U.S. Drug Policy: Addicted to Failure." *Foreign Policy*. No. 102, pg. 121. Hereafter referred to as *Addicted to Failure*.

¹⁵*Addicted to Failure* pg. 120

¹⁶Youngquist, P. (2000). "Score, Scan, Schiz: Dick on Drugs." *Cultural Critique*. No. 44, pg. 85 Hereafter referred to as *Score, Scan, Schiz*.

¹⁷Skolnick, J. H. (1990). "A Critical Look at the National Drug Control Strategy." *Yale Law and Policy Review*. Vol. 8 No. 1, pg. 76. Hereafter referred to as *Critical Look*.

¹⁸Morales, W. Q. (1989). "The War on Drugs: A New US National Security Doctrine?" *Third World Quarterly*. Vol. 11 No. 3, pg. 148 Hereafter referred to as *New Security*.

needed to replace anticommunism as the vehicle to legitimize U.S. action once the public no longer bought into the fear of communism.¹⁹ Available budgetary information also corroborates this assertion –defense spending after the Cold War was projected to be slashed, but the drug war initiative allowed the Defense Department to escape the reductions and reclassify the funding as drug related.²⁰

From its onset the war on drugs was also closely related to patriotism. President Lyndon B. Johnson once stated that he could “wrap the flag around this policy, and use patriotism as a club to silence critics.”²¹ The administrations during the war on drugs seemed to agree with this strategy. Dissent was a direct threat to a national security doctrine that operated like religious dogma.²² Patriotic citizens would embrace the national security doctrine for its prioritization of the well-being of the country, and those who would blasphemously critique it were demonized for not placing the country’s needs above their own. However, a policy without clearly defined objectives that spell out how they will be accomplished has created a tendency to reduce the mission of the war on drugs to measurement; as a result, the war has become “autonomous” – an end rather than a means to one.²³ In order to understand the way that these attitudes and ideologies manifested themselves, an examination of the policies of the war on drugs is necessary.

Drug Supply and Demand: The Policies

While President Nixon had previously closed borders with Mexico and exerted diplomatic pressure on Turkey in order to influence foreign participation in the reduction of drug

¹⁹*New Security* pg. 147

²⁰*Addicted to Failure* pg. 122

²¹*New Security* pg. 149

²²*New Security* pg. 151

²³Bertram, E. & Sharpe, K. (1997). “The Unwinnable Drug War: What Clausewitz Would Tell Us.” *World Policy Journal*. Vol. 13 No. 4, pg. 43. Hereafter referred to as *Unwinnable War*.

supply²⁴, substantive policy and commitment began when President Ronald Reagan declared war on drugs in February of 1982, pledging to curtail America's blossoming drug epidemic.²⁵ Congress responded by approving tougher drug legislation, widening military involvement, expanding U.S. designed drug eradication, crop substitution, and law enforcement programs in source and transit countries culminating in the Anti-Drug Act of 1986.²⁶ The Anti-Drug Act was the most comprehensive initiative in modern U.S. history to lower domestic demand and reduce the supply of drugs from abroad. It featured an increase of \$1.7 billion dollars in the federal budget for an anti-drug campaign where 75% of the funding went to supply reduction and 25% went to rehabilitation, education, prevention, and treatment.²⁷ A subsequent budget cut of roughly \$1 billion dollars removed the bulk of the funding from the latter, cementing the prioritization of punitive measures and supply reduction.²⁸

These measures logically followed from the doctrine of realism, which puts nation-states as key actors in international politics, requires state elites to design and implement foreign policy strategies to defend and promote vital interests, places national security interests as the epitome of foreign policy agendas, and responds to national security threats from the international system with the full range of power available to coerce hostile or stubborn nation-states.²⁹ Realism corroborated the ideology of the political sphere's approach to the war on drugs. It made use of the national security doctrine that, by rejecting all other alternatives and dismissing critique, placed the blame of America's "drug problem" on foreign source and transit countries.

²⁴*Addicted to Failure* pg. 121

²⁵Bagley, B. M. (1988). "US Foreign Policy and the War on Drugs: Analysis of a Policy Failure." *Journal of Interamerican Studies and World Affairs*. Vol. 30 No. 2/3, pg. 189. Hereafter referred to as *Analysis of a Failure*.

²⁶*Analysis of a Failure* pg. 193

²⁷*Analysis of a Failure* pg. 193

²⁸*Analysis of a Failure* pg. 194

²⁹*Analysis of a Failure* pg. 195

As a result, realism dictates that the United States must assume responsibility for enforcing international law and preserving order.³⁰ Drugs were considered a threat to this responsibility, so mandating cooperation in foreign countries via coercion was necessary. Senator Hawkins referred to this as the “punish them into submission” approach, but this approach failed to address the transnational and subnational agents that engaged in drug trafficking.³¹

However, once frustration set in from the lack of tangible progress in curbing drug production, trafficking, and consumption, Congress passed the Omnibus Drug Act only two years after the previous Anti-Drug Act.³² It featured a new demand side focus, emphasizing penalization of both drug users and dealers as well as federal support for local and state enforcement programs.³³ It contained a provision where three drug possession convictions of amounts varying from one gram to five grams mandated a life sentence without the prospect of early release.³⁴

The mandatory minimum sentencing described in these two drug acts included a five year sentence for the possession of either one gram of LSD, one hundred kilos of marijuana, five grams of cocaine, five hundred grams of powder cocaine, one hundred grams of heroin, ten grams of methamphetamine, or ten grams of PCP.³⁵ The ten year sentence merely multiplied the possession amount for each drug by ten. There is no medical justification for the one hundred to one disparity between crack and powder cocaine amounts necessary to reach minimum sentencing levels, but this disparity has contributed to the larger representation of minorities in

³⁰*Analysis of a Failure* pg. 195

³¹*Analysis of a Failure* pg. 192

³²*Analysis of a Failure* pg. 208

³³*Analysis of a Failure* pg. 208

³⁴Lee, L. W. (1993). “Would Harassing Drug Users Work?” *The Journal of Political Economy*. Vol. 101 No. 5, pg. 939.

³⁵PBS. (2011). “Drug Laws and Snitching: A Primer.” Retrieved from <http://www.pbs.org/wgbh/pages/frontline/shows/snitch/primer/>. Hereafter referred to as *Drug Laws*.

prisons for drug related offenses since crack is proportionally cheaper to purchase.³⁶ The later act in 1988 also applied the mandatory sentences targeted at high level traffickers to everyone involved in a drug conspiracy.³⁷ For example, a lookout at a crack house doorway would be liable for every drug sold in that structure or by the organization running the structure.

Additionally, the two drug acts allowed for the government seizure of property used in drug crimes or property obtained through illicit drug sale profits.³⁸ These forfeiture provisions also applied to property owners uninvolved in the drug trade who had taken steps to protect their property from being used for drug trafficking but failed. Under these provisions, innocent citizens must bring a cash bond to bring suit against the government for the return of their property, and those who fail to do so within the allotted time frame lose their property permanently.³⁹ The proceeds of property forfeited to the government are given to the enforcement agency that made the seizure, which introduces a dangerous incentive for these agencies to seize property in unmerited circumstances.⁴⁰

The Reagan administration believed that until U.S. domestic demand diminished, it would be incredibly difficult to bring drugs under control.⁴¹ The increased focus on the drug user and seller on the domestic front foreshadowed the policy preferences of the men that would follow President Reagan -- President George H. W. Bush and his drug czar William Bennett.

³⁶ACLU. (2006, October 26). "ACLU Releases Crack Cocaine Report, Anti-Drug Abuse Act of 1986 Deepened Racial Inequity in Sentencing." Retrieved from <http://www.aclu.org/drug-law-reform/aclu-releases-crack-cocaine-report-anti-drug-abuse-act-1986-deepened-racial-inequity/>.

³⁷*Drug Laws*

³⁸*Drug Laws*

³⁹*Drug Laws*

⁴⁰*Drug Laws*

⁴¹ Sharpe, K. E. (1988). "The Drug War: Going after Supply: A Commentary." *Journal of Interamerican Studies and World Affairs*. Vol. 30 No. 2/3, pg. 77.

In 1989, President George H. W. Bush declared that “drugs are the gravest domestic threat facing our nation today.”⁴² Drug czar William Bennett believed that the focus of the war on drugs should be a massive wave of arrests.⁴³ While 30% of the drug-taking population at the time were hardcore users, Bennett was equally (and in many cases more) interested in pursuing and punishing the casual user who might indulge as little as once a week or less often.⁴⁴ Bennett believed that the casual user of drugs was a “highly contagious” influence on others because the individual was more likely to have an intact family, a social life, and a work life while addicts were “bottomed out messes” whose use would not appeal to anyone.⁴⁵

William Bennett’s public policy approach treated the use of drugs as bad for those who use the drugs and for others whom those people affect by their conduct; legal sanctions would send the necessary message to deter those who would otherwise act illegally.⁴⁶ The ideology of William Bennett manifested itself in the Bush administration’s “National Drug Control Strategy,” which advocated the vast expansion of apparatuses of social control, especially police officers and prisons.⁴⁷ The Strategy placed drug use in the same category as murder and rape and consequently called for more tools to combat it – more prosecutors, judges, courtrooms, and administrative staff.⁴⁸ Bennett’s theory that casual users were “contagious” served as the vehicle of justification for stricter legislative action against them.⁴⁹

⁴²Blachman, M. J. & Sharpe, K. E. (1990). “The War on Drugs: American Democracy under Assault.” *World Policy Journal*. Vol. 7 No. 1, pg. 135. Hereafter referred to as *Democracy Assault*.

⁴³*Democracy Assault* pg. 135

⁴⁴Barnett, R. E. (1994). “Review: Bad Trip: Drug Prohibition and the Weakness of Public Policy.” *The Yale Law Journal*. Vol. 103 No. 8, pg. 2613. Hereafter referred to as *Bad Trip*.

