



AMERICAN
CONSTITUTION
SOCIETY FOR
LAW AND POLICY

*THE CONSTITUTION IN THE CLASSROOM
2010*

**THE FOURTH AMENDMENT
SEARCH AND SEIZURE**

ELEMENTARY SCHOOL LESSON PLAN

INTRODUCTION / PRELIMINARIES

“THE CONSTITUTION IN THE CLASSROOM”

The purpose of this exercise is for students to come away better informed about the Bill of Rights and, more generally, about the American legal and justice systems.

You will want to make contact with school personnel in advance – first, to get your visit authorized, and second, to get a better understanding of the class(es) you’ll be addressing. Be prepared that there may be some questions or concerns about the age-appropriateness of the material, and be flexible in deciding what’s right for your community and for the maturity of the listeners.

These lesson materials are meant to be used and adapted according to the needs and interests of the class. Don’t feel wedded to the sequence of events and don’t feel obliged to use everything.

Make sure you leave 5 minutes at the end of class to complete and collect evaluation forms.

Above all, have fun!

ORGANIZATION / PROCEDURE

We suggest that you start with a quick overview on the Bill of Rights and the workings of the legal system, to provide context for the discussion to follow.

(Remember that “state action” applies only to the *public* schools – if you are speaking to *private* school students, be careful not to leave the impression that the Fourth Amendment case law about school searches will apply to them.)

This lesson plan was produced in cooperation with the legal staff of the Student Press Law Center, www.splc.org, a nonprofit advocacy group that works with students and school law on a daily basis protecting young people’s First Amendment rights.

BACKGROUND ON GOVERNMENT AND THE CONSTITUTION

The Basics

The law is the set of rules that we live by. Can anyone think of a law? The Constitution is the highest law. It belongs to the United States. It belongs to all Americans.

The Constitution says how the government works and how it is created.

The Bill of Rights adds to the Constitution and lists some of our most important rights. Rights are things that all people have just because they are alive. By listing the rights, they are made special. They are made safe.

History

The Constitution was written in 1787. Yes, it is over 200 years old. We actually have old copies of what was created. In 1787, a group of men met to write the Constitution. They did not like the way the country was going. They fixed it by creating the Constitution. We call these men The Framers. Some of the framers are very famous. George Washington was a Framers. So was Ben Franklin. Can you name any Framers?

The Bill of Rights

The Bill of Rights is very important. It protects important ideas. It protects your right to say what you want. It lets you think for yourself. It keeps the laws from being too hard. It gives rules for the police.

It lets you believe in God or not believe in God if you want. No one can tell you not to believe or to believe. It makes sure you can tell important stories about the community in newspapers. The Bill of Rights makes sure you get a lawyer if you are accused of a crime. Today, we are very happy the Bill of Rights was added to the Constitution. What do you think are some of the other fundamental rights guaranteed in the Bill of Rights?

How it all works

The Constitution sets up the government, which is split into three parts. One part is the Congress. The Congress writes laws. The people elect the members of Congress.

The next part is the President. The President enforces the laws. Who is our President?

The last part is the courts. The courts decide what the law means when there are questions.

All of the parts have to work together. Just like the Framers agreed on the Constitution, the parts have to agree on the laws. No part has too much power. The power is shared. This helps protect the people.

FOURTH AMENDMENT FUNDAMENTALS EXERCISE

Start with a basic discussion of individual rights. Emphasize that individual rights belong to everyone. The Constitution doesn't say, "People over 21." So even if you're 12 years old and the police are pretty sure that you stole something, they can't just put you in jail without a lawyer and without a trial and keep you there forever. The Constitution would protect you, and you would get a right to be told what you did wrong and a fair opportunity to defend yourself.

Then move to basic concepts of privacy. The Fourth Amendment is about privacy, and about protecting everyone's privacy against officers of the government coming into their houses or stopping their cars or looking inside their purses and their bags all the time without a really good justification.

