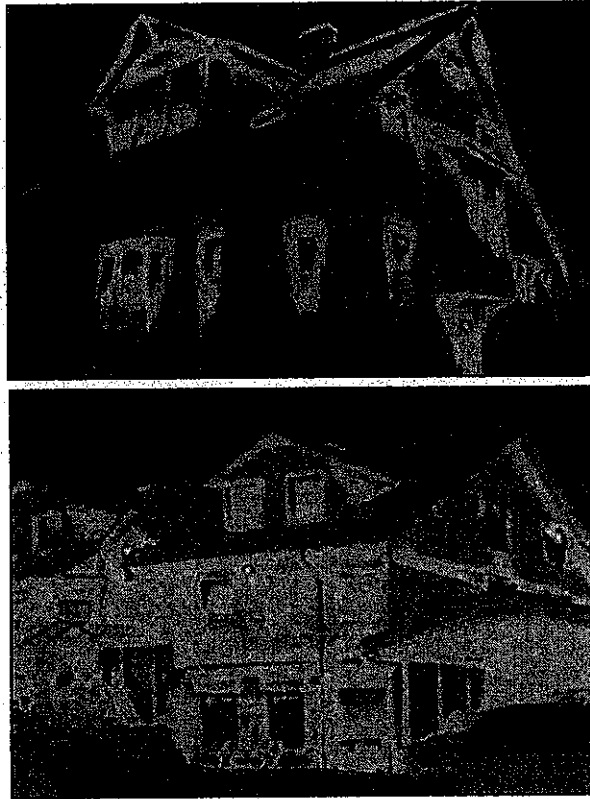


---

# Search and Seizure: Did the Government Go Too Far?

---

EV



**Overview:** In the past two decades, technology has provided the police and other law enforcement agencies with new tools for gathering evidence. These new tools have raised some constitutional questions. One such question arose in Oregon in a case of an individual whose initials are DLK. Federal agents suspected that DLK was growing marijuana in his home. Agents used a thermal imager to scan DLK's residence from the outside. The results showed heat just like the kind that is generated by special lights used in growing marijuana indoors. Based on the scan and other information, a judge issued a search warrant for the home. 100 marijuana plants were found. Agents arrested DLK. But did the scan violate DLK's Fourth Amendment rights? That is the question asked by this Mini-Q.

## The Documents:

- Document A: Two Precedent Cases
- Document B: A Police Officer's View
- Document C: Thermal Images
- Document D: The Petitioner: DLK's Argument
- Document E: The Respondent: The Government's Argument
- Document F: Opinions of Supreme Court Justices

## Hook Exercise: When Is Search and Seizure Justified?

The Fourth Amendment to the US Constitution says that people's bodies, homes, and belongings cannot be searched or taken by the government (the police, school officials, or other government officials) without a warrant. A warrant is a paper signed by a judge saying that a search has been approved. The amendment also says that a warrant cannot be issued without a good reason ("probable cause").

Fourth Amendment rights are very important, but they have limits. Sometimes, the government can act without a warrant. When can they do this? If the police think evidence could be destroyed or removed, they can search without a warrant. They can search a person who is being arrested. They can conduct a search to prevent harm – for example, if they have reason to believe a person has a weapon that could be used against the police or the public. They can search without a warrant in special circumstances where a warrant wouldn't be practical.

**Directions:** Below is a list of five situations. With a partner, decide if the government should be able to act *without a warrant* in each case.

Situation	Warrantless Search		Reason
	Okay	Not Okay	
At the airport, your luggage is searched. A bottle of shampoo is taken by the TSA agent. Is this a constitutional search and seizure?	<input type="checkbox"/>	<input type="checkbox"/>	
Another student tells the police you stole a television from his house. He says it is in your bedroom. Can the police search your bedroom?	<input type="checkbox"/>	<input type="checkbox"/>	
Your older brother is stopped for speeding. The police officer sees a plastic bag containing a suspicious looking material. Can the police search the car?	<input type="checkbox"/>	<input type="checkbox"/>	
The principal has heard that some students are being cyberbullied. She seizes your cell phone and reads your text messages. Is this constitutional?	<input type="checkbox"/>	<input type="checkbox"/>	
The police have evidence that suggests someone in your house might be selling drugs. They stake out your house, watching people come and go. They use binoculars to read the documents you are meeting about. Is this a constitutional search?	<input type="checkbox"/>	<input type="checkbox"/>	

## Search and Seizure: Did the Government Go Too Far?

*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.*

Those are the words of the Fourth Amendment to the US Constitution. But why are they important and what do they mean?