⁴⁵*Critical Look* pg. 80

⁴⁶*Bad Trip* pg. 2615

⁴⁷*Critical Look* pg. 75

⁴⁸*Critical Look* pg. 79

⁴⁹*Critical Look* pg. 81

The Strategy sought to curb use by making drugs difficult to obtain; the limited availability would create higher prices that would lower demand and subsequently limit use.⁵⁰ It relied on the law and the force behind it to battle growers, refiners, shippers, distributors, and money launderers.⁵¹ However, it also contained threats to control the domestic front with sanctions including jail, fines, loss of licenses and housing, and “boot camps” to “reeducate” users, especially youths with limited to no criminal background.⁵² The Strategy advocated everything from \$10,000 fines for small drug sales⁵³ to the presentation of antidrug propaganda in schools.⁵⁴

The change from the conservative Bush administration to the Clinton administration did not drastically alter the terms of the war on drugs. President Clinton generally endorsed his predecessors’ emphasis on curtailing drug supply.⁵⁵ The Clinton administration requested additional funding in order to focus on stopping drugs closer to the source of their production rather than concentrating on interdiction.⁵⁶ Congress denied the request and republicans criticized the shift away from interdiction as a litmus test to President Clinton’s commitment – essentially, the quarrel was more a debate of methods than intent.⁵⁷ Like previous administrations, a majority of the funding set aside for the war on drugs was allocated to enforcement rather than treatment and prevention, roughly two-thirds of the \$16 billion dollars requested for the former and one-third for the latter.⁵⁸

⁵⁰*Democracy Assault* pg. 135

⁵¹*Democracy Assault* pg. 136

⁵²*Critical Look* pg. 77

⁵³*Bad Trip* pg. 2613

⁵⁴*Bad Trip* pg. 2616

⁵⁵*Addicted to Failure* pg. 122

⁵⁶*Addicted to Failure* pg. 123

⁵⁷*Addicted to Failure* pg. 123-4

⁵⁸*Score, Scan, Schiz* pg. 84-5

During the Clinton administration, mandatory minimum sentencing was again expanded with the Methamphetamine Control Act of 1996.⁵⁹ An individual apprehended with ten grams of pure methamphetamine was subjected to a mandatory minimum sentence of five years, while the ten year sentence required ten times that amount.⁶⁰ The act also raised the penalty for trafficking in pre-cursor chemicals that are used to make methamphetamine. An individual apprehended with two to six kilos of ephedrine or pseudoephedrine was subjected to a mandatory minimum sentence of five years, while twenty kilos or more triggered a nine year sentence.⁶¹ This act continued the previously established trend of treating punitive enforcement and incarceration as viable solutions to the drug problem in America.

When President George W. Bush took office in 2000, his administration faced a unique challenge in the war on drugs as a result of the 2001 terrorist attack on New York City. It led to an investigation of terrorist groups, including the means through which they funded their operations. Congressional effort culminated in the Vital Interdiction of Criminal Terrorist Organizations Act of 2003, which called for those convicted of low-level drug offenses that contributed to a “foreign terrorist organization” to be held criminally liable for a terrorism related offense – even if the person charged is unaware the money went to a terrorist group.⁶² The White House also began running a series of television advertisements through the Office of National Drug Control Policy depicting young actors admitting to helping terrorists blow up buildings by

⁵⁹Office of National Drug Control Policy. (2011). “The National Methamphetamine Drug Conference.” Retrieved from <http://www.ncjrs.gov/ondcppubs/publications/drugfact/methconf/appen-b6.html>. Hereafter referred to as *Drug Conference*.

⁶⁰*Drug Conference*

⁶¹*Drug Conference*

⁶²ACLU. (2003, December 15). ACLU Interested Persons Memo Providing Analysis of the Latest Available Draft of the Vital Interdiction of Criminal Terrorist Organizations Act of 2003. Retrieved from <http://www.aclu.org/national-security/aclu-interested-persons-memo-providing-analysis-latest-available-draft-7302003-vit>

linking the purchase of drugs to financing terrorism.⁶³ The Bush administration's linking of the fight against terrorism and the war on drugs is the most recent in a long history of public policies seeking to legitimize government initiatives through a national security doctrine. In order to examine the ways in which the war on drugs eroded Fourth Amendment protections and civil liberties, an examination of the effects of the initiative is necessary.

The War on Drugs: An Assault on the Fourth Amendment

Public policy and the ideology behind the war on drugs enabled a transformation from a welfare state to one that resembles a semi-martial state.⁶⁴ Democrats and Republicans alike want to appear tough on drugs and hit the campaign trail with new schemes for cracking down on drug supply.⁶⁵ Enacting tough anti-drug statutes is viewed as “doing something” about a social problem and “morally superior” to doing nothing.⁶⁶ Those politicians who opposed such policies were considered old-fashioned and small-minded – they were “soft” on drugs.⁶⁷ Every time a drug policy failed to meet goals it was interpreted as a need for escalated funding⁶⁸ and more firepower rather than a need to reevaluate the strategy.⁶⁹ Senator Dennis DeConcini offered a vote of confidence in the strategy when he declared that “for those who say that we can't possibly win the war on drugs, I say we haven't tried.⁷⁰” Drug policy has essentially been captured by its own rhetoric and rendered immune to criticism⁷¹ – after all, when politicians stress the need to get tough on drugs, whose vote do they lose?⁷²

⁶³Drug Policy Alliance. (2004, July 19). Drug Policy Around the World: Terrorism. Retrieved from <http://www.drugpolicy.org/global/terrorism/>

⁶⁴*Critical Look* pg. 75

⁶⁵*Unwinnable War* pg. 41

⁶⁶*Bad Trip* pg. 2617

⁶⁷*Bad Trip* pg. 2618

⁶⁸*Bad Trip* pg. 2618

⁶⁹*Unwinnable War* pg. 41

⁷⁰*Unwinnable War* pg. 43

⁷¹Nadelmann, E. A. (1988). “U. S. Drug Policy: A Bad Export.” *Foreign Policy*. No. 70, pg. 83 (*A Bad Export*)

⁷²*Bad Trip* pg. 2618

The rhetoric greatly influenced the American public. A *Washington Post*-ABC News poll of Americans during the Bush-Bennett era indicated that 52 percent of respondents would sanction the search of homes based solely on suspicion without a court order, 67 percent indicated they approved of random car searches, and 67 percent of those questioned also indicated they were “willing to give up a few of the freedoms we have” to attack the drug problem.⁷³ During the Clinton administration, a 1995 Chicago Council on Foreign Relations national survey indicated that 85 percent of respondents ranked “stopping the flow of drugs” at the top of the list of foreign policy goals.⁷⁴

The underlying logic and motivation of the war on drugs was righteous prosecution: drug use was zealously labeled as heresy and heretics must be punished for their own good in order to preserve the morality of society.⁷⁵ As long as the prohibitionists set the terms for abuse, victims of drug abuse will appear to get what they deserved.⁷⁶ This unsympathetic view of drug use and addiction extended as far as the Supreme Court; Thurgood Marshall told *Life* that “if it’s a dope case, I won’t even read the petition...I ain’t giving no break to no dope dealer.”⁷⁷

The intense focus on enforcement and the passion behind the war on drugs movement placed a lot of pressure on law enforcement, jeopardizing police integrity when the pressure to lie about the circumstances of an arrest or search to justify its legality was prioritized over the Constitution.⁷⁸ The pressure to escalate enforcement measures went hand in hand with the pressure to compromise the safeguards to civil rights.⁷⁹ In order for law enforcement to have a chance at remedying the drug problem it would require more man-power as well as the

⁷³*Democracy Assault* pg. 136

⁷⁴*Addicted to Failure* pg. 120

⁷⁵*Bad Trip* pg. 2616

⁷⁶*Score, Scan, Schiz* pg. 85

⁷⁷*Bad Trip* pg. 2616

⁷⁸*Bad Trip* pg. 2623

⁷⁹*Democracy Assault* pg. 137

suspension of Fourth Amendment restraints of police searches, seizures, wiretaps, and the abolition of the exclusionary rule.⁸⁰ Rather than attempting to undo decades of Supreme Court cases that developed the Fourth Amendment to its modern understanding, law enforcement is pressured to consider the ways in which it can circumvent Fourth Amendment protections in order to carry out the initiatives of the war on drugs.

Political initiatives like William Bennett's National Drug Control Strategy presented law enforcement with an impossible task. They stressed the importance of punitive measures but did not address the fact that meeting policy goals would require creative maneuvering on the part of law enforcement outside legally accepted means, nor did the Strategy once mention police corruption.⁸¹ However, the involvement of law enforcement in a relatively inelastic drug market resulted in some officers taking advantage of the powers afforded to them. Some members of law enforcement accepted "licensing fees" from major drug traffickers to prevent new entrants from competing with established sellers, simultaneously serving the needs of the public and the trafficker.⁸²

Ironically, other officers' dishonest behavior was for the "greater good" of convicting the drug dealers and users that the political sphere had demonized for decades. Officers obviously had a lot of incentive to distort their testimony and stretch the facts to fit particular circumstances – no one wants to lose a case or see one's discoveries suppressed or ruled illegal.⁸³ The credibility gap between an officer and a defendant presented police with the opportunity to commit perjury; officers were able to concoct fictitious tips providing a series of incriminating details corresponding exactly to the facts the officers observed at the scene, falsely claim that a

⁸⁰*Democracy Assault* pg. 137-8

⁸¹*Critical Look* pg. 87

⁸²Eatherly, B. J. (1974). "Drug-Law Enforcement: Should We Arrest Pushers or Users?" *The Journal of Political Economy*. Vol. 82 No. 1, pg. 213.

⁸³Stuntz, W. J. (1991). "Warrants and Fourth Amendment Remedies." *Virginia Law Review*. Vol. 77 No. 5, pg. 914. Hereafter referred to as *Fourth Remedies*.

defendant consented to a search, or falsely claim that the evidence was discovered in an area the officers had authority to search.⁸⁴

An officer's knowledge of the objective evidence prior to testifying makes it extremely difficult to contest any misrepresentation of the facts offered as truth to a jury.⁸⁵ In addition to officers, judges may tilt toward the government in deciding suppression motions, since such motions are made by unsympathetic defendants (recall Thurgood Marshall's statement to *Life*).⁸⁶ It is also generally accepted that warrant application rejections are exceptions rather than the rule.⁸⁷

The temptation for officers to lie to circumvent Fourth Amendment protections is enhanced when they consider that even truthful testimony from defendants will appear less credible than any misrepresentation by law enforcement.⁸⁸ If police officers lie at suppression hearings they then have the ability to effectively get rid of it, and when perjury is successful searches are no longer constrained by any substantive standards other than an officer's inability or willingness to come up with a good story.⁸⁹ In fact, perjury ends the probable cause inquiry altogether in the government's favor.⁹⁰

The temptation to circumvent the Fourth Amendment or erode the probable cause requirement is a direct result of the unusual nature of drug-related crimes. Drug trafficking and sale is an entirely consensual activity between a willing seller and buyer, so the lack of a "victim" in the traditional sense calls for more intrusive law enforcement measures to apprehend violators.⁹¹ These intrusive measures often are a result of "hunches," and hunches have proven to

⁸⁴*Fourth Remedies* pg. 914

⁸⁵*Fourth Remedies* pg. 915

⁸⁶*Fourth Remedies* pg. 915

⁸⁷*Fourth Remedies* pg. 935

⁸⁸*Fourth Remedies* pg. 915

⁸⁹*Fourth Remedies* pg. 916

⁹⁰*Fourth Remedies* pg. 937

⁹¹*A Bad Export* pg. 91

be controversial in the next platform for the erosion of Fourth Amendment principles – drug courier profiles.