During this class, we will talk mostly about the relationship between the public and the police, because that is how court cases about the Fourth Amendment usually happen. The police are public servants and they do a good job protecting us, but they're also human and they can make mistakes. And if they make a really big mistake, a mistake that causes someone's rights to be violated, the Fourth Amendment says that the police – or any other government agent – can't just get away with that mistake.

DISCUSS: What does privacy mean to you? What types of things or pieces of information are private? (Don't actually tell the information, just talk about the kinds of information that you wouldn't want to see shared with the public.)

- PROMPTING POINTS: For example, maybe I have someone in my family who got fired from his job. He might be embarrassed that he got fired, so he might not want just anyone outside of his family knowing about that. He's afraid what people might think of him. Some people might think it was his own fault and he did something wrong. It's nobody else's business. So he wants that information private, and he does his part to keep it private by only telling a few people and making them promise they won't tell.
 - But what if he doesn't keep that information secret at all? What if he puts an ad in the newspaper and in magazines with his picture and his name and it says, "I lost my job, please hire me." Now that's not private information, right? So whether something is private information depends on the steps that you take to keep it private.

EXERCISE: Get a piece of paper and write down three facts – three pieces of information – that a police officer could observe about you or about your belongings if he walked into this room right now, without doing any kind of a search or questioning you. What are some pieces of information that are NOT private about you or about the things that you bring with you to school? Get the students to share some of that information – and then discuss some of the information that would NOT be immediately apparent. What's your date of birth? What's your address? Those types of information would come out either if I questioned you, or if I searched you and found some kind of an ID card.

FULL TEXT OF 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.

-U.S. Constitution, Amendment IV

Review the text of the Fourth Amendment. What does it protect against?

- FIRST, emphasize that the Constitution applies to acts of the government. That means federal or state or city or county employees, like police officers or soldiers. It doesn't mean the manager at a store, or members of your family. You have constitutional rights to be protected against the government because the government has so much power over our lives. They can put people in prison, they can take away your property if they can prove it was stolen.
- Go over text of the amendment – the keys are:
- No unreasonable SEARCHES of: (1) persons, (2) houses, (3) papers, and (4) effects.
- No unreasonable SEIZURES.
 - Talk about the definition of these terms. "Person" is easy: your body and your clothes. And that also means testing your blood, testing your hair – you can be searched without the police actually touching you. What about "effects," what is an "effect"? That's all of your belongings, your possessions. What kinds of "effects" do you have with you today?

OPTIONAL DISCUSSION POINT: Why do we even have a Fourth Amendment? Why isn't it good enough to say that the police can look where they want to when they want to, and if you're innocent you have nothing to hide?

Explain the mechanics of how a Fourth Amendment case would get in front of a judge:

- As a defense in a criminal case – e.g., "This evidence was taken from my house without a warrant and it can't be used at my trial."
- As a claim in a civil lawsuit for violation of rights – e.g., "I was falsely arrested."

OPTIONAL DISCUSSION POINT: If the police come into your house or reach into your pockets without a good enough justification, a judge can throw out the evidence and pretend it doesn't exist. So even if the police find some really strong evidence – they find stolen jewelry or they find the plans for robbing a bank – they may not be able to use that evidence if there are criminal charges and the case goes to court.

What do you think about that? If the police break the rules when they are gathering evidence, is it fair to let the evidence in anyway? What are the dangers if we have blanket rules that say, "No evidence from a flawed search can ever be used in court?" What are the dangers if we have blanket rules that say, "Evidence can be used no matter how the police got it?"

What does it mean to be "searched?"

- DEFINE: Not every method of getting information is a "search." For instance, a police officer walks up to you on the street, asks a question, and you answer it. No search, because you offered the information freely. The Fourth Amendment comes into play only where a government employee actually looks at something

private. That's why we started out by talking about privacy. If the police look at something that isn't private, then it's not a search. For example, they can look at the license plate on your car and they can describe the color and model of your car, and all of that information is public. So if the police write down that information or take a picture of the outside of your car, that's not a "search" because it's information anyone can see. It's public. No privacy, no search.

When is there an expectation of privacy?