In colonial times, the British government often searched houses and businesses of American colonists. They were looking for goods that had been brought into the colonies without paying taxes. The colonists did not like these general **searches**, in which officials could look anywhere for anything. After independence, the Founders included the Fourth Amendment of the Bill of Rights to protect against such searches.

The Fourth Amendment says that you have an expectation of privacy in your home and person (body). The government cannot search you, your home, or your belongings without a good reason. Nor can it take any of your belongings without a good reason. Taking your belongings is called a **seizure**. A **warrant** – a legal paper authorizing a search – cannot be issued unless there is cause. **Probable cause** must be sworn to by a police officer or prosecutor and approved by a judge. The warrant must describe what is being searched and what will be seized.

But times are changing, and technology is raising new questions. Police officers have many new tools, like GPS systems, for gathering information. Use of these new tools raises constitutional questions, many related to the Fourth Amendment. For example, is use of a high tech tool to gather information a search? Should police officers have

a warrant before they can use such tools?

That is the question in the case of DLK. Federal agents suspected DLK was growing marijuana in his home. Agents scanned DLK's residence from outside with a **thermal imager**, a device that detects warmth within the home. The results were consistent with the use of the heat-intensive lights used in growing marijuana indoors. Based on the scan and other information, a judge issued a search warrant for the home. Agents found more than 100 marijuana plants in the home. They then arrested DLK.

DLK's attorneys argued that the agents needed a warrant to use the scanner. The government said they didn't. DLK's attorneys lost the argument at trial in federal district court, and again with the Court of **Appeals**. Eventually, the US Supreme Court agreed to hear the case.

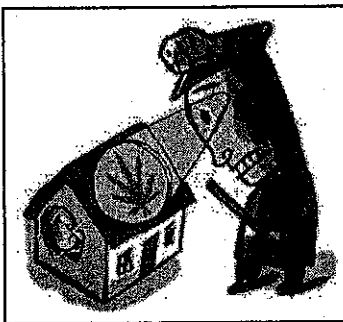
As the DLK case shows, a person's Fourth Amendment rights may at times seem to hinder the work of law enforcement. Police

officers feel that they have strong evidence that a crime is occurring. They want to be able to act on that evidence without stopping to get a warrant. However, warrants serve an important function. They require that a neutral party, such as a judge, agree that there is a good reason for a search.

Courts have ruled that a warrant is not required in every case. Sometimes, the needs of law enforcement to be effective override privacy concerns. Four examples of this are:

- hot pursuit
- public safety
- danger of loss of evidence
- permission of the suspect.

The trick, of course, is knowing when a warrant is needed while gathering evidence and when it isn't. Your task is to read documents related to the search and seizure DLK case, and decide: *Did the government go too far?*



EV

## Background Essay Questions

1. Why did the British government conduct general searches of the colonists' homes and businesses?
2. How did Americans react to the British searches?
3. How does the Fourth Amendment protect the privacy of Americans?
4. What technology did the government use to gather evidence against DLK?
5. What constitutional question did the use of this technology raise?
6. Do you see a conflict between Fourth Amendment rights and the work of law enforcement? Why or why not?
7. Under what circumstances is a warrant not necessary?
8. Define these terms:

search

seizure

warrant

probable cause

thermal imager

appeal

---

## Timeline

- 1700s** – British officials in America conduct general searches.
- 1776** – Declaration of Independence lists general searches as a cause for independence.
- 1791** – Bill of Rights, including the Fourth Amendment, is adopted.
- 1925** – *Carroll v. United States*: Some warrantless searches are OK.
- 1967** – *Katz v. United States*: Using a secret electronic listening device (a “bug”) requires a warrant.
- 1992** – DLK is arrested.
- 2001** – *DLK v. United States*

## Document A

**Sources:** *Carroll v. United States*, 267 U.S. 132 (1925). *Katz v. United States*, 389 US 347 (1967).

**Note:** When appeals courts, including the US Supreme Court, decide cases, they use precedents. Precedents are earlier cases that establish a rule or principle by which later cases can be decided. Here are two precedents that might be important in the DLK case.