Among other accusations, drug courier profile searches are criticized for leading to “groundless searches of blacks and other minorities police believe are more likely to be carrying drugs.”⁹² The profile searches are referred to as the “slippery slope” in law, where average citizens who do not break the law are still suspects in the war on drugs.⁹³ Law enforcement is also criticized for being prone to reading too much into the manner in which “suspects” approach agents.⁹⁴ One particular instance of a Fourth Amendment violation occurred when hall of fame baseball player Joe Morgan was unlawfully seized and arrested when a black drug courier characterized his accomplice as “looking like him.”⁹⁵ A police officer noticed a short, muscular black man walk towards the agent and then abruptly turn away toward several telephones; the officer moved in for questioning and within moments the exchange turned violent as the officer handcuffed the suspect, pulled him to his feet, placed his hand across the man’s mouth, and marched him away -- refusing to allow the man to secure his briefcase to provide identification and ignoring a bystander’s attempt to identify the suspect.⁹⁶

Only after the police interrogated the suspect in a private room did the officers realize that they had detained a famous baseball figure. Officers attempted to justify the action taken against Morgan through the testimony of the black drug courier who informed the officers he looked like his accomplice, but the result left the officers with no more warning than to be on the lookout for a nervous black male exhibiting the characteristics of a narcotics courier.⁹⁷ However,

⁹²*Second Casualty* pg. 1422

⁹³*Second Casualty* pg. 1425

⁹⁴*Second Casualty* pg. 1428

⁹⁵*Second Casualty* pg. 1430

⁹⁶*Second Casualty* pg. 1429

⁹⁷*Second Casualty* pg. 1429-30

when pressed on what those characteristics might be, enforcement provided no definitive answers.⁹⁸

Drug profiles have also at times been dangerously general. Driving alone in the early morning in a big car as a male out of state traveler can be enough to rouse the suspicion of an officer, especially if the driver chooses to honor the speed limit.⁹⁹ Many of these profile-based searches are a result of completely typical and unremarkable behavior on the part of the suspect who, as a tourist, commuter, or businessman, is subjected to a stop.¹⁰⁰ While the drug profile searches in the latter examples were described by the courts as an “intrusion upon the privacy rights of the innocent...too great for a democratic society to bear,” the courts have not categorically dismissed the legality of this practice as long the reasonable suspicion has some foundation in “individualized observation.”¹⁰¹

In the 1990s, “reasonable suspicion” had a different meaning in the state of New Jersey when it came to traveling I-95. The reputation of officers patrolling I-95 to engage in racial profiling was so severe that even some black officers preferred to take back roads than to subject themselves to the scrutiny of the New Jersey turnpike.¹⁰² According to a former state trooper, many state troopers parked perpendicular to the turnpike so that the headlights of their car enabled them to identify motorists by race.¹⁰³ Troopers were trained to target vehicles with out of state license plates, particularly from Florida, New York, and Virginia, with dark faced drivers

⁹⁸*Second Casualty* pg. 1430

⁹⁹*Second Casualty* pg. 1426

¹⁰⁰*Second Casualty* pg. 1427

¹⁰¹*Second Casualty* pg. 1427

¹⁰²Goldberg, J. (1999, June 20). “The Color of Suspicion.” *New York Times*. Retrieved from http://www.jeffreygoldberg.net/articles/nyt/the_color_of_suspicion.php.

¹⁰³NJ Black and Latino Legislative Caucus. (1999). “A Report on Discriminatory Practices within the New Jersey State Police.” Retrieved from <http://www.njleg.state.nj.us/legislativepub/reports/police.pdf>. Hereafter referred to as *NJ Discrimination*.

and passengers.¹⁰⁴ Terms like “mutts” and a “carload of coal” were employed by troopers to signal ahead to other officers that a “good stop” was approaching.¹⁰⁵

A former trooper also described New Jersey state police’s policy of “criminal programming,” which advocated the aggressive targeting of blacks and other minorities as criminal suspects.¹⁰⁶ Numerous minority victims of racial profiling on the turnpike gave detailed accounts of officers engaging in verbal harassment and physical abuse. There were even accounts of officers placing a gun to a passenger’s head and laughing afterwards once they had determined only a speeding ticket was necessary.¹⁰⁷ In the words of then state police Superintendent Colonel Carl Williams: “Today with this drug problem, the drug problem is cocaine or marijuana. It is most likely a minority group that’s involved with that...If you are looking at heroin and stuff like that, your involvement there is more or less Jamaicans.”¹⁰⁸

In 1999, the Black and Latino Caucus met with President Clinton to urge the expedition of the investigation the Justice Department began three years earlier regarding the profiling practices of New Jersey state police.¹⁰⁹ The talks were positive, evident in President Clinton’s prioritization of addressing the problem of racial profiling in his “Memorandum on Fairness in Law Enforcement” constructed the same year.¹¹⁰ Racial profiling has obvious search and seizure implications in regards to pulling over vehicles, which do not require warrants to search. Any determination of probable cause and reasonable suspicion based on practices similar to the New Jersey state police hardly honors the intent of the Fourth Amendment.

¹⁰⁴*NJ Discrimination* pg. 9

¹⁰⁵*NJ Discrimination* pg. 9

¹⁰⁶*NJ Discrimination* pg. 9

¹⁰⁷*NJ Discrimination* pg. 9-10

¹⁰⁸*NJ Discrimination* pg. 2

¹⁰⁹*NJ Discrimination* pg. 2

¹¹⁰US Department of Justice. (2001). “Principles for Promoting Police Integrity.” Retrieved from <http://www.ncjrs.gov/pdffiles1/ojp/186189.pdf>.

Nevertheless, the Court allows for the profile-based stop of a suspect who has exhibited suspicious behavior and characteristics such as paying for an airline ticket from a wad of cash, traveling under a name that did not match the name of their telephone listing, not checking one's luggage on the flight, and staying very briefly in an area that takes significant travel time to reach.¹¹¹ Clothes, jewelry, and nervousness are also important to an officer's construction of a profile and identification of an individual exhibiting those "classic" traits. The difference between this accepted search and the earlier searches condemned by the courts seems to be the latter's root in individualized observation rather than a profile, but the officer's suspicion in the latter was first aroused because the suspect fit an accepted idea of what a drug courier looked like.¹¹²

These explanations result in quite a blurred sense of acceptable searches with distinctions that at times appear arbitrary. It is certainly not inconceivable that an innocent person could provide a false name to avoid publicity or hide something personal like marital infidelity, or that a family medical emergency could cause a short layover, or that an individual could live with a roommate whose name appears on the telephone listing rather than their own.¹¹³

The threat of profile searches to the Fourth Amendment is clear – the criteria calls for nearly thousands of innocent travelers to be scrutinized every hour.¹¹⁴ This appears to indicate a tendency for the courts and enforcement to see profiles and searches merely through the way it relates to the interests of apprehending criminals. However, as Justice Marshall noted, "the strongest advocates of Fourth Amendment rights are frequently criminals" and as a result "it is easy to forget that our interpretations of such rights apply to the guilty and the innocent alike."¹¹⁵

¹¹¹*Second Casualty* pg. 1424

¹¹²*Second Casualty* pg. 1424

¹¹³*Second Casualty* pg. 1425

¹¹⁴*Second Casualty* pg. 1424

¹¹⁵*Second Casualty* pg. 1429

This one sided emphasis has enabled the officers' ability to apprehend dozens of individuals with very few legitimate arrests without seriously scrutinizing the evidentiary and punitive implications and measures these stops facilitate.¹¹⁶

¹¹⁶*Second Casualty* pg. 1428

Concluding Remarks:

While the repeal of alcohol prohibition suggests that drug prohibition is not as impregnable as the proponents of the war on drugs would have people believe, the war certainly is deeply rooted in society. Encompassing the war on drugs in the national security doctrine has successfully linked supporting the war to supporting the wellbeing of the country. The political sphere's demonization of drug users has caused citizens and magistrates alike to register a very unsympathetic view of them under the spotlight the war on drugs provides. Popular rationale states that in order to restore America to its "inherently just and moral form," it must be taken back from the drug users and sellers as well as the minority demographic it is often portrayed to represent. Citizens have bought into this initiative in order to facilitate law and order and appear patriotic – going as far as sanctioning an invasion of the rights afforded to them by the Fourth Amendment.

Law enforcement has taken advantage of this societal green light. Faced with the constant pressure from the political sphere to produce tangible results to justify and strengthen the rationale of the war on drugs, officers face the severe temptations to mislead, misrepresent, and doctor the facts in order to use evidence illegally seized evidence and to justify constitutionally unauthorized stops. The political sphere's work has essentially eliminated any check against this temptation because the zeal of politicians and society alike is directed towards sellers and users as immoral cancers to society. It constantly puts the word of an officer against the word of a suspected drug offender, and the political sphere's deference to police and enforcement in turn influences magistrates and a jury of the drug suspect's peers to adopt a similar view.

The Fourth Amendment to the Constitution seeks to protect Americans from the injustices of unreasonable searches and seizures, but when the political sphere's rhetoric and initiatives produce a society content to operate in a semi-martial state in the name of morality and patriotism, it is only so many words on a powerless piece of paper. While the historical context surrounding the Fourth Amendment establishes the Framers' intent to protect the individual against the excessive and arbitrary powers of government, this intent is irrelevant if citizens no longer recognize the importance of the freedoms it protects and instead willingly cede civil liberties to the government "for the greater good." The Supreme Court's interpretation of the Fourth Amendment determines its scope, and if that interpretation is in any way a reflection of the sociopolitical forces surrounding it then the Fourth Amendment cannot hope to protect citizens in a nation more deferential towards law enforcement than civil liberties.