- Get the students talking about the "effects" that they are carrying on them, and their expectation of privacy in them.
 - E.g., the exterior versus the interior of your backpack – no expectation of privacy in the exterior, because that is open to public display.
- What about their expectation of privacy in conversations – would an expectation of privacy be reasonable in:
 - A conversation with your best friend in front of the mirror in the school bathrooms.
 - A cell-phone conversation while riding on a city bus.
- To illustrate that a "search" is broader than just looking through your effects, give some examples of what courts have held to be searches, and ask if the students agree:
 - Giving a blood test for drugs.
 - Having your phone bugged and your conversations recorded.
- Give some examples of what courts have held NOT to be searches, and ask if the students agree there is no expectation of privacy:
 - Being sniffed by a drug-sniffing dog (what you smell like when you're out in public is not a private fact).
 - Flying a plane over your fenced backyard.
 - Having your garbage picked through, *after* you put it on the curb.
 - Use the "garbage" point as a relatable way of reinforcing the privacy point. Why isn't your garbage "private" after you've taken it to the curb? You've given up ownership and control over it.

OPTIONAL DISCUSSION POINT: How has technology changed people's expectation of privacy? Do you have more or less privacy than your parents or your grandparents had? How should the Fourth Amendment treat text messages, e-mails and other electronic communications – should the rules be the same as for a letter written on a piece of paper?

What does it mean to be “seized?”

- DEFINE: The key is that you are not free to leave where you are detained – if you can end the conversation and walk away, then you aren’t “seized.” (Or in the context of property, that you are not free to take your property back.)
- Police put the cuffs on you, put you in the squad car, take you down to be booked – that’s the easy one. But there are other ways you can be seized. What if the police park a car blocking your car so you can’t get out of the parking lot. That’s a “seizure” because you can’t leave. Let’s talk about what it means to be “seized” by the police under the Fourth Amendment.

OPTIONAL EXERCISE:

Act out a police encounter with a student volunteer. You will play the part of the police officer and the student is walking to school. Stop and ask at each point – has the student been “seized” or is the student free to leave? Take a show of hands, “Who thinks that I have seized [STUDENT]?”

- Step out into the student’s path as she is walking. What about now? No, because she has room to walk around you.
- “Excuse me, I’m Officer [NAME], do you have a minute to answer a few questions?” What about now? No, because it’s still consensual – you could say no and keep walking.
- “Maybe you did not see my police badge. I’m really going to need you to stop so I can ask you some questions.” What about now? Closer call, but most courts would say as long as no coercion or confinement, no seizure.
- “Come sit in the back of this police car and I’m going to ask you some questions.” What about now? Getting closer to a seizure. May depend on how long you are left in the car and whether you are restrained.
- “I’m going to need to put these cuffs on you for my protection while you’re sitting there and I’m questioning you.” What about now? Much more likely that you’ve been seized because it’s physically impossible to break off the encounter.

When can the police search without a warrant?

- Normally we want the police to go in front of a judge and get a judge’s written order that says they can come into a person’s house or confiscate a person’s belongings to do a search. But there are exceptions. There are times when it is recognized that it’s just too time-sensitive for the police to take the time to write up everything they know and take it in front of a judge to get a warrant, so sometimes the police can search even without a warrant and it’s not a violation of anyone’s Fourth Amendment Rights.
 - DISCUSS: What would be some examples of when it’s too urgent for the police to take the time to go to court and explain to a judge why they need permission for a search?
 - PROMPTING POINTS / EXAMPLES:

