

# WHERE IS THE COURT GOING WITH THE FOURTH AMENDMENT? SEARCH ME....



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## PRESIDENT'S MESSAGE

### The fifties, pre *Miranda*

In the fifties, police walked foot patrols. Residents told them about problems in the neighborhoods and they questioned suspects without having to read them their “rights” under *Miranda*.<sup>1</sup> Searches were carried out, often at the wrong house or business. Innocent people or their reputations were injured. However, the federal exclusionary rule was not applicable to the states. *Weeks*.<sup>2</sup> Courts struggled with a way to discourage lawless police conduct without hobbling law enforcement, sometimes applying the exclusionary rule in egregious state cases. *Irvine v. People*.<sup>3</sup>

### Age of enlightenment, a reasoned balance between law enforcement and constitutional rights

Thereafter, the exclusionary rule was applied to the states through the due process clause of the Fifth and Fourteenth Amendments to discourage police misconduct. *Mapp v. Ohio*.<sup>4</sup> When the constable blunders, the criminal may go free but many innocent citizens will benefit from the lesson learned by the police. The exclusionary rule discourages the police from conducting illegal “sneak and peak” searches. Police must seek a warrant based upon probable cause from a neutral and detached magistrate before they can disrupt the peace and sanctity of the home and seek out evidence of crime. In addition, people subjected to coercive police encounters are entitled to be apprized of their constitutional right to remain silent, obtain counsel, or have counsel appointed as well as the fact that anything they say can and will be used against them in court. *Miranda*. And in *Jones* the Court provided automatic standing to complain of the search of an item to a defendant charged with possession of that item.<sup>5</sup>

### The summer of love, you say there’s gonna be a revolution

At the same time this body of law was developing distrust between the establishment and young people became a palpable “generation gap.” Social mores evolved with a tolerant group of students and intellectuals. They promoted tolerance of different cultures, political philosophies, sexual practices, recreational use of drugs and spiritual philosophies. At the same time that this movement engendered tolerance it was also intolerant of abuses of power, unquestioned authority or unquestioned routine. Polite society thus had difficulty accepting the “in your face” advocacy of the hippies and revolutionaries. Some in power actually believed that a revolution was going to take place which would lead to the downfall of our government. Riots, protests and unrest were weekly occurrences. However, the strength of democracy navigated free speech, free love, the “let it all hang out” sixties and the Presidency of Richard Nixon with its Watergate and Cointelpro abuses of power and lawlessness.

The balance between the judicial and executive branches served well to maintain a modicum of peace, except where that balance was upset. In May of 1970, Kent, Ohio used the Ohio and National Guard (“Guard”) to put down a protest against Nixon’s expansion of the Vietnam War to Cambodia. The previous Saturday an ROTC office had burned. On Monday, May 4th, protesters threw rocks at the Guard who shot back, killing four students. One student was shot in the head. Fifteen others were wounded, many seriously. In the aftermath, the campus was ordered evacuated and Guardsmen took over. On one occasion a Guard held his gun to the head of a journalist, because he wore a beard.<sup>6</sup> The military is not trained to respect and maintain our civil rights. Nor do we want them to be. They are intended for use in the rare case when the aggression and courage that war requires is necessary. Citizens protesting against government excess, whether in 1970 or in 2004, should not be targeted as unpatriotic or criminals.

“America, love it or leave it.” An inane statement for a developed and enlightened country. We were founded by revolutionaries who disagreed with the general warrant and wanted to end the high tariffs placed upon exports. Again citizens protested when government policies were oppressive and unaccepting of all citizens, African American, white, Latino American Indian and female.

### The war on drugs/ terror

In the eighties and nineties, the administration moved toward intolerance again. Touting tougher drug laws, the courts similarly scaled back the exclusionary rule by providing a good faith exception to the warrant requirement. Officers can rely on a flawed warrant, in good faith. *Leon*.<sup>7</sup> If the problem with the warrant is a misstatement or omission that officers knew or should have known affected the probable cause determination, the good faith exception does not apply. *Franks*.<sup>8</sup>


The Supreme Court also required a clear request for counsel before officers need to cease questioning. *Edwards* and *Davis*.<sup>9</sup> And distinguished one’s Fifth Amendment right to Counsel from one’s Sixth Amendment right to Counsel to allow questioning about another crime than the one for which the defendant had been appointed counsel, even if the offense was inextricably intertwined with the offense concerning which the police questioned him. *McNeal* and *Cobb*.<sup>10</sup>

In addition, the *Salvucci*<sup>11</sup> case disposed of automatic standing to complain of the search when one was charged with possession of the item seized. This question should be revisited in light of the *Pringle*<sup>12</sup> case. And the court slid down the slippery slope from requiring a warrant for closed containers in legally stopped vehicles, *Sanders and Robbins*<sup>13</sup>, to not requiring a warrant for any container which could hold the item sought. *Houghton* and *Acevedo*.<sup>14</sup> Anonymous tips can be used to establish probable cause. *White*.<sup>15</sup> You must prove that evidence, which was destroyed, was favorable or destroyed in bad faith before its destruction will be questioned. *Arizona v.*

*Youngblood*.<sup>16</sup> Coerced confessions can be found to be harmless error. *Fulminante*.<sup>17</sup> Someone can consent to the search of your home, even if they lack the authority to do so. *Rodriguez*.<sup>18</sup> You can be held in custody for 48 hours without being charged or given access to a lawyer. *Riverside v. McLaughlin*.<sup>19</sup> Most frightening is *Garamendi*<sup>20</sup>, which held that an executive agreement with a foreign power preempts state law. And even though most erroneous convictions are only discovered after a decade or more has passed, the writ of habeas corpus has been severely limited. A one-year statute of limitations was placed on the writ and a truncated review implemented. Efforts to improve the quality of counsel by creating guidelines or testing have and will continue to prove fruitless unless the ABA Guidelines for Death Penalty Counsel are adopted and lawyers adequately funded. *Wiggins*.<sup>21</sup>

There is a little glimmer of hope on the horizon. The Supreme Court appears poised to demand strict compliance with the warrant requirement, finding that failure to particularly describe the items to be seized so obviously invalidated a warrant that officers were not reasonable to rely upon it. *Groh*.<sup>22</sup> In *Lidster*<sup>23</sup> the Court allowed inquiry into the subjective intent of officers conducting a road block. In *Banks*<sup>24</sup> the Court held that the state was duty bound to correct false testimony and under a continuing duty to reveal favorable and impeaching evidence. And *Crawford*<sup>25</sup> held that cross examination was so important to a fair trial that an unavailable witness’ prior testimony could only be admitted where the defendant had a prior similar opportunity to cross examine the witness.

### If you’re not doing anything wrong, why should you care?

If you are John or Suzy Q. Citizen and lead a fairly boring life, why should you care that constitutional rights are being whittled away. You should care because of Kent State, because power can be abused and lead to tragedies. You should care because of Dr. Albadr Alhazmi and Miguel Martinez and John Forte, Adrian Smith and Sang Ho and Sang Hwan Tillman. You should care because innocent children were held at Guantanamo Bay for two years before their release. Because a nice radiologist was abducted by federal officers and held incommunicado from his lawyer for 10 days before his innocence was discovered. You should care because a charlatan was allowed to pass himself off as a serologist and DNA expert causing the wrongful conviction of Miguel Martinez who came within two days of execution. You should care because the least culpable are getting long prison sentences while the most hardened repeat offenders are doing short time for cooperating and returning to society to prey on others. And when they come for you, who will care? 

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endnotes continued on page 24