Chapter 4: Individual Analysis

This chapter will identify a relationship between Supreme Court decisions regarding the scope of the Fourth Amendment and the social and political attitudes of the times those decisions were made. The trend itself is relatively simple – as the political sphere’s support for prohibition of alcohol and drugs intensifies the Court’s interpretation of the scope of the Fourth Amendment narrows. This chapter will argue that this narrower interpretation of the Fourth Amendment, resulting in the gradual weakening of the warrant requirement and standards for probable cause, violates the spirit in which the Fourth Amendment was constructed by the Framers.

This chapter will examine how the inherent enforcement problems of prohibitive policy in the war on drugs pose inescapable threats to freedom that the Framers would not condone in the balance of government and private interests. It will propose an alternative solution to the punitive focus of the current initiative, distinguishing itself from the latter with goals that are clear, achievable, sensible, and treat the well-being of citizens not as a symbolic means to legitimize government action but as an end in itself.

The Supreme Court: Responding to Pressure

The landmark nineteenth century Fourth Amendment case *Boyd v. United States*¹ suggested a future of wide Fourth Amendment protections under the Court's "liberal construction" of citizens' rights to security of property and person.² The Court cited Lord Camden's rationale in the case involving the printer John Entick, where he stated that the law to warrant power should be as clear as the power is exorbitant.³ John Entick's case against the government was linked to John Wilkes' suit, as Entick had printed Wilkes' "Number 45" issue of the *North Briton* that was deemed libelous.⁴ Lord Camden's ruling in the Wilkes case condemned general warrants for subjecting every citizen to search and inspection on the whim of any government or Crown representative who merely suspected a person to be in some way responsible for an offense.⁵

The ruling sought to restrain the excessive and arbitrary powers of government. By citing this highly celebrated case in civil liberty, the Court in *Boyd* established a precedent of prioritizing the privacy interests of the individual via a wide scope of Fourth Amendment protections. The Court in *Boyd* further acknowledged the influence of Lord Camden's ruling by drawing from it to determine what the Framers meant by "unreasonable searches and seizures."⁶ Consequently, the *Boyd* case offers two fundamental considerations from the Framers for determining the scope of the Fourth Amendment and judging the actions of the government: the power must be proportional to the clarity of the law and the rights of the individual must be liberally construed rather than narrowly formulated. Any decision or government action veering

¹*Boyd v. United States*, 116 U.S. 616 (1886).

²116 U.S. 616, 617

³116 U.S. 616, 627

⁴116 U.S. 616, 626

⁵Loewy, A. H. (1983). "The Fourth Amendment as a Device for Protecting the Innocent." *Michigan Law Review*. Vol. 81 No. 5, pg. 1239.

⁶116 U.S. 616, 627

away from these considerations violates the intent with which the Fourth Amendment was formulated.

The Court once again limited government action almost thirty years later in *Weeks v. United States*⁷ when it adopted the “exclusionary rule” for the federal government. The Court addressed the tendency of those executing the law to obtain convictions by means of unlawful seizure, stating that if illegally obtained evidence was admissible then the Fourth Amendment is of no value.⁸ Therefore, the Court adhered to the principle of liberal construction by ruling that illegally obtained evidence was inadmissible in federal proceedings, but made a distinction that would have perhaps confused even the Framers by not subjecting the states to the same rule.⁹

The general trend of limiting government powers continued in cases where corporations were deemed by the Court to have the same rights against self-incrimination and illegal seizure illuminated in the previous *Boyd* case¹⁰ and a spouse could not waive the rights of her husband to allow an illegal search.¹¹ However, the Court shifted away from the prioritization of clarity in law and a liberal construction of the Fourth Amendment when the National Prohibition Act was enacted in 1919.¹²

The Alcohol Prohibition Era

In light of the social and political support of prohibition, the Court decided several cases that moved for a narrower interpretation of the scope of the Fourth Amendment and seemed to cast the purpose of its protections in unclear terms. In the middle of alcohol prohibition, the Court ruled that the government could use evidence obtained by illegal search and seizure as

⁷*Weeks v. United States*, 232 U.S. 383 (1914)

⁸232 U.S. 383, 393

⁹232 U.S. 383, 398

¹⁰*Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1919)

¹¹*Amos v. United States*, 255 U.S. 313 (1921)

¹²Murchison, K. M. (1994). *Federal Criminal Law Doctrine: The Forgotten Influence*. Durham and London: Duke University: Duke University Press, pg. 7 Hereafter referred to as *Federal Doctrine*.

long as the evidence was turned over by a private individual and the government had no knowledge of the violation.¹³ An unreasonable search and seizure still occurs when a private citizen trespasses, and the evidence seized by the private individual and turned over to the government has the very real power to result in a conviction, but the Fourth Amendment does not apply due to the semantic difference of who actually committed the violation. The Court also restricted the scope of the Fourth Amendment by declaring it was not applicable to the “open fields” outside a citizen’s home, in a case where law enforcement wanted to use evidence of alcohol abandoned outside the defendant’s home.¹⁴

The Court also shifted away from a focus on liberal construction and clarity by juggling the public interests and the rights of the individual, which was evident in a case where the Court decided that no warrant was necessary for the search and seizure of an automobile.¹⁵ This allowed officers to seize alcohol contraband in a vehicle before it could be moved outside the jurisdiction in which the warrant would be secured.¹⁶ As long as officers had probable cause arising out of the circumstances known to the officer, the subsequent search does not violate the Fourth Amendment.¹⁷

The Court lowered the requirement of particularly describing the place to be searched by stating that the characterization of a building as a garage for business purposes in a warrant merited the search of every room and connected area that one would be able to reach by elevator.¹⁸ The Court also sanctioned the warrantless search of an individual incident to a lawful arrest and the search of the place where he was arrested without a warrant; it also held that the unlawful search and seizure of one individual’s residence in a conspiracy case did not prevent

¹³*Burdeau v. McDowell*, 256 U.S. 465 (1921)

¹⁴*Hester v. United States*, 265 U.S. 57 (1924)

¹⁵*Carroll v. United States*, 267 U.S. 132 (1925)

¹⁶267 U.S. 132, 153

¹⁷267 U.S. 132, 149

¹⁸*Steele v. United States*, 267 U.S. 498 (1925)

the government from using the illegally obtained evidence against the other conspirators.¹⁹ It made room for the seizure of ledgers and bills as incident to a lawful arrest, even if the warrant itself did not specify these things.²⁰ The Court even held that the government could use a wiretap to eavesdrop on a telephone conversation and use the following incriminating evidence to secure a conviction.²¹

Chief Justice William Howard Taft served on the Court during the prohibition era from 1921 to 1930, which encompassed the years of strongest prohibition support before the Great Depression greatly altered the political landscape. Taft was heavily involved in the selection of the first three of four new justices that would join the Court prior to 1925.²² Before prohibition was ratified, Taft criticized the prospect of national prohibition, believing it to be a local issue.²³ Once prohibition became part of the Constitution, Taft abstained from his previous practice of drinking alcohol and criticized those who continued to drink alcohol. It was the duty of the citizen to follow the law advocated by the majority regardless of whether he agreed with it.²⁴

However, this deference to the will of the majority ignores the circumstances in which prohibition gained popularity, a mistake this work will not make. Established in 1883, The Anti-Saloon League operated as a single interest pressure group focused on achieving political success.²⁵ The league overlooked whatever scandal a congressman might face as long as he voted “dry.”²⁶ It concentrated on securing local option ordinances and waited for public support for prohibition to grow stronger before lobbying at the state level. The league was careful to not offer prohibitive measures that represented a stricter temperance prioritization than the

¹⁹*Agnello v. United States*, 269 U.S. 20 (1925)

²⁰*Marron v. United States*, 275 U.S. 192 (1927)

²¹*Olmstead v. United States*, 277 U.S. 438 (1928)

²²*Federal Doctrine* pg. 14

²³*Federal Doctrine* pg. 15

²⁴*Federal Doctrine* pg. 15

²⁵*Federal Doctrine* pg. 5

²⁶*Federal Doctrine* pg. 6

surrounding general public, and these strategic measures eventually resulted in prohibition law victories in a majority of states.²⁷

The league then used the patriotism coursing through the nation as a result of World War I to enact wartime prohibition.²⁸ Since food conservation was an important wartime consideration, “wasting” foods to distill liquor was strictly regulated.²⁹ The league followed this wartime victory with the adoption of national prohibition. As a conservative, Taft would certainly not allow this historical context to influence his standard of strict adherence to all laws, regardless of their nature. The fact that a single focus interest group was able to rouse public support by manipulating wartime fervor for its own policy preference was irrelevant to Taft and the conservative members of his Court.

Essentially, the Court prioritized the strict enforcement of this socially supported initiative over the Framers’ intentions specified in the *Boyd* precedent, and this is reflected in the narrow construction of the Fourth Amendment that defined the prohibition era. This narrow construction of the Fourth Amendment was necessary to provide law enforcement with the means to strictly enforce prohibition law. The expense was the clear, liberal construction of the Fourth Amendment protections available to the individual.

The Interlude: Returning to the Principles of *Boyd*

When the Great Depression of 1929 began eroding the public support for prohibition, the political sphere responded by repealing it in order to demonstrate a level of receptiveness to the

²⁷*Federal Doctrine* pg. 6

²⁸*Federal Doctrine* pg. 7

²⁹*Federal Doctrine* pg. 7

public to raise morale.³⁰ However, the impact of this change was not limited to the social and political sphere – the repeal of prohibition caused a return to the more liberally constructed view of the Fourth Amendment described in *Boyd*. The cases between the repeal of prohibition and the introduction of the war on drugs demonstrate this shift back towards *Boyd*.

In the immediate wake of the lessened support for prohibition the Court held that an invalid warrant was enough to make the search of a premise unreasonable, even if the facts were sufficient to justify an arrest without a warrant.³¹ This ruling sought to distinguish itself from the previous *Marron v. United States*³² ruling during strong support for prohibition, but the Court's explanation of the distinction was unclear. Between the similar issues presented in both cases, it seems as if the only difference is the attitude of the times and the Court is steering away from admitting the influence of prohibition on its interpretation of the Fourth Amendment.