EV

**Case Overview: *Carroll v. United States* (1925).** During the Prohibition Era, federal agents believed Carroll was selling liquor. They saw him driving on a highway, chased him, and pulled him over. When they searched the car, they found liquor and arrested Carroll. Carroll argued that a warrant was needed to search his car. The Supreme Court ruled that the warrantless search was valid because otherwise, Carroll might drive away and the evidence would disappear. In this case, the warrantless search was found to be constitutional. Writing for the Court, Chief Justice William Howard Taft said:

*...the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been [understood], ... since the beginning of the Government, as recognizing a ... difference between a search of a store, ... house or other structure ... and a search of a ship, motor boat, wagon or automobile, ... where it is not practicable to secure a warrant because the vehicle can be quickly moved....*

**Case Overview: *Katz v. United States* (1967).** The government believed Katz was giving people in other states gambling information over the phone. Federal agents put a bug – a device that allowed them to listen to conversations – on the outside of a public phone booth that Katz used. The bug produced evidence that led to Katz being convicted on gambling charges. Katz appealed, saying the recordings from the bug could not be used as evidence because they were obtained without a warrant. The Court of Appeals disagreed. But the Supreme Court agreed with Katz. The Court ruled that agents violated his Fourth Amendment rights, even though they did not actually enter Katz's phone booth. Justice Potter Stewart wrote the following:

*... [T]he Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. But what he seeks to [keep] as private, even in an area accessible to the public, may be constitutionally protected.*

## Document Analysis

1. What is a precedent case? Why is it important to know about precedent cases before you decide on the DLK case?
2. What is the main idea of *Carroll v. United States*? Why is that idea important to the DLK case?
3. What is the main idea of *Katz v. United States*? Why is that idea important to the DLK case?
4. How does this document help you decide if the government went too far?

**Document B**

Source: Jonathan Bastian, "Structure Profiles with a Thermal Imager," Officer.com, October 23, 2007.

Growing plants indoors is not new, nor difficult. By bringing the soil inside (in a planter), regularly watering the plant, and allowing natural sunlight into the room, you can grow almost anything inside. The problem with growing marijuana inside, however, is that it's illegal (it's illegal outdoors too, but you get the point). And growers are greedy. Since it is illegal, they cannot grow plants near windows. Since they are greedy, they are not happy with just four or five plants.

Therein lays the pot grower's conundrum [problem or dilemma]. He needs light, but cannot use natural light. Therefore, he has to use artificial light that simulates sunlight. Besides the tremendous amount of electricity this requires, it generates an overwhelming amount of heat. This is problematic for the grower, as marijuana does not grow well in hot environments.

So, the pot grower has to vent this excess heat somewhere outside the pot growing room. The greedier he is, the more plants he grows. The more plants he grows, the more lights he needs. The more lights he needs, the more heat he generates. The more heat he has, the more he has to vent. And, since the thermal imager sees heat . . . it can be a great tool to locate abnormal heat signatures [patterns] on and around buildings.

By comparing a suspect structure to similar structures, you might see unusual heat build-up that indicates a grow room. Or, you might see strange heat patterns indicating the location and direction of vents. Either way, it can be another indicator in your investigation that the suspect is indeed growing marijuana. . . .

EV

**Document Analysis**

1. According to this document, what causes a house where marijuana is being grown to produce excess heat?
2. How can the thermal imager be used to help identify if marijuana is being grown in a house?
3. How does this document help you decide if the government went too far?

**Document C**

**Source:** 123rf Royalty Free Photos.

**Note:** This image is a house seen through a thermal scanner. Areas that are white indicate places where heat is escaping the home.



EV

**Document Analysis**

1. Based on this document, where is the greatest amount of heat escaping from?
2. Assume that this is a home where no criminal activity is taking place. What might explain the loss of heat in certain areas of the house? How might your thinking change if you believed the homeowner was involved in illegal activities, specifically growing marijuana?
3. How does this document help you understand the issue in this case?
4. How might this document be used to show that the government went too far?
5. How might this document be used to show that the government did not go too far?

**Document D**

**Source:** (DLK), *Petitioner, v. United States of America, Respondent*. No. 99-8508, United States Supreme Court Petitioner's Brief, November 13, 2000.

**Note:** The petitioner is the person or organization that lost in the lower court and is thus appealing the case to a higher court. In this case, the petitioner is DLK. This document was taken from the brief of the petitioner. The brief is the written argument presented to the Court.

EV

The text of the Fourth Amendment expressly provides for protection of the home against unreasonable searches and seizures. This Court has repeatedly emphasized that the right to retreat and be free in one's home from unreasonable government intrusion is at the very core of the Fourth Amendment.

