

CONSTITUTION DAY – SEPTEMBER 17, 2014 Classroom Activity

Purpose

The goal of this activity is to introduce 11th grade students to the Fourth Amendment of the U.S. Constitution.

Format

- 10-15 minute interactive (Socratic style) lecture about the Fourth Amendment
- Explain student exercise
- Students do the exercise
- Students report their decisions

Materials Needed:

- PowerPoint (on thumb drive or email to your teacher ahead of time)
- Student Exercise



Interactive Lecture (10-15 minutes)

- Introduce yourself and spend a couple of minutes telling the students what kind of law you practice.
- Make your lecture interactive by asking the students if they know some of the following information:
 - The Constitution was created on September 17, 1787.
 - It was ratified on June 21, 1788, in what is now the Unitarian Universalist Church on the edge of the Boston Commons (on your PowerPoint are photos of the plaque on the outside of the church, the church itself, and the statue across the street from the church in the Boston Commons of George Washington (wearing a Boston Bruins jersey!))



- The original Constitution did not have a Bill of Rights.
- James Madison drafted the Bill of Rights in 1789 and it was adopted by the states on December 15, 1791.
- The Bill of Rights was created because our country's founding leaders were afraid the government would have too much power. These new American citizens wanted to be certain that particular, important rights were explicitly stated and protected.
- Thomas Jefferson was one of those founding citizens. He believed that a fair government must list and protect the basic rights of its citizens. His idea was that governments do not give *rights to people*, but rather have the *responsibility* to protect the rights that all people have naturally. They call his school of thought "Enlightenment."

- **Q:** Why were our country's Founding Fathers worried about whether the government had too much power?

A: Because the United States just finished fighting England for our independence. The Americans were protesting the king of England's strict control over the colonies. Americans wanted to make sure that no government held that kind of control over them again. These new American citizens wanted to be certain that particular, important rights were explicitly stated and protected.

- **Q:** What specifically did British officials do to Americans and their homes before America gained its independence?

A: They ransacked their homes and arrested them without warrants.

- **Q:** Which amendment to the Constitution protects Americans against unreasonable searches and seizures by government officials?

A: The Fourth Amendment.

The Fourth Amendment to the U.S. Constitution states:

"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."**

- U.S. Supreme Court Justice Louis Brandeis said the Fourth Amendment secures "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men."

- Can anyone think of a single word that describes what he’s talking about? How about “privacy”? Don’t you highly value your privacy?
- But what can happen if the government allows people who have committed crimes to have their privacy? The government would have a difficult time proving the crime was committed. Without enforcing the rule of law, what happens to society? We have chaos, mayhem, and all of the societal and economic woes that befall lawless nations.
- Does the Fourth Amendment apply to inspections, searches and seizures by anyone other than “the government?”
- Who is “the government?”

You are going to debate and decide some actual U.S. Supreme Court cases regarding the Fourth Amendment.

- Does anyone know how many U.S. Supreme Court justices there are? (9)
Can anyone name them?

Antonin Scalia (Reagan appointee)
 Anthony Kennedy (Reagan appointee)
 Clarence Thomas (G. Bush appointee)
 Ruth Bader Ginsburg (Clinton appointee)
 Stephen Breyer (Clinton appointee)
 John Roberts (G.W. Bush appointee)—Chief Justice
 Samuel Alito (G.W. Bush appointee)
 Sonia Sotomayor (Obama appointee)
 Elena Kagan (Obama appointee)

Before we divide into groups, you need to know more about the Fourth Amendment.

First—What are the five senses?

Sight
 Smell
 Hearing
 Feeling
 Tasting

Can you give some examples of how someone’s senses might help him determine the need to search a scene for a possible crime?

E.g.:

- See a person weaving back and forth over the center line while driving
- Smell marijuana
- Hear a gun go off
- Feel a cold body

- Taste cocaine

The Fourth Amendment talks about “probable cause.” What is “probable cause?”

Probable cause is sufficient reason, based upon known facts, to believe a crime has been committed or that certain property is connected with a crime.¹

How do the five senses tie into “probable cause?”

The senses provide *objective factual circumstances* that the police can cite when they say they believe someone has committed a crime.

If evidence of a crime is discovered as a result of a search, does that mean probable cause exists?

Not necessarily. The probable cause must exist *before* the search is conducted. To argue that probable cause existed because evidence of a crime was found is a style of argument we sometimes call “bootstrapping.”

Who decides whether probable cause existed?

The judge.

Can anyone think of situations where probable cause is automatically found?

Spend some time talking about the June 25, 2014 U.S. Supreme Court case of *Riley v California*. http://www.supremecourt.gov/opinions/13pdf/13-132_8l9c.pdf

In that case, David Riley was stopped by a police officer for driving with expired registration tags. Riley was also driving on a suspended license so his car was impounded and searched. Loaded firearms were found under the hood. Riley was arrested for possession of concealed weapons and searched.