Nevertheless, the Court responded with a series of rulings favorable to a liberal construction of the Fourth Amendment while restricting the powers of the government. The Court ruled that the solicitation of orders for alcohol does not justify the search of the premises as an incident to an arrest.³³ It ruled that a suspicion of a prohibition violation confirmed by odor and a chink through a fence was not enough to merit law enforcement's forced entry into the defendant's garage.³⁴ The rationale of one case even emphasized the importance of construing the Fourth Amendment in such a manner to prevent impeding its extended protection and held that the evidence necessary for issuing a warrant must meet the same standards that would lead a

³⁰Levine, H. G. & Reinerman, C. (1991). "From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy." *The Milbank Quarterly*. Vol. 69 No. 3, pg. 465

³¹*Go-Bart Imp. Co. v. United States*, 282 U.S. 344

³²See reference 20

³³*United States v. Lefkowitz*, 285 U.S. 452 (1932)

³⁴*Taylor v. United States*, 286 U.S. 1 (1932)

jury member to conclude an offense occurred.³⁵

The Court also held that warrants could not merely be re-dated and reissued upon expiration, but required a new warrant and a new proceeding supported by probable cause at the time the new warrant was issued.³⁶ It also linked the Fourth and Fourteenth Amendment when the Court held that the arbitrary intrusion into privacy by police is prohibited by the Due Process Clause of the latter, although it still held that the exclusionary rule was not imposed on the states.³⁷ The Court subsequently eliminated this distinction and held state law enforcement and courts to federal standards in the landmark case *Mapp v. Ohio*.³⁸ The Court stated that not applying this standard to states presents a needless conflict compromising a healthy federalism by encouraging state disobedience to the federal constitution.³⁹

The Court in this era further distinguished itself from the prohibition court by reversing the ruling allowing government eavesdropping of telephone conversations in *Katz v. United States*.⁴⁰ The Court itself admitted that decisions subsequent to the *Olmstead* case eroded the pro-enforcement trespass doctrine established in that case to the point where it can no longer be considered controlling, and the result was the labeling of recorded phone conversations as a search and seizure within the Fourth Amendment.⁴¹

Thomas Marshall's work concerning public opinion and prevailing Supreme Court decisions helps explain this era's trend of shifting back to the *Boyd* rationale of the liberal construction of the Fourth Amendment. In his description of the public opinion model, public

³⁵*Grau v. United States*, 287 U.S. 124 (1932)

³⁶*Sgro v. United States*, 287 U.S. 206 (1932)

³⁷*Wolf v. Colorado*, 338 U.S. 25 (1949)

³⁸*Mapp v. Ohio*, 367 U.S. 643 (1961)

³⁹367 U.S. 643, 657-8

⁴⁰*Katz v. United States*, 389 U.S. 347 (1967)

⁴¹389 U.S. 347, 350-3

opinion acts as a check on the Court.⁴² The model was tested by examining 128 Supreme Court rulings from the 1930s to the 1981 Burger Court term. The test matched each ruling with a nationwide poll public opinion poll concerning the same issue near the time of the decision.⁴³ Rulings initially consistent with public opinion polls and rulings where public attentiveness was low emerged as statistically significant and prevailed significantly more often.⁴⁴

In order to determine the relevance of Marshall's findings for this work, public attitudes towards drugs in this era must be addressed. During the 1920s and 1930s, the opiate problem declined to the degree where it mostly affected the periphery of society.⁴⁵ By 1930, the New York City's Mayor's Committee on Drug Addiction was reporting that cocaine addiction had ceased to be a problem.⁴⁶ However, it was during this era that smoking marijuana was introduced to the United States via Mexican immigrants. The negative view of immigrants caused marijuana use to be linked to violence, and the government responded with the marijuana transfer tax.⁴⁷ The tax mandated that private citizens purchase a stamp for the transfer of marijuana between private citizens, but the government refused to provide private citizens with the necessary stamp.⁴⁸

Widespread marijuana use in the 1960s drew attention from the scientific community, but it was difficult to link health problems to its use.⁴⁹ The youth counterculture in the 1960s sparked

⁴²Marshall, T. R. (1989). "Policymaking and the Modern Court: When Do Supreme Court Rulings Prevail?" *The Western Political Quarterly*. Vol. 42 No. 4, pg. 495. Hereafter referred to as *Supreme Court Rulings*.

⁴³*Supreme Court Rulings* pg. 496

⁴⁴*Supreme Court Rulings* pg. 501. See Table 1 (pg. 498) and Table 2 (pg. 501) for the technical statistical findings justifying this statement.

⁴⁵Musto, D. (1991). "Opium, Cocaine and Marijuana in American History." *Scientific American*. Retrieved from <http://www.drugtext.org/Various-general/opium-cocaine-and-marijuana-in-american-history.html>. Hereafter referred to as *American History*.

⁴⁶*American History*

⁴⁷*American History*

⁴⁸*American History*

⁴⁹*American History*

a demand for marijuana that peaked around 1978. The views of the Presidential Commission on Marijuana reflected this new environment in 1972 by recommending decriminalization of marijuana.⁵⁰ In 1977, the Carter administration formally proposed for the legal possession of marijuana in amounts not exceeding one ounce.⁵¹ A 1980 Gallup poll demonstrated that a majority of Americans favored the relaxation of marijuana laws -- 53% percent of Americans responded that they supported the legalization of small amounts of the drug. By 1986, a new Gallop poll that asked the same question resulted in only 27% of Americans supporting the same view.⁵²

When cocaine and opiate use was restricted to the peripheral parts of urban society in the 1930s, the general public's attention was not fixated on the drug problem. There was no prohibitive initiative successfully capitalizing on World War II fervor or any other patriotic sentiments. Marshall's findings suggest that rulings where public attentiveness was low prevailed more often, and in this environment the Court turned away from the narrow construction of the Fourth Amendment that aided the strict enforcement of prohibition law.

When marijuana use increased and the attitudes surrounding the drug shifted to a more tolerant view in the 1960s and 1970s, the Court's liberal construction of the Fourth Amendment called for the reversal of allowing the government to eavesdrop in telephone conversations. The *Mapp* ruling during this tolerant era represents the widest scope of protections given to citizens via the Fourth Amendment. Therefore, when support for prohibition died, so did the prioritization of enforcement measures. Furthermore, when public opinion actually advocated a more tolerant view of marijuana, the Court extended Fourth Amendment protections in some of the most pro-individual and pro-privacy decisions of the century. However, the 1986 Gallup poll

⁵⁰*American History*

⁵¹*American History*

⁵²*American History*

indicating low support for marijuana legalization foreshadowed an imminent change in the rationale of rulings that would greatly erode Fourth Amendment protections.

The New Prohibition: The War on Drugs

The first president to declare war on drugs was Richard Nixon, who began using the term in association with the growing marijuana and drug use in the late 1960s and 1970s.⁵³ The previous chapter of this work demonstrated a parallel between alcohol prohibition and the war on drugs. While both initiatives demonstrate a tendency to influence the Court's narrow construction of the Fourth Amendment, the war on drugs has a few key differences. Unlike prohibition, the war on drugs has been successfully encompassed within the national security doctrine and as a result has lasted longer.⁵⁴

The linking of the war on drugs to national security has occurred as recently as the September 11 attacks, and the response by the political sphere throughout the war on drugs has been to demonize drug users; the terrorist attacks even allowed for the political sphere to accuse users of contributing to the funding of terrorism.⁵⁵ The Supreme Court decisions from the late 1960s into the new millennium will demonstrate a shift back towards the narrow formulation of the Fourth Amendment from the days of alcohol prohibition.

In the first case representing this shift, the Court held that officers had the right to stop and frisk an individual for weapons if one such officer believed that an individual was armed but lacked the probable cause necessary to make a lawful arrest in *Terry v. Ohio*.⁵⁶ This case was the first of a series of rulings that would favor law enforcement over the individual in the balancing

⁵³Finkelman, P. (1993). "The Second Casualty of War: Civil Liberties and the War on Drugs." *Southern California Law Review*. Vol. 66 No. 4, pg. 1396.

⁵⁴Morales, W. Q. (1989). "The War on Drugs: A New US National Security Doctrine?" *Third World Quarterly*. Vol. 11 No. 3, pg. 148

⁵⁵Drug Policy Alliance. (2004, July 19). Drug Policy Around the World: Terrorism. Retrieved from <http://www.drugpolicy.org/global/terrorism/>

⁵⁶*Terry v. Ohio*, 392 U.S. 1 (1968)

act between public and private interests. The Court also held that a subject's knowledge of their right to refuse a search was not a prerequisite to establishing voluntary consent of that search.⁵⁷ It sanctioned routine stops for brief questioning at checkpoints⁵⁸ and also held that the exclusionary rule was not applicable to grand jury proceedings.⁵⁹ The Court upheld the constitutionality of warrantless arrests even when enforcement had the time to secure one, stating that it would not transform a judicial preference for warrants into a constitutional rule.⁶⁰

At times the Court even put the fox in charge of the chicken coop by allowing officers to perform searches of impounded and incapacitated vehicles pursuant to standard police procedure, putting the burden on the defendant to demonstrate an investigatory motive on the part of police.⁶¹ In the search of a car, any package that could conceal the object of the search as well as the search of the compartments and containers inside the vehicle were considered constitutional as long as probable cause dictated the action.⁶²

The Court also stated that a stop or seizure of a citizen meant being unable to walk away or ignore police questioning, and any contact between an officer and a citizen sans a show of authority would not cause a reasonable person to assume he was compelled to cooperate.⁶³ Throughout the course of an officer's contact with a citizen, any contraband presenting itself in plain view of the officer is not within the scope of the Fourth Amendment to protect.⁶⁴

The Court held that evidence is not excluded when judges make mistakes involving warrants rather than officers, since the purpose of excluding evidence is to deter police

⁵⁷*Schneekloth v. Bustamonte*, 412 U.S. 218 (1973)

⁵⁸*United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)

⁵⁹*United States v. Calandra*, 414 U.S. 338 (1974)

⁶⁰*United States v. Watson*, 423 U.S. 411 (1976)

⁶¹*South Dakota v. Opperman*, 428 U.S. 364 (1976)

⁶²*United States v. Ross*, 456 U.S. 798 (1982)

⁶³*United States v. Mendenhall*, 446 U.S. 554 (1980)

⁶⁴*Washington v. Chrisman*, 455 U.S. 1 (1982)

misconduct.⁶⁵ As long as the officer had a reasonable belief that the warrant was valid, the evidence procured from the search it authorized was admissible.⁶⁶ This “good faith” exception to the exclusionary rule obviously indicates that the application of the exclusionary rule is not synonymous with a Fourth Amendment violation. Therefore, the Fourth Amendment cannot protect a citizen from a magistrate’s error. The results may be just as damaging to a citizen as police misconduct, but deterrence rather than the protection of the individual is the primary concern in these instances.

