

What Is A Reasonable Expectation of Privacy?

Overview

The Constitutional principle of due process, which holds that government must interact with citizens according to duly-enacted laws, balances the rights of suspects with public safety. The Fourth Amendment was added to the Constitution to ensure we would be protected from unreasonable searches and seizures. But do all searches require a judge-approved warrant? How do we know which ones do? Further, surveillance technology has posed challenges to the meaning and application of the Fourth Amendment, and understandings of “reasonable,” “papers and effects,” and “search” have changed over time. Understanding, analyzing, and applying the Fourth Amendment is vital to maintaining the freedom the Founders sought to protect and the principle of due process.

Recommended Time

One 45-minute class period plus game time.

Objectives

Students will:

- Understand the principle of due process, which holds that the government must interact with all citizens according to the tenets of the law; applying these rules equally among all citizens.
- Understand ways the Supreme Court has interpreted the Fourth Amendment.
- Evaluate whether the Fourth Amendment is effectively protecting citizens from unreasonable search and seizure.

Materials

Background Essay

Handout A: Attitude Inventory

Handout B: Interpreting the Fourth Amendment

Handout C: Should You Expect Privacy?

“Are They Watching You” Game, available at <http://teachingfoundingprinciples.org>

Answer Key

Lesson Plan

Background/Homework [15 minutes the day before]

- A. Have students read the **Background Essay: How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced?** and answer the questions.

Day I

Warm-up [10 minutes]

- A. Distribute **Handout A: Attitude Inventory** and do a think-pair-share. If students wish to change their answers after discussing with their partner, they should feel free to do so.
- B. Reconvene the class and ask for a few volunteers to share their responses. Which items led to the most discussion? Did anyone change their mind? Why?
- C. Ask students how they responded to the questions that asked about their understanding of concepts (#s 1-2). What information do students need to increase their understandings? Make a list on the board and refer to it through the activities.

Activity I [10 minutes]

- A. Project and/or distribute **Handout B: Interpreting the Fourth Amendment**. Read the text of the Fourth Amendment aloud to the class.
- B. Ask students to contribute their answers, and type or write their contributions on the projected handout. See the Answer Key for suggested responses.

Activity II [20 minutes]

- A. Put students in groups of 2-4 and distribute **Handout C: Should You Expect Privacy?**
 - B. Give students 10 minutes to complete the chart. After deciding on each scenario, they should include a one-sentence justification.
 - C. Bring the class together and ask for student responses to the first scenario.
 - D. When student discussion of each scenario is complete, share the information from the Answer Key.
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Wrap-Up [5 minutes]

Conduct a brief discussion on the following questions:

- Is it always clear when someone has a “reasonable expectation of privacy”?
- Based on the kinds of things the Supreme Court has said the Fourth Amendment allows government to do, is that amendment effectively protecting citizens from unreasonable search and seizure?
- Why is it important that Americans have an ongoing conversation about what is private and what government can and cannot do to its citizens?

Day II

Activity I [30 minutes]

- Have students play the “Are They Watching You” interactive game, available at <http://teachingfoundingprinciples.org>. In this game, students will explore five colorful, interactive scenes and analyze instances of possible searches.
- Remind students that the Fourth Amendment only limits government, but to look for all instances of searches or surveillance. The questions that follow several items will ask them to consider whether the Fourth Amendment would apply.
- Encourage students to write thoughtful answer to the final question.

Wrap-Up [20 minutes]

- Clarify any questions about Fourth Amendment applications, especially the difference between public and private actors.
- Ask students to answer the questions on **Handout A** again individually, using a different color pen than they did last time. After a few minutes, have students pair up once again to discuss their answers.
- Reconvene the class for one final discussion on the questions: Is the Fourth Amendment is effectively protecting citizens from unreasonable search and seizure? What can citizens do if the government violates constitutional protections? Why is the constitutional principle of due process important?

Homework and Extension Options

- Have students pretend they are a member of Congress who wishes to propose a new amendment to the U.S. Constitution that “updates” the Fourth Amendment and addresses new issues of personal privacy. In ONE sentence – just as the Fourth Amendment is one sentence -- have them write a new amendment that includes Fourth Amendment-style protections for new technologies and modern life. In 2-3
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paragraphs, defend and justify what they included in their new, proposed Amendment. Do they believe their proposed amendment answers ALL of the potential challenges to both privacy and search/seizure in modern life and going forward? Is it even possible? What does this assignment reveal about the durability of the Fourth Amendment?