During the search, the police found a cell phone in Riley’s pocket. The police viewed information stored in the cell phone which led them to charge him with firing at an occupied vehicle, assault with a semiautomatic firearm and attempted murder.

In another case, Brima Wurie was observed during a police surveillance as making a drug sale from a car. He was arrested and at the station, the officers seized his phone, which kept ringing and identifying the number as “my house.” The police went to “my house” and found cocaine, marijuana, drug paraphernalia, a firearm and ammunition as well as cash. Wurie was charged with distributing crack cocaine and being a felon in possession of a firearm and ammunition.

Was it legal for the police to search Riley’s pockets? Why? Why not?

¹ West’s Encyclopedia of American Law, edition 2. Copyright 2008 The Gale Group, Inc.

Was it legal for the police to search the digital information on his phone? Why? Why not?

The court held the police generally may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

A warrantless search is reasonable only if it falls within a specific exception to the Fourth Amendment's warrant requirement—the exception that applies here is “incident to a lawful arrest.” Officers may search property found on or near an arrestee in three instances:

A “Chimel” search—limited to the area within the arrestee's immediate control where it is justified by the interests in officer safety and preventing the destruction of evidence.

The “Robinson” rule—says the risks in Chimel are present in ALL custodial arrests regardless of whether there is a specific concern about the loss of evidence or threat to officers.

The “Gant” exception—applies to searches of a car where the arrestee is unsecured and within reaching distance of the passenger compartment, or where it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle.

In the *Riley* case, the court weighed the degree of intrusion upon an individual's privacy and the degree to which it is needed for the promotion of legitimate governmental interests.

Because digital data cannot be used as a weapon to harm an arresting officer or effectuate an arrestee's escape, searching the electronic data is a violation of the Fourth Amendment.

We're going to look at some factual scenarios in groups of five students; then we will regroup to discuss the scenarios as a class.

- Help the class divide into groups of five. Each group will have three justices and two lawyers: one for the government and one for the individual.
- One of the students will read the case out loud and then each lawyer will make an argument as to whether the search violated the Fourth Amendment.
- The three justices will debate for one minute and then vote by raise of hands. Majority wins. One student records the vote in each case so he can report to the classroom afterwards as to how his court voted and why.

To Search or Not to Search?

RAPID FIRE DECISIONS! NO MORE THAN 2 *MINUTES* PER CASE!

- **Case Number 1A**

Ann Arbor High just held its graduation commencement ceremony and students are holding graduation parties all over town. Mrs. Busybody is walking her dog around the block and sees such a party in full swing. Her dog, a well-trained German Shepherd, starts barking ferociously at one of the cars parked in the street in front of the house where the party is taking place. The car belongs to Sam Seaside. Mrs. Busybody calls the police and tells them her dog has found drugs in a car in her neighborhood. The police arrive and talk to Mrs. Busybody. They are very impressed with her dog. Nothing looks unusual about the car, but the dog continues to bark at it.

May the police search the car?

- **Case Number 1B**

During the graduation party referenced in Case Number 1A, Sam Seaside and his friends decide to paint his car. They paint "Class of 2015" and a marijuana leaf on the rear window. Sam gets in his car and starts driving to the car wash to wash it off before he gets home. The police pull him over because he has expired license plate tabs. Nothing else is out of the ordinary about Sam or his car.

May the police search Sam's car?

- **Case Number 1C**

After being pulled over by the police, Sam is shaken up and decides to skip the car wash and go to his friend's house to unwind before going home. His friend offers him a beer and he drinks it. He's never had a beer before. His friend tells him to take the beer can and pitch it on the way home. A short time later, Sam starts driving home with his empty beer can. The same police officers observe

his car driving along the center line, then along the curb. They follow him and he continues to drive in this manner, going back and forth within his lane. They decide to pull him over again. This time, they smell beer on his breath and see the empty beer can. Based on these observations, they allow their certified drug-detecting dog, Aldo, to circle the car and sniff the open air. Aldo goes crazy when he reaches the driver's side door. The police open the door, look under the seat and find a bag of illegal pills.

Did the police have the right to search the car?

Case Number 2A

A freshman on the public high school field hockey team, Savannah, is changing out of her uniform into her street clothes when the school's principal comes into the locker room and tells her to remove her clothing for a body inspection. When Savannah asks why, the principal says someone else on the team was found with ibuprofen, which is against school policy. The teammate told the principal she got it from Savannah. Savannah submits to the search. No ibuprofen is found. Her parents sue on her behalf for money damages.

Is the principal's search of Savannah a violation of the Fourth Amendment?

Should Savannah get money damages?

What if Savannah attended a private school, not a public school?

Case Number 2B

The summer following Savannah's high school graduation, she is pulled over by the city police for a broken taillight. When the officer checks Savannah's identification against the statewide computer database, he learns that Savannah has a bench warrant for her arrest due to her failing to appear in court on a speeding ticket. The speeding ticket is punishable by fine, not jail time. Savannah is arrested and taken to the county detention center. While detained, the police conduct a strip search on Savannah. It is the center's policy to strip search everyone coming into the detention center for the safety of its staff and other detainees.