The Court then issued a series of rulings that limited the scope of the Fourth Amendment as it relates to one’s home. Motor homes were subjected to the same weakened expectation of privacy as automobiles⁶⁷ and the Court even sanctioned the aerial view of an individual’s backyard because of its physically nonintrusive manner.⁶⁸ Even a citizen’s garbage outside their home was not protected by the Fourth Amendment.⁶⁹

The cases of this era did not limit themselves to weakening the warrant formulation – they also weakened the standards for probable cause. The Court ruled that a drug profile could lead to a reasonable suspicion of criminal behavior and therefore establish probable cause.⁷⁰ Another case eliminated the knock-and-announce requirement of police in exigent circumstances and even rejected the wide scope of the exclusionary rule offered by the Court in *Mapp* – the new rationale would not treat a Fourth Amendment violation as synonymous with employing the exclusionary rule.⁷¹ Law enforcement was also allowed to prevent an individual from entering

⁶⁵*United States v. Leon*, 468 U.S. 897 (1984)

⁶⁶*Massachusetts v. Sheppard*, 468 U.S. 981 (1984)

⁶⁷*California v. Carney*, 471 U.S. 386 (1985)

⁶⁸*California v. Ciraolo*, 476 U.S. 207 (1986)

⁶⁹*California v. Greenwood*, 486 U.S. 35 (1988)

⁷⁰*United States v. Sokolow*, 490 U.S. 1 (1989)

⁷¹*Hudson v. Michigan*, 547 U.S. 586 (2006)

their house while a warrant was secured.⁷² When technological advances enabled the possibility of the thermal imaging of a home, the Court held that such a scan was constitutional as long as a warrant was secured.⁷³

While Marshall's statistical analysis did not extend beyond the early 1980s, Jeffrey Segal and Harold Spaeth's description of the "attitudinal model" helps explain the influences affecting the Court's Fourth Amendment rulings during this era. This model asserts that the Supreme Court decides disputes via a meeting of the facts of the case with the ideological attitudes and values of the justices.⁷⁴ The theory behind the model assumes that sets of objects (direct and indirect objects of suits) and situations (the dominant legal issues) will correlate with one another to form issue areas (such as First Amendment freedoms or criminal procedure) in which an interrelated set of attitudes (values like freedom, equality, and libertarianism) will explain the behavior of the justices.⁷⁵ The capacity for members of the Supreme Court to further their own policy goals is realized by the fulfillment of three conditions, all of which are met by life-tenured justices: justices lack electoral or political accountability, have no ambition for higher office, and are members of a Court of last resort that controls its own caseload.⁷⁶

Judge Richard Posner elaborates on the capacity for Supreme Court justices to further their own policy goals: "Where the Constitution is unclear, judicial review is likely to be guided by political prejudices and the policy preferences of the judges rather than the Constitution itself."⁷⁷ Additionally, the fact that the President and the Senate choose the justices means that

⁷²*Illinois v. McArthur*, 531 U.S. 326 (2001)

⁷³*Kyollo v. United States*, 533 U.S. 27 (2001)

⁷⁴Segal, J. A. & Spaeth, H. J. (2002). *The Supreme Court and the Attitudinal Model Revisited*. Cambridge: Cambridge University Press, pg. 86. Hereafter referred to as *Attitudinal Model*.

⁷⁵*Attitudinal Model* pg. 91

⁷⁶*Attitudinal Model* pg. 92

⁷⁷*Attitudinal Model* pg. 93

their political ideology will rarely fall outside of the dominant political coalition at the time of their selection.⁷⁸ Therefore, one can assume that justices selected in a time where public and political opinion coincides with the strict focus of punitive enforcement regarding illegal drugs would mirror this position in their own political ideology.

This contextual information provides the background for Segal and Spaeth's statistical analysis. Initially, Segal and Spaeth examined all Court decisions dealing with the reasonableness of a search and seizure from 1962 to 1998 (217 total decisions).⁷⁹ In order to avoid the possibility that the Supreme Court would phrase the facts in a way indicating the decision it desires to reach, the model employs the facts from the lower court record. In this time period, the Court ruled in a liberal direction in 36% of the cases.⁸⁰

The Court gave the greatest protection to one's home and business by upholding 53% and 59% of the searches conducted in each place.⁸¹ Sixty-five percent of searches of one's person were upheld, and vehicles received even less protection when 74% of searches conducted there were upheld.⁸² Sixty-one percent of full searches were upheld, compared with 81% of limited intrusion stops (such as *Terry* stops).⁸³ The Court upheld 72% of search and seizure cases with warrants and 63% of warrantless searches.⁸⁴ Sixty-one percent of searches where the lower court found probable cause were upheld by the Court, while 66% of instances where the lower court did not find probable cause were also upheld.⁸⁵ The Court upheld 90% of searches the lower court indicated took place as an incident to a lawful arrest.⁸⁶ Additionally, the Court upheld 66% of searches after arrests that the lower court considered unlawful while only 63% of the searches

⁷⁸*Attitudinal Model* pg. 94

⁷⁹*Attitudinal Model* pg. 316

⁸⁰*Attitudinal Model* pg. 316

⁸¹*Attitudinal Model* pg. 316

⁸²*Attitudinal Model* pg. 316

⁸³*Attitudinal Model* pg. 317

⁸⁴*Attitudinal Model* pg. 317

⁸⁵*Attitudinal Model* pg. 317

⁸⁶*Attitudinal Model* pg. 317

the lower court found lawful after an arrest.⁸⁷ This latter instance as well as the probable cause findings demonstrate the subjective nature of Supreme Court decisions.

The logit analysis provided by Spaeth and Segal indicated that variables like the home, a business, one's person, or a vehicle decrease the probability of a search being upheld, while searches incident to an arrest, after an arrest, after an unlawful arrest, or those enabled by other exceptions increased the likelihood of a conservative ruling.⁸⁸ However, this fact-based model is static and does not reflect changes in membership on the Court. Spaeth and Segal discovered that when they added a variable that counted each instance a Warren Court justice was replaced with one appointed by Nixon, Ford, or Reagan, it indicated that the current Court would evaluate search and seizure cases with more lenient standards (enforcement friendly) than the Warren Court.⁸⁹

Additionally, Spaeth and Segal measured the attitudes of the justices through newspaper editorials between the time of their nomination and confirmation that characterized them as liberal or conservative in regards to civil rights and liberties.⁹⁰ The findings are especially significant to this work; on a scale from -1.00 to 1.00 (where -1.00 is extremely conservative and 1.00 is extremely liberal), the values measure of every confirmed presidential nominee on the Court from the appointment of Earl Warren in 1953 to Thurgood Marshall in 1967 were 0.00 or higher.⁹¹ These appointees were either neutral or to some degree liberal. The percentage of liberal votes in civil liberties cases for these justices ranged from 42.4% to 88.9%.⁹² The values measure of every confirmed presidential nominee on the Court post-Richard Nixon, who first declared the war on drugs, from Justice Burger to Justice Breyer were -.05 and lower (aside from

⁸⁷*Attitudinal Model* pg. 317

⁸⁸*Attitudinal Model* pg. 318. See Table 8.1

⁸⁹*Attitudinal Model* pg. 319

⁹⁰*Attitudinal Model* pg. 321

⁹¹*Attitudinal Model* pg. 322. See Table 8.2

⁹²*Attitudinal Model* pg. 322. See Table 8.2

Justice Ginsburg, nominated by President Clinton).⁹³ These appointees were all conservative. The percentage of liberal votes in civil liberties cases for these justices ranged from 25.7% to 64.2% (only two justices from Nixon's appointees onward exceeding 60% when excluding Justice Ginsburg).⁹⁴

When the attitude measure was combined with the fact variables (the impact of the home, business, etc. on the probability of a conservative finding), the attitudinal model was able to predict 71% of the individual justices' decisions.⁹⁵ Interestingly, the attitude measure alone achieved a 70% prediction rate, while the fact-based variables alone achieved a 62% prediction rate.⁹⁶ Clearly, knowing the attitudes of Supreme Court justices are more important than knowing the facts of the case when predicting an individual justice's opinion.⁹⁷

President Nixon's declaration of the war on drugs signaled a change in the political landscape. The national security doctrine encompassed the war on drugs and greatly affected public opinion by associating the doctrine with patriotism. The results are evident in the aforementioned Gallup Poll, which indicated that by 1986 only 27% of Americans supported the legalization of marijuana. Sixty-seven percent of Americans in the George H. W. Bush-William Bennett era were willing to give up a few freedoms to attack the drug problem.⁹⁸ A 1995 Chicago Council on Foreign Relations national survey indicated that 85% of respondents ranked "stopping the flow of drugs" at the top of the list of foreign policy goals.⁹⁹

⁹³*Attitudinal Model* pg. 322. See Table 8.2

⁹⁴*Attitudinal Model* pg. 322. See Table 8.2

⁹⁵*Attitudinal Model* pg. 325. See Table 8.3

⁹⁶*Attitudinal Model* pg. 324

⁹⁷*Attitudinal Model* pg. 325

⁹⁸Blachman, M. J. & Sharpe, K. E. (1990). "The War on Drugs: American Democracy under Assault." *World Policy Journal*. Vol. 7 No. 1, pg. 136

⁹⁹Falco, M. (1996). "U.S. Drug Policy: Addicted to Failure." *Foreign Policy*. No. 102, pg. 120

The attitudinal model demonstrates how these factors influenced the Supreme Court to shift towards a narrow construction of the Fourth Amendment during the war on drugs era. The initiative enjoyed support from the public in the polls, and both parties wanted to appear tough on drugs.¹⁰⁰ This conservative view resulted in the appointment of conservative Supreme Court justices, as demonstrated by the value measures. The knowledge of these conservative attitudes provided more predictive power than the actual facts of a given case, which demonstrates how the conservative pro-enforcement ideology (rather than pro-individual) permeated the Court in post-Lyndon Johnson Supreme Court appointees, beginning with those appointed by President Nixon and beyond. This resulted in an era defined by the erosion of Fourth Amendment protections via conservative rulings that narrowly rather than liberally constructed its scope.

The State of Affairs: What the Framers Would Say

The conservative shift by the Court to the narrow construction of the Fourth Amendment does not honor the intent of the Framers. The lenient attitude of the conservative Court regarding search and seizure issues sought to make the punitive focus of the war on drugs feasible. This prioritization poses a grave danger to the scope of the Fourth Amendment by expanding the powers of police. This expansion of police power represents the very thing the Framers wished to prevent, since the Fourth Amendment's intent was to protect the individual against the excessive and arbitrary abuse of government power.