- What if the police are giving a person a ticket, and the car is pulled over on the side of the road? The police want to look around inside the car to make sure the person getting the ticket doesn't have a gun or a knife to attack them with. Should the police have to wait to get a judge to sign a written order so they can look on the car seats and look on the floor of the car for weapons?
- What if the police are running after someone who robbed a bank, and the person runs into his house and slams and locks the door? Should the police have to wait to get a judge to sign a written order so they can keep chasing the robber?
- So you can see from these examples, there are times when it's just not possible to get a warrant from a court even though it's usually required. So judges have developed exceptions when it's so urgent to let the police do their search that the search is still legal – it doesn't violate anyone's rights under the Fourth Amendment – even without getting a warrant.
- Besides emergencies, there are other times when government agents are allowed to do searches even if they haven't gone to a judge and gotten an order allowing them to search:
 - With the person's CONSENT.
 - DISCUSS: What does it mean to give "consent" to being searched? Act out an example – "can I look inside that backpack?" If you get a "yes," that's consent.
 - When it's necessary to protect the officer's safety – the officer can pat down a person for weapons.
 - When the evidence is in PLAIN VIEW so that it's not really hidden at all.
 - DISCUSS: Look around the classroom at objects that are in plain view, and do some compare-and-contrast. Point to an object that is immediately obvious, such as a potted plant. If the officer walks into this classroom and that is an illegal plant, he can seize the plant because he can tell right away from looking at it what it is. Then point to a sealed container like a box or a purse. The officer cannot open that container without a warrant, because even though *the container* is in plain view, what's inside is not.

How does this work in the setting of the public schools?

- Importantly, students do not have zero Fourth Amendment rights, even when they are on school grounds during the school day.
- But the courts have recognized a reduced burden on the government to justify a search of a student's person or possessions at school.
- The Supreme Court set out the ground rules for when schools can search students in 1985 in a case called *New Jersey v. T.L.O.*

- Discuss the facts of the *T.L.O.* case: A teacher caught two high school freshmen smoking in the bathroom where it wasn't allowed. She took them to the Assistant Principal's office to be disciplined. One girl, Tracy, claimed that she had never smoked in her life, so the Assistant Principal demanded to look inside her purse for cigarettes. While he was going through the purse, he found all kinds of evidence that Tracy was using and selling illegal drugs.

STOP AND DISCUSS: What do you think about that? Does the teacher's statement that she walked in and saw Tracy smoking give the Assistant Principal enough evidence to check inside of her purse for cigarettes? Would he also have the right to make her empty her pockets? Would he have the right to go to her house and go through the drawers in her bedroom at home to look for cigarettes?

- Tracy's family got a lawyer to defend her, and they went to court and argued that the search of the purse violated Tracy's Fourth Amendment rights.
- The school pretty much agreed that the evidence would not have been enough for the police to stop and search an adult walking down the street if that person was smoking in a no-smoking area. If the police had taken away an adult's purse to look for cigarettes without first getting a warrant and they had found that drug evidence, they probably could not use that evidence in court. So the school tried to convince the Supreme Court that searching a student on school grounds during school time is different from stopping an adult on the street.
- The Supreme Court agreed with the school and disagreed with Tracy and her attorneys. The Supreme Court said that a school can search a student's person or possessions if there is at least a "reasonable suspicion" that the student will have items they're not allowed to have. And in that case, there was a reasonable suspicion for searching the student's purse for cigarettes, because she and one of her friends were caught smoking.
- REASONABLE SUSPICION is not the same as PROBABLE CAUSE. You can have a reasonable suspicion even if you are not convinced there has been a crime committed. Reasonable suspicion means that a person in the police officer's position, knowing the information that is available to him, could reasonably believe that a crime has been committed or is about to be committed. It's not just a hunch, it has to be backed up by some evidence, but less than what you'd need for probable cause.

STOP AND DISCUSS: Why reduce the burden in schools? Do you agree? Are there other places where it also makes sense to give the government more authority to search people and property?

OPTIONAL EXERCISE: Ask the students to take out a piece of paper and rate from 1 to 10 – 10 is the highest and 1 is the lowest – how important is it for police to have the power to do immediate searches in these places without going to court to get a search

warrant. Then discuss why – what might be sensitive or urgent in these locations, and what privacy interests might be compromised.

1. The trunk of a car
2. A shed in a person's back yard
3. A high school student's locker
4. The airport
5. The courthouse
6. A student's college dorm room

DISCUSS: Does the answer change depending on what the police are searching for? Would the police have greater power to do an immediate search if they were looking for a person who'd been kidnapped? What if they were looking for stolen documents from the Department of Defense about making nuclear weapons? So you might look at a search differently depending on the urgency of what the police were looking for.