... [DLK] certainly had a subjective and reasonable expectation of privacy in the activities he conducted in his home. He took normal precautions against observation by conducting his activities inside his home. The Fourth Amendment does not require that citizens take extreme measures to protect the privacy of what one cannot see, feel, hear, taste, or smell out of fear that the government might be able to employ new technologies that reveal what may be going on inside their homes.

[DLK] did not knowingly expose his conduct, or his thermal radiation, to the public. Thermal imaging is extrasensory and permits the police to "see" what is invisible to the naked eye, even though thermal radiation is not intentionally exposed to public view ... When technology can exceed the natural senses, it subverts the human ability to contain private matters in a normal way and threatens the core expectation of privacy in the home. Society regards as reasonable the expectation of privacy from such intrusive scanning of the home. Thermal imagers should be used only when authorized by a warrant.

**Document Analysis**

1. What does the brief say about privacy at home?
2. What does the brief say about the use of technology to gather information about people's activities in their homes?
3. Why are DLK's efforts to keep his activities private important to the case?
4. How might this document be used to show that the government went too far?
5. How might this document be used to show that the government did not go too far?



**Document E**

**Source:** (DLK), *Petitioner, v. United States of America, Respondent*. No. 99-8508, United States Supreme Court Reply Brief, January 22, 2001.

**Note:** The respondent is the person or organization that won in the lower court. Thus, they are responding to the arguments of the petitioner. In this case, the respondent is the US government. This document was taken from the brief of the respondent. The brief is the written argument presented to the Court.

The use of the thermal imager in this case was not a Fourth Amendment search. The thermal imager detected heat radiating from the exterior of petitioner's house, and it did not invade the home or reveal detailed activities (or, indeed, any activities) within the home itself. As such, the imager represented a permissible means for law enforcement to gather information without previously obtaining a search warrant. . . .

The view that the thermal imaging device used in this case presents a serious threat to privacy rests largely on the belief that the technology ... can acquire detailed information about the interior of a home. That claim is highly inaccurate. Thermal imagers do not function to read "heat signatures" of persons and objects within a building. . . . Here, the thermal imager did not detect private activity in a private place, but instead scanned a surface exposed to public view in order to detect the physical fact of relative heat [escape]. That ... observation does not infringe a ... reasonable expectation of privacy.

**Document Analysis**

1. The government's position is that the thermal scan was not a search. What arguments does it make to support that position?
2. What, in your view, is the strongest argument for the respondent?
3. If you were the attorney for DLK, how might you counter the argument you listed above?
4. How does this document help you decide if the government went too far?

**Document F**

**Source:** (*DLK*) v. *United States*, 533 U.S. 27 (2001).

**Note:** One of the excerpts below is from the majority decision in the DLK case; the other is from the dissent.

EV

[In this case,] the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without [going in], the surveillance is a search and is . . . unreasonable without a warrant.

Justice Antonin Scalia

As still images from the infrared scans show, no details regarding the interior of petitioner's home were revealed. . . . Thus, the notion that heat emissions [on] the outside of a dwelling is a private matter [needing] the protections of the Fourth Amendment . . . is not only unprecedented but also quite difficult to take seriously. Heat waves, like aromas that are generated in a kitchen, or in a laboratory or opium den, enter the public domain if and when they leave a building. A[n] . . . expectation that they would remain private is . . . [unlikely] . . . [T]he officers' conduct did not amount to a search and was perfectly reasonable. . . .

Justice John Paul Stevens

**Document Analysis**

1. Summarize Justice Antonin Scalia's position on the DLK case.
2. If Scalia's view is the Court's majority opinion, who won the case, DLK or the US government?
3. Summarize Justice John Paul Stevens's position on the DLK case.
4. If Stevens's view is the Court's majority opinion, who won the case, DLK or the US government?
5. How does this document help you decide if the government went too far?

# From Thesis to Essay Writing

---

## Mini-Q Essay Outline Guide

### Working Title

#### Paragraph #1

Grabber

Background

Restating the question with key terms defined

Thesis and road map

#### Paragraph #2

Baby Thesis for bucket one

Evidence: Supporting detail from document with document citation

Argument: Connecting evidence to the thesis

#### Paragraph #3

Baby Thesis for bucket two

Evidence

Argument

#### Paragraph #4

Baby Thesis for bucket three

Evidence

Argument

#### Paragraph #5

Conclusion: Restatement of main idea and “although” statement

EV