The rationale of Lord Camden in the *Wilkes* case speaks to this intent. Lord Camden, the influential legal mind whose decision was celebrated by the Colonists and cited by the Court in *Boyd*, condemned general warrants centuries ago for their power to subject citizens to search and seizure on the whim of the government – it was he who demanded that a warrant's power match

¹⁰⁰Bertram, E. & Sharpe, K. (1997). "The Unwinnable Drug War: What Clausewitz Would Tell Us." *World Policy Journal*. Vol. 13 No. 4, pg. 41.

its clarity.¹⁰¹ It was this rationale that led to James Otis Jr.'s passionate condemnation of general warrants, and it was Otis who inspired one of the contributors to the Fourth Amendment when John Adams witnessed his speech.¹⁰²

Modern citizens are not faced with the problems of the general warrant, but the current threat is equally dangerous to the scope of the Fourth Amendment. The erosion of the probable cause standard has replaced general warrants as the greatest danger posed to the scope of the original intent of the Fourth Amendment. Lord Camden condemned subjecting citizens to search and seizure on the whims of the government, but the Court has enabled law enforcement to stop citizens without probable cause, to form profiles on hunches and whims, to search automobiles without warrants, to form checkpoints and question drivers, and to make use of technology the Framers could not even have imagined to circumvent any definition of the Fourth Amendment concentrating on physical intrusion.

Court rulings in the time of the Colonists emphasized the importance of magistrates determining probable cause rather than officers¹⁰³, but the Court throughout the war on drugs era has placed the burden on law enforcement to determine when a *Terry* stop is reasonable, when profiles are corroborated by something other than their own biases, and how to treat information passed by informants. So much relies on the judgment of law enforcement that officers motivated to lie and misrepresent facts threaten this standard. Subjecting the scope of the Fourth Amendment to the honesty of officers presents a very real danger to the freedoms it protects and presents the opportunity for government power as grand as any available through general warrants. Essentially, as the probable cause standard weakens, the level of suspicion necessary

¹⁰¹Loewy, A. H. (1983). "The Fourth Amendment as a Device for Protecting the Innocent." *Michigan Law Review*. Vol. 81 No. 5, pg. 1239

¹⁰²Lasson, N. B. (1937). *The history and development of the fourth amendment to the United States Constitution*. Baltimore: Johns Hopkins Press, quoted in pg. 59

¹⁰³Levy, L. W. (1999). "Origins of the Fourth Amendment." *Political Science Quarterly*. Vol. 114 No. 1, pg. 96

to conduct warrantless searches weakens, and this warrantless search power represents the “general warrant” of modern times.

Enforcing a Victimless Crime: Issues and Hypocrisy

The conservative shift of the Court demonstrated the prioritization of the efficient enforcement of the war on drugs over the privacy interests of individuals. In addition to dishonoring the intent of the Fourth Amendment, the attitudes of proponents of the war on drugs and the harshly punitive response to drug use is inconsistent with the realities of American culture. Illegal drugs are not the only dangerous and addictive substances available for use. Logical consistency is not available to a nation that condemns “illegal” drugs while running advertisements for alcohol and cigarettes, especially when one considers the addictive power of nicotine and the health risks associated with smoking.

The Fourth Amendment protects the individual from the excessive and arbitrary abuses of government. It did not seek to invade a citizen’s privacy to “protect” the citizen from their own choices when one chooses to engage in a consensual activity. The image of individuals purchasing marijuana or another drug does not immediately lend itself to a perception of an injustice like stealing, assault, murder, or rape. The difference between these examples is key – when an individual purchases a drug from a seller, that person is not being deprived of anything against their will. Both individuals voluntarily enter into a business relationship and neither claims to have had any right violated upon its successful completion. When the political sphere decides that this consensual relationship is destroying the fabric of society and seeks to harshly punish those involved, it places law enforcement in an unenviable position.

Consensual participants in the purchase and sale of drugs do not report their behavior to the police. With no victim to corroborate government inquiry, law enforcement must resort to more intrusive methods to prove their case. As demonstrated by the Supreme Court cases, employing these enforcement methods as it relates to the war on drugs requires an erosion of the Fourth Amendment freedoms the Framers envisioned it would protect. It is a consequence of far-reaching policy goals seeking to regulate the actions of what citizens put into their bodies and do in their homes.

As a result, it is difficult to characterize the war on drugs as anything other than unreasonably punitive and paternalistic. The employment of punitive measures irrespective of amount, type, and responsible use demonstrates a presumptuous attitude in policy. Surely a citizen base expected to recognize the importance of forfeiting freedoms for the well-being of the country also has the capacity to responsibly use drugs, especially when the dangers of the latter are quite light when compared to the implications of punitive enforcement in the war on drugs.

All of these issues essentially derive from a danger Clausewitz described as making a war an end in itself.¹⁰⁴ This danger presents the need to reevaluate the war on drugs. Should the focus remain on punitive measures and the demonization of drug users encompassed within the national security doctrine or should it shift? A government that views the well-being of citizens as a reflection of itself – a government that adheres to the principles of the Constitution – will not ignore the social and economic forces behind drug use the way the war on drugs has. We must consider whether the current emphasis should remain or change to prioritize education, treatment, and the freedom of responsible citizens to use drugs when their actions threaten only themselves.

¹⁰⁴Bertram, E. & Sharpe, K. (1997). "The Unwinnable Drug War: What Clausewitz Would Tell Us." *World Policy Journal*. Vol. 13 No. 4, pg. 43.

Honoring the Fourth Amendment: Learning From the Past for a Better Future

This work will ultimately offer decriminalization of drugs as the most logically consistent alternative to the current punitive path that has caused the erosion of Fourth Amendment rights. Before discussing decriminalization, it is important to note that this is not the only plausible path that would turn away from the narrow construction of the Fourth Amendment in order to honor the Framers' intent in its construction. This work does not wish to present the reader with the erroneous perception that rejecting decriminalization implies embracing the status quo or dismissing possibilities for reform.

If drugs remained illegal, the political sphere could still better represent the intent of the Fourth Amendment by shifting from funding enforcement to funding drug rehabilitation, education, and prevention programs. Congress could enact legislation that would remove the mandatory minimum sentencing guidelines and offer job training programs to those individuals who were driven into the drug trade because of socioeconomic issues. Companies willing to employ those who complete these programs could be offered some form of tax benefits. If Congress altered the forfeiture laws that enabled government agencies to keep the proceeds from seized property allegedly used for drug trafficking, then the agencies would no longer be faced with the temptation to seize property without merit.

While these are viable alternatives, these possible solutions cannot address the issues surrounding the war on drugs and the erosion of Fourth Amendment rights as effectively as decriminalization. If drugs remain illegal, there is no way to characterize a citizen as a responsible user of marijuana or other drug not named nicotine or alcohol. While intoxication and health issues are associated with nicotine and alcohol, the arbitrary legal distinction between

the two previous drugs and illegal drugs results in arbitrary and often incorrect characterizations of drug users. It enables the demonization of illegal drug users by the political sphere when the legality of the substances involved is the only distinguishing factor between a drinker and a drug user.

The demonization of drug users still puts defendants in drug cases where law enforcement officers can easily misrepresent the facts of the case to help secure a conviction. If police officers need to misrepresent the facts to secure convictions in an era where the Supreme Court has taken the conservative approach of lenient search and seizure standards, one can assume that a more liberal construction of the scope of the Fourth Amendment would result in even more instances of police misconduct to secure conviction. Honoring the intent of the Fourth Amendment by prioritizing the individual would directly clash with the needs of law enforcement. The illegality of drugs and the consensual nature of drug sale and use mandate intrusive enforcement measures if police officers are to competently perform their duties. A liberal construction of the Fourth Amendment could cripple some of these intrusive enforcement measures, which in turn would make combatting drug possession incredibly difficult.

Maintaining the status quo in terms of how drugs are characterized also presents difficult questions regarding how to treat citizens discovered possessing illegal drugs. If drugs remain illegal, it is still the job of law enforcement to search for and seize them. Should all citizens caught possessing illegal drugs be subjected to rehabilitation and educational programs or are there instances where possession of an illegal drug still merits prison time? These questions are incredibly difficult to answer. A citizen who is able to manage their drug use and function as a

successful member of society hardly needs to be subjected to hours of mandatory rehabilitation and education; the citizen would object to this presumptive approach.

Decriminalization removes the pressures that have so negatively affected the scope of the Fourth Amendment. There would be no way to justify the arbitrary treatment of drug users or their demonization. Police officers would no longer need to misrepresent the facts of the case to secure convictions due to the uniquely complex enforcement issues presented in the consensual sale and use of drugs. Decriminalization avoids the hypocrisy associated with a society that condemns marijuana and other “illegal” drugs while advertising for liquor and cigarettes. New Supreme Court justices would be appointed in an era similar to the tolerant attitudes of the 1960s, and the intent of the Fourth Amendment would be honored via the liberal prioritization of the individual over the establishment.

If decriminalization provides the most logically consistent means of honoring the intent of the Fourth Amendment, reformers must demonstrate that it is possible. The same challenge was presented to reformers by alcohol prohibitionists, who argued (like prohibitionists now in relation to drugs) that the liquor business could not be regulated. The onus was on reformers to demonstrate that structures could make the alcohol and drug industry obey laws and yield taxes.¹⁰⁵ The results corroborated the position of the reformers. The government controlled alcohol by regulating producers to ensure the safety and uniform alcohol content of their product. The government also screened, taxed, and created a license requirement for the production and distribution of alcohol and mandated the creation of a socially organized way for drinkers to consume alcohol in a manner that would not affront abstainers – the key was for regulation to be strong enough to control the industry without being so tight that citizens still preferred going to

bootleggers.¹⁰⁶ There were special stores for distilled liquor and wine, but beer was widely

¹⁰⁵Levine, H. G. & Reinerman, C. (1991). “From Prohibition to Regulation: Lessons from Alcohol Policy for Drug Policy.” *The Milbank Quarterly*. Vol. 69 No. 3, pg. 474. Hereafter referred to as *From Prohibition*

¹⁰⁶*From Prohibition* pg. 474

available in grocery stores and other small markets were licensed to sell it, and this resulted in alcohol consumption mostly occurring in the home.¹⁰⁷ The focus then (as it should be now) was on whether the advantages and disadvantages of decriminalization make it desirable.¹⁰⁸

Illegal drugs can be successfully decriminalized and regulated if the process mimics the path of alcohol regulation. The government would serve as the regulatory force to ensure the uniformity of the drug product and to prevent it from being laced with additional substances without consumer knowledge. Companies involved in the production and distribution of drugs would be subjected to government mandated background checks, screens, and a licensing process.