B. Explain to students that customs agents at the national border may search a person or their property without a warrant. The same is true at an airport when someone wants to board a flight. (Airports have been the subject of controversy with the installation of backscatter radiation full-body scanners and the carrying out of full-body pat-downs). Write a 2-3 paragraph response to the following questions: How have fears of terrorism affected the way people view these practices? What other criminal procedures, if any, would it be acceptable to relax in light of the war on terror?

C. Although the Bill of Rights does not explicitly protect a “right to privacy,” such a right to be free from unwarranted government intrusion is implicitly protected by the Constitution and Bill of Rights in many ways. Give students a copy of the Bill of Rights. Putting them in pairs or small groups, have them locate specific provisions of Amendments 1-10 that they believe protect privacy. They should keep a running list of all of the provisions they believe imply such a right, and be able to justify their selections. Have each group share their results, noting similarities and differences. Explain to students that while *Griswold v. Connecticut* (1965) didn’t “create” the right to privacy within marriage, it is considered to be the first case where the Supreme Court specifically defined a right to privacy and justified it via our Bill of Rights. Have students read selected parts of the Majority Opinion of *Griswold* at www.law.cornell.edu/supct/html/historics/USSC_CR_0381_0479_ZO.html and compare/contrast their discovery of privacy in the Bill of Rights with the Supreme Court’s.

D. Have students interview a school official, asking the following suggested questions. Students should then write a 1-2 page summary of the official’s answers, closing with a statement of student opinion regarding the state of the Fourth Amendment in your school:

- What recent situations have you encountered in which you’ve conducted a search?
 - How do you go about the decision to conduct a search? What district policies, state laws and/or Supreme Court rulings guide your decision to conduct a search?
 - Do you believe the application of the Fourth Amendment in schools strikes a good balance between student rights and the need to preserve school safety and learning?
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Handout A: Attitude Inventory

Directions: For each statement, circle the number that best describes your response.

1. I understand the purpose of the Fourth Amendment.

1 2 3 4 5 6 7 8 9 10

2. I understand the constitutional principle of due process.

1 2 3 4 5 6 7 8 9 10

3. I believe that protections from unreasonable search and seizure are important.

1 2 3 4 5 6 7 8 9 10

4. It is important for the people to give government more power to search because it will keep us safe.

1 2 3 4 5 6 7 8 9 10

5. If people object to being searched, it's because they have something to hide.

1 2 3 4 5 6 7 8 9 10

6. When balancing liberty and security, I think liberty is more important.

1 2 3 4 5 6 7 8 9 10

Background Essay:
**How Have the Protections of the Fourth Amendment
Been Interpreted, Applied, and Enforced?**

The Founders knew that some of the most vulnerable people in our society are those suspected of crimes. Suspected criminals tend to be disliked, and almost all lack the vast resources of government. The Fourth Amendment was added to the Constitution to protect the rights of accused persons -- and all citizens -- from abuse by government.

Due process protections are evident in the Fourth, Fifth, Sixth, Seventh, and Eighth Amendments to the Constitution. The principle of due process means that, in going about the business of enforcing laws, government must follow established rules and procedures that respect all citizens' rights. (In other words, it is not enough for the laws to be followed. The principle of due process requires that laws themselves are constitutional.) The Fourth Amendment's warrant requirement provides for one of the most important individual protections: freedom from unreasonable searches and seizures. If the police want to search someone, they must first get a warrant by convincing a court that there is probable cause to believe that an individual has committed a crime. If the court agrees, they will give the police the okay to act.

When is a Warrant Required?

Warrant requirements are not always clear-cut. In general, a search of someone's home requires a warrant, stating the person and place to be searched, and the items to be searched for. The Supreme Court has ruled, however, that many types of searches can be considered "reasonable" even if conducted without a warrant. If a police officer is in a place where he is allowed to be and sees an illegal item in plain sight, the item may be seized without a warrant. Police may also conduct a warrantless search if they believe there is an immediate danger to his life or the life and property of others. In these "exigent circumstances," a search is considered reasonable, so long as there is no intent by the officer to either arrest or seize evidence. Cars, the Supreme Court has ruled, can be searched without a warrant, provided the officer legally stopped the vehicle in the first place and has reasonable suspicion that a crime may have been committed. Finally, no warrant is required if an individual voluntarily allows a search request.

