

# Search Warrants in the 21<sup>st</sup> Century

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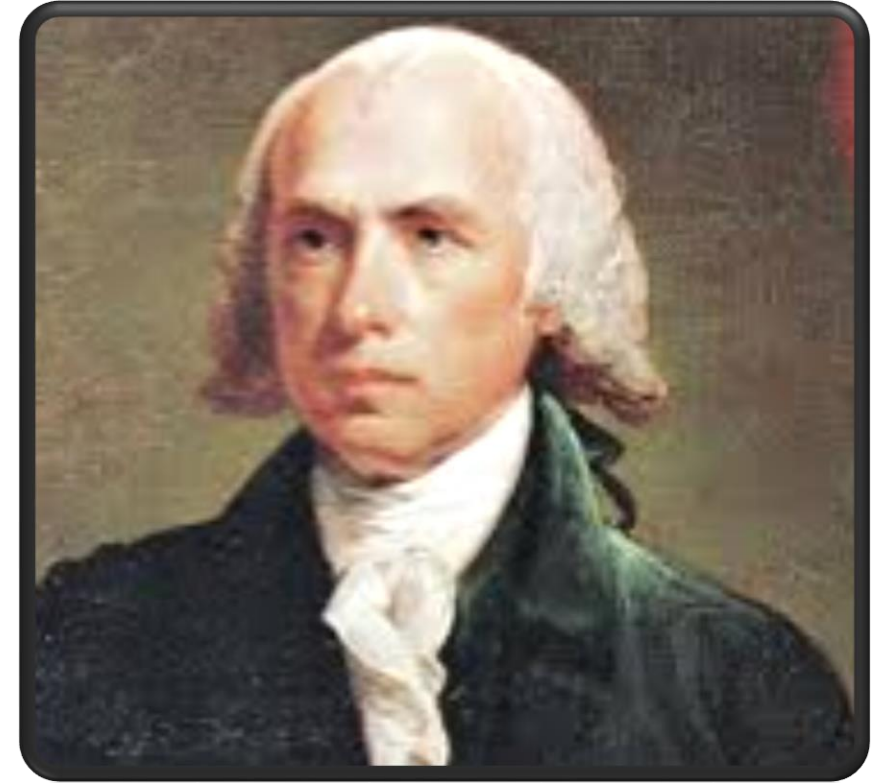


# Search Warrants in the 21<sup>st</sup> Century

- The 4<sup>th</sup> Amendment
- Basic Warrant Requirements
- Writing Warrants in the Digital Age
- Role of the 5<sup>th</sup> and 6<sup>th</sup> Amendments
- Encrypted Information
- Conclusion, Discussion, and Questions

# The Fourth Amendment

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”



# The Supreme Court and Warrants

- The Basic Role of SCOTUS

1. Interpretation of statutes

2. Judicial review

- Both the laws and the Constitution are rife with ambiguities



# The Supreme Court and Warrants

1. Two key standards
  - Protects people, not places
  - Reasonable expectation of privacy
2. Exclusionary rule
  - *Mapp v. Ohio* (1961)
3. Exceptions to the warrant requirement
  - Witnessing a crime, plain view, implied consent, explicit consent
4. Cyberspace
  - Increasing complexity relative to physical observation

# Basic Requirements of a Warrant

“What is required to obtain a warrant? Briefly put, the procedure requires the police officer to fill out an application that *particularly* describes what the authorities expect to find and where they expect to find it. Not only must this affidavit deal in specifics, but also it must set them out to the extent that a **neutral and detached magistrate** can independently determine if such information demonstrates that there is ‘**probable cause**’ to justify the issuing of the warrant. ... In executing a search pursuant to a warrant, law enforcement officers are **limited** to searching in areas where the items identified in the warrant **might logically be found** ...”

- Craig Ducat, constitutional law professor

# Writing Warrants in the Digital Age

- In some ways, more complicated
  - May be no “physical objects” to search for
- However, digital info is readily traceable
  - You have to know what you’re looking for

**See the Department of Justice manual:  
“Searching and Seizing Computers and  
Obtaining Electronic Evidence in Criminal  
Investigations”**



versus



# Writing Warrants in the Digital Age

- Devising a search strategy – what are you looking for? Where might that be found?
- Role of the computer in the offense:
  1. Contraband itself – houses contraband, or is stolen property
  2. Computer is a repository for data that are evidence of a crime
  3. Computer is used as an instrument of a crime (hacking, e.g.)
- Look beyond just what's visible



# Writing a Warrant and Affidavit

- Step 1: You must include **facts** as probable cause
  - **Why** do you believe digital information is evidence of or was used to commit a crime?
  - How we can establish probable cause:
    1. Through IP addresses
    2. Online account information
    3. Offline conduct

- Step 2: Describe with particularity the things to be seized
  - The computer hardware? Or the info it may contain?
    - Be specific and limited
- Step 3: Establish the necessity for imaging and off-site analysis
  - Finding evidence on a computer is time-consuming
    - You need authorization to seize devices
- Step 4: Avoid specifying forensic methods
- Step 5: Multiple warrants may be needed in network searches

# The Role of the Fifth and Sixth Amendments

- Both important for any criminal investigation/trial
  - Fifth: “[no person] shall be compelled in any criminal case to be a witness against himself”
  - Sixth: the right to “have the assistance of counsel for his defense”
- *Miranda v. Arizona* (1966)

# Encryption and Other Issues

- What does the right against self-incrimination mean in the 21<sup>st</sup> century?
  - What is part of the “self”?
- Key disclosure laws – force the surrender of cryptographic keys
  - No such law in the US
- Inconsistencies in federal judiciary
  - Colorado federal district court in 2012: yes
  - Eleventh Circuit US Court of Appeals: no

# Conclusion and Discussion

- If you were to write a search warrant for digital information (wink, wink), you should think about these issues:
  - Where is the information stored?
  - What files are we looking for?
  - Will the judge— given the judge's level of knowledge of these issues— understand our affidavit?
  - Have you established probable cause?
  - Have we excluded from our warrant information that may help us?
  - Should you focus on hardware or data?