Marijuana would serve as the “beer” of drug regulation and be widely available anywhere cigarettes are sold. A rating scale produced by Dr. Jack E. Henningfield of the National Institute on Drug Abuse and Dr. Neal L. Benowitz of the University of California at San Francisco reinforces treating marijuana in this manner. In their rankings, marijuana was rated as having the least severe withdrawal symptoms, the lowest level of dependency, and a very weak tendency to induce consumers to use again and again or to up the amount to achieve the same high (nicotine and alcohol included).¹⁰⁹ The two doctors rated heroin and cocaine as more likely to induce higher amounts of use, repeated use, and more difficult to quit – but the withdrawal symptoms were still less severe than alcohol.¹¹⁰ This suggests the need to treat drugs whose dependency, tolerance levels, and withdrawal symptoms rank somewhere between marijuana and cigarettes/beer as meriting a separate place for their sale -- much like the post-prohibition

¹⁰⁷ *From Prohibition* pg. 478

¹⁰⁸ *From Prohibition* pg. 482

¹⁰⁹ Hilts, P. J. (1994, Aug. 2). “Is Nicotine Addictive? It Depends on Whose Criteria You Use. Experts say the definition of addiction is evolving.” *New York Times*. Retrieved from: <http://www.tfy.drugsense.org/tfy/addictvn.htm>. Hereafter referred to as *Addiction Evolving*.

¹¹⁰ *Addiction Evolving*

government treated distilled liquors with higher alcohol content than beer. These separate structures for sale could also be adjoined by a “drug bar” where users could consume away from the abstaining population. These structures would not be in close proximity to elementary, middle, and high schools or churches.

The purpose of these examples for regulatory measures is simply to demonstrate that decriminalization and regulation is possible. The goal is to adopt a strategy that is feasible and advantageous rather than one cast in terms of morality that seeks to dictate the private actions of individuals harming no one but themselves. No strategy is perfect or without its expenses – the question is whether Fourth Amendment protections and the rights it affords to the individual should be among them. An examination of the *Boyd* case and the other rulings post-prohibition leading up to the war on drugs suggests that when the focus is on the intent of the Framers, the answer to that question is no. Decriminalization and regulation provides a strategy more consistent with that intent than the punitively focused war on drugs.

Future Outlook: Change on the Horizon?

While decriminalization and regulation is easier said than done, President Barack Obama appears ready to move away from the current path of failure. He nominated Gil Kerlikowske as his drug czar, a man known for his harm reduction based policies as police chief in Seattle, where marijuana is legal for medicinal purposes and is one of the lowest priorities of law enforcement.¹¹¹ The new administration has also made it clear that it would embrace a federally funded needle exchange program.¹¹² Ethan Nadelmann, executive director of the Drug Policy Alliance that lobbies for an alternative solution than the war on drugs, indicated that this

¹¹¹Glaister, D. (2009). “Obama drops 'war on drugs' rhetoric for needle exchanges.” *The Guardian*. Retrieved from <http://www.guardian.co.uk/world/2009/mar/16/drug-policy-obama-needle-exchange>. Hereafter referred to as *Needle Exchanges*.

¹¹²*Needle Exchanges*

shift represents President Obama's administration placing public health and science above politics.¹¹³

Gil Kerlikowske has stated that he wants to end the idea that the United States is fighting a war on drugs or a war against users.¹¹⁴ The Obama administration has already confirmed that it will not raid places where medical marijuana is dispensed like previous administrations, since federal law does not recognize a medical marijuana exception.¹¹⁵ Mr. Kerlikowske intends to work with Congress and other agencies to alter current legislative policies regarding drugs. In the words of Ethan Nadelmann regarding this new focus, "The analogy we have is this is like turning around an ocean liner. What's important is the damn thing is beginning to turn."¹¹⁶

This "turn" is also evident in current public opinion polls. A 2009 Gallup poll indicated the strongest support for the legalization of small amounts of marijuana in over 40 years.¹¹⁷ Fifty percent of people under the age of 50 believe that small amounts of marijuana should be legalized, compared to 28% of seniors over the age of 64. This represents a very real generational difference in attitudes, and at the current rate the majority of Americans could favor legalization of marijuana as soon as 2013.¹¹⁸

As long as liberals or libertarians maintain control of the White House, one can assume that presidential appointees to the Supreme Court will possess similar liberal attitudes towards the drug issue. In such instances, the attitudinal model would be making predictions with

¹¹³*Needle Exchanges*

¹¹⁴Fields, G. (2009). "White House Czar Calls for End to 'War on Drugs'." *The Wall Street Journal*. Retrieved from <http://online.wsj.com/article/SB124225891527617397.html#articleTabs%3Darticle>. Hereafter referred to as *Czar Calls for End*.

¹¹⁵*Czar Calls for End*

¹¹⁶*Czar Calls for End*

¹¹⁷Saad, L. (2009). "U.S. Support for Legalizing Marijuana Reaches New High." *Gallup*. Retrieved from <http://www.gallup.com/poll/123728/u.s.-support-legalizing-marijuana-reaches-new-high.aspx>. Hereafter referred to as *New High*

¹¹⁸*New High*

justices whose values contrast with those of the 1980s and beyond. These new appointees could liberally construct the Fourth Amendment in such a manner that would condemn the current enforcement methods and render the punitive approach futile. If conservatives control Congress, these appointees could fail to be confirmed in the Senate. However, if liberal justices are confirmed then Congress would potentially need to reevaluate the punitive approach to the war on drugs.

If support amongst younger voters for the legalization of marijuana continues at the same rate, those elected to office in the coming years would reflect these values. If this new attitude permeates Congress, it provides the opportunity to substantially shift away from the punitive approach (instead of merely relaxing enforcement of drug laws on the state and local level in spite of federal law) towards a sociopolitical environment that could embrace the decriminalization of drugs and truly honor the intent of the Fourth Amendment.

The Erosion of the Fourth Amendment and the War on Drugs: Final Comments

The Framers of the Fourth Amendment knew abuses of power. They knew of a history of being subjected to the whims of a monarch's desires. When they moved to the colonies they were subjected to abuses of power via general warrants that provided for searches and seizures at the Crown's request. The Fourth Amendment was their expression against the potential abusive powers of the government, and its words allowed for those aware of its history to liberally construct the Amendment in such a way that it prioritized the rights of the individual citizen against the brutish exhibition of government power and coercion. The much celebrated opinion of Lord Camden cited by the Court in *Boyd* reveals this much and set the standard for recognizing when a decision was not prioritizing the clear, liberal construction of the Amendment.

When the Court developed the Amendment through the years outside of the narrow focus of prohibition and the war on drugs, the decisions reflected the liberal construction the Framers envisioned. However, prohibition and then the war on drugs narrowed the scope of its protections in order to balance the needs of law enforcement to fight an unwinnable war. Because of the prioritization of the war on drugs, most Fourth Amendment cases have been drug related – seeking to circumvent the protections available to the citizen in order to destroy supply and cripple demand.

The war on drugs was the end and if it could create a drug-free America then law enforcement and the political sphere were willing to let that end justify the means – yet the means employed were unsuccessful. The socioeconomic factors of the war on drugs were largely ignored and the expense of freedoms to eradicate drug sources, users, and sellers was for

the “greater good.” However, the means required to execute the initiatives of the war on drugs are irreconcilable with the intent of the Fourth Amendment. The punitive focus places law enforcement in situations where there is no deterrence factor to police misconduct in drug searches and seizures, since such a situation places an unsympathetic defendant against the word of those sworn to uphold the law.

Police misconduct resulted in searches solely based on racial profiling and in other instances where the facts of the case did not merit their action. The war on drugs was immune to criticism because it was encompassed within the national security doctrine. Embracing the national security doctrine required the embrace of the war on drugs, and “responsible” citizens would not dissent. Public opinion polls during the 1980s and 1990s demonstrated how the doctrine affected the general public. Citizens identified drugs as the most serious foreign relations issue facing America and a majority of respondents were willing to forfeit some freedoms to tackle the problem.

The conservative Court of the 1980s obliged. The work of Jeffrey Segal and Harold Spaeth demonstrated how the ideological values of the Court influenced the favorable enforcement rulings of the era. Their models determined that every Supreme Court justice appointed in the war on drugs era (aside from Justice Ginsburg) held conservative ideologies, and that recognizing these values was a more accurate measure for predicting individual votes than the facts of the case.

This demonstrates a need for a shift in focus if the intent of the Fourth Amendment is to be honored. If drug use is to be curbed, policies focused on incarceration as well as mandatory minimum sentencing must be dropped in favor of programs advocating treatment, rehabilitation,

and education. While there are possible alternatives that honor the intent of the Fourth Amendment better than the current mindset, decriminalization and regulation of drugs is the most effective way of honoring this intent. Decriminalization avoids the arbitrary legal distinctions amongst illegal and legal drugs, removes the incentive of law enforcement to circumvent Fourth Amendment protections to enforce a far-reaching policy initiative, and avoids the difficult question of determining how drug possession can be enforced in a way that honors the intent of the Amendment.

These advantages of decriminalization merit consideration. It is logically consistent and should be rationally examined for its benefits rather than morally evaluated and immediately dismissed. Since decriminalization provides many advantages, it is on the reformers to demonstrate that regulation is possible. Regulation can be achieved by mimicking the regulatory path of alcohol. While it is a lofty goal, the commitment of the Obama administration to public health and science rather than punitive policies represents a serious opportunity for the reevaluation of the way legislation has handled drug policy in America.

Public opinion is also catching up with the attitudes of the Obama administration, which named a drug czar known for his focus on treatment rather than incarceration and punishment. At the current rate, a majority of Americans will support the legalization of small amounts of marijuana by 2013. Those under the age of 50 are far more receptive to legalization than those over the age of 64. In time, this trend will saturate constituencies with citizens receptive to legalization, in stark contrast with the 1980s through George W. Bush, where citizens ceded freedoms as a form of patriotic sacrifice. If presidents continue to adopt the liberal or libertarian view, the prospect for decriminalization is bright. Surely the Framers would support an initiative

prioritizing treatment, health, well-being, and freedom over one that has demonized citizens and declared war against the privacy and freedoms of its own people.

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