Does the detention center have a right to strip search Savannah and other detainees?

Does it make a difference if the detainee is there for a violation that is punishable by fine or by jail?

- **Case Number 3A**

Vernonia High school has been having problems with drugs. Somehow, drugs are infiltrating the school and it appears they are coming from the student athlete population. Coaches have witnessed students getting injured during sporting events due to drug use. Drug detecting dogs have been unable to locate the source of the drugs. School administrators have decided to randomly test 10 percent of the student athletes for drugs before they can participate in sports.

Is the drug testing a violation of the students' Fourth Amendment rights?

- **Case Number 3B**

It is 10 years later and Vernonia High School has had a principal for the past 10 years who was a high-ranking officer in the military before becoming a school administrator. His administration has been tough and strict and it has paid off because the student body is ranking highest in the state academically. Sports teams appear to be "clean" of any drug use and students are actually excelling in the fine arts to boot. The principal has decided to retire at the peak of his successful career and the new principal has decided to resurrect the old random drug screening policy.

Is the policy a violation of the students' Fourth Amendment rights?

ANSWER KEY

- **Case Number One**

1A: No, the police cannot search

1B: The police probably cannot search

1C: The police can search

Florida v Harris decided in 2013:

In June 2006, a Florida county sheriff and his drug-detecting dog Aldo were on patrol. He stopped Clayton Harris for expired license plate tags. Mr. Harris had an open beer in his cup holder and was shaking and breathing fast. Aldo sniffed the air around the outside of the truck and indicated he found something near the driver's side door handle. The officer searched the vehicle and found 200 pseudoephedrine pills in a plastic bag under the driver's seat. Further search uncovered ingredients to manufacture methamphetamine. Harris (the ACLU) argued that officers should not be allowed to search a vehicle based solely on an alert by a drug dog. He also raised the question of what is required to establish that a drug dog is well-trained. The Supreme Court (Justice Kagan) held that a dog's certification as a drug dog and its continued training are adequate indicia of its reliability and therefore it is sufficient to presume the dog's alert provides probable cause to search. In so doing, the High Court rejected the Florida Supreme Court's ruling that no matter how much other proof is offered of a dog's reliability, its comprehensive hit-or-miss record in the field must be established in order for there to be probable cause.

- **Case Number Two**

2A: Savannah's Fourth Amendment rights were violated

2B: Savannah's Fourth Amendment rights were not violated

Florence vs Bd. of Chosen Freeholders of Burlington, 132 S. Ct. 1510, 182 L. Ed.

2d 566 (2012): *Florence* cites *Atwater v Lago Vista*, 532 U.S. 318 (2001), in

which a woman was arrested for a seatbelt offense that carries no chance of

incarceration and there is no need for detention. Nevertheless, applying a

rationale related to custodial arrests as opposed to searches, the *Atwater* Court found no Fourth Amendment violation when the woman was arrested, taken to a detention facility and strip searched. Justice Kennedy delivered the opinion of the Court in *Florence*, giving police deference to arrest individuals when a crime has occurred in their presence. The Court concluded that the search procedures at the county jail struck a “reasonable balance between inmate privacy and the needs of the institutions.” The rationale supporting an across-the-board policy of strip searches for every detainee, regardless of the nature of the offense and possible penalty, comes down to safety of the employees and detainee population. Facts relied upon by the Court include: heightened threat of aggression due to drug usage, contraband contributions to the jail underground economy, coercion to smuggle contraband, the effectiveness of hiding objects in body cavities, and difficulty “classifying” inmates by current and prior offenses.

- **Case Number 3**

3A: The random drug screening was not a violation of the Fourth Amendment

3B: The random drug screening probably would not be a violation of the Fourth Amendment

Vernonia School District 47J v Acton, 515 US 646 (1995). The SCOTUS upheld the constitutionality of random drug testing of student athletes by the local public schools. Ten percent of all athletes were randomly selected for drug testing before being allowed to participate in sports. The testing was implemented in the face of rising drug use among the students, and student athletes were “the leaders of the drug culture.” Coaches had witnessed injuries attributable to student drug use. The school tried using drug detection dogs, to no avail. In a 6-3 ruling, the high court held that the drug testing did not violate the Fourth Amendment. Schools act *in loco parentis* to the children, and

therefore the reasonableness inquiry cannot disregard the schools' custodial responsibility for children. Public school students have a lesser expectation of privacy than the general public (e.g., they have to undergo vaccinations, vision, hearing and other examinations). Student athletes have an even lesser expectation. They voluntarily suit up in locker rooms and take communal showers and subject themselves to additional regulation and medical screening in order to participate in school sports. The schools' interest in deterring drug use among students is truly important. Drug use has a more deleterious effect on adolescents than adults and it disrupts the educational process for all students. Athletes also have an increased risk of injury during sporting events.