WRAPUP/SUMMARY

The key question in a search of a student's clothing or belongings on school property will be REASONABLENESS. The keys to reasonableness are:

- Is the item that the school is searching for something really dangerous?
- How reliable is the information?
- How much was the person's privacy invaded?

It's like a balancing test. If the item you are looking for is very dangerous, then you may not need for the information to be super-reliable. If the invasion of privacy is very severe – such as asking a person to give a blood sample, or to allow the police into their bedroom – then the information will have to be more reliable and the need for the search will have to be more urgent.

EXERCISE: Searching the Shoebox

Bring in an empty box – a shoebox would be ideal. Get seven volunteers, each of whom will take a turn carrying the box. (The last scenario requires a male volunteer.)

Explain that you will play the part of the police officer. You'll try to take the box and search it. Then the class will be asked to vote and discuss whether you've made a good enough argument to be allowed to look inside. The purpose is for the students to understand *why* certain searches are not well-grounded and what factors a judge might consider.

Push back and try to draw out arguments – e.g., in Scenario 2, if all students immediately agree that the bomb threat justifies the search, push back and explore why: “But we don't know if the tip is reliable. It might have been a prank.” Point: the law recognizes emergency public-safety exceptions to the warrant requirement.

Use some form of the following scenarios – and adapt to how the students respond. Feel free to embellish with details to make it more fun, depending on the audience.

Encounter 1:

“Excuse me, sir/miss – I'm with the [CITY] Police Department. A witness just called and said she saw someone stealing cars in this neighborhood. I'm going to need to look inside that box.”

[Bad search – stolen car couldn't be in the shoebox]

Encounter 2:

“Excuse me, sir/miss – I'm with the [CITY] Police Department. Someone just called in a bomb threat and said there was a time bomb planted on this street inside of a [DESCRIBE YOUR SHOEBOX IN DETAIL (color, shoe brand)]. Please set that box down – gently – and I'm going to open it.”

[Good search – bomb is imminent safety hazard, and box matched the tip]

Encounter 3:

“Excuse me, sir/miss – I'm with the [CITY] Police Department. We have an anonymous tip that someone was on this street corner two weeks ago selling drugs. I'm going to need to look inside that box.”

[Bad search – tip is (a) anonymous and (b) stale]

Encounter 4:

“Excuse me, sir/miss – I'm with the [CITY] Police Department. One of our undercover police detectives bought a live hand grenade in a shoebox from someone wearing [DESCRIBE THE STUDENT'S CLOTHING IN DETAIL] on this street corner an hour ago. I'm going to need to look inside that box.”

[Good search – undercover detective is reliable source, timing is recent, person fits clothing description]

Encounter 5:

[Get the student's name]

“Excuse me – aren’t you [NAME]? Well, I have this search warrant signed by a judge [SHOW PIECE OF PAPER] that says I can search the trunk of your car for drugs. You might have put the drugs in that shoebox, so hand it over, I’m going to search it.”

[Bad search – a warrant must describe with specificity the premises to be searched]

Encounter 6:

“Excuse me, sir/miss – I’m with the [CITY] Police Department. I see that you’re trying to take that shoebox inside of [NAME OF SCHOOL]. Now, I have no reason to think you did anything wrong, but just as a precaution, we’re searching all of the boxes that come into [NAME OF SCHOOL] because a student brought in a weapon last week. I’m going to need to look inside that box.”

[Good search – schools can do blanket security checks of bags/boxes, especially if there are recent security incidents]

Encounter 7 (male volunteer):

“Excuse me, sir – I’m with the [CITY] Police Department. A person got shot in this neighborhood recently. I couldn’t help but notice that you are male, and we’re stopping all males and searching them because we know that boys are more likely to shoot people than girls. Hand over that box.”

[Bad search – can’t “profile” one demographic group for search based on vague suspicions]