What is the Exclusionary Rule?

All searches are subject to the Exclusionary Rule, which holds that evidence obtained through unconstitutional means may not be used against defendants at trial. The Court first interpreted the Fourth Amendment this way for federal trials in 1914, and applied it to the states in the 1961 case of *Mapp v. Ohio*. Police must be certain their warrant is

correct and complete, as the Court ruled in *Groh v. Ramirez* (2004) that an incorrectly written search warrant could also lead to evidence being excluded from trial.

The Exclusionary Rule can be controversial. The text of the Fourth Amendment does not require it, and critics argue there are other ways to discourage police from conducting illegal searches that do not threaten public safety by setting guilty people free. Other critics claim the rule does not actually stop officers from conducting illegal searches because they face no personal punishment. Supporters tend to agree with the Court that allowing the government to punish people using evidence it obtained in violation of the law would be unjust and violate the principle of due process.

Like the warrant requirement of the Fourth Amendment, however, the Exclusionary Rule is not absolute, according to the Court. If the police can prove the evidence would surely have been found through legal means, it may be presented in court. This is called “inevitable discovery.”

Has Technology Changed the Meaning of the Fourth Amendment?

Technological advances, surveillance technology, and the use of military-grade equipment by police have dramatically enhanced the government’s power to search. In many cases, these developments have forced citizens and the Court to wrestle with finding the constitutional balance of liberty and security.

In 1965, Charles Katz was suspected by the FBI of being involved in illegal interstate gambling. He would often use a pay-phone near his apartment to place his bets, so police attached a listening device to the outside of the phone booth to record his conversations. He was arrested and later convicted. He challenged the search on the basis that his conversation, though in a public location, was private and protected by the Fourth Amendment. The Supreme Court agreed in *Katz v. United States* (1967), reasoning that the Fourth Amendment protected “people, not places,” and that Katz had a “reasonable expectation of privacy” that was protected from an unreasonable government search.

The case of *Kyllo v. United States* (2001) also concerned issues of technology and privacy. Police believed Danny Kyllo was growing marijuana in his home. They used a heat-sensing device to look for the telltale signs of heat lamps that are commonly used to grow the illegal plants. The Court found that the police actions were an illegal search, as the government “use[d] a device...to explore the details of the home...[which is] unreasonable without a warrant.”

The widespread use of GPS devices has prompted constitutional questions about privacy and the Fourth Amendment. Antoine Jones was suspected of possessing and

dealing drugs. In 2005, police attached a GPS-tracking device to his car without a warrant. They traced his movements for nearly a month. In mapping his whereabouts, along with other evidence, police were able to tie Jones to locations where drug transactions were known to occur. In *United States v. Jones* (2012), the Supreme Court unanimously agreed that the warrantless GPS tracking was an unreasonable search. The Court further argued that while Jones drove on public streets, he did so with a “reasonable expectation” of privacy. This ruling may prove an important precedent in future cases, as many Americans now carry GPS-enabled cell phones as they go about their daily lives.

How Does the Fourth Amendment Apply in Public School?

Public schools have long been considered by the Supreme Court as a special place. The Fourth Amendment does protect you in school, but at a much lower threshold than would be the case for adults in the “real world.”

Tracy was a high school student in New Jersey, and exited the girl’s bathroom smelling like smoke. A teacher took Tracy to the principal’s office, where an Assistant Vice Principal searched her purse, finding not only cigarettes, but rolling papers, a pipe, and other evidence of marijuana use. In *New Jersey v. T.L.O.* (1985), the Supreme Court upheld the constitutionality of the search, adopting a lower standard than is applied to police in criminal situations. The court held that school officials only needed “reasonable suspicion” to search students.

While the Court found this lower standard met in *T.L.O.*, it found in 2009 that Arizona school officials went too far in strip-searching a 13 year old student who they thought might be distributing ibuprofen (*Advil*). In *Safford Unified School District v. Redding* (2009), the Court ruled that while schools have search authority to root out contraband, the search cannot be “excessively intrusive,” in light of the age and sex of the student, and the nature of the items being searched for.

Drug tests can also be a kind of “search,” and the Supreme Court has weighed in on the use of them by public schools. In the 1995 case of *Vernonia School District v. Acton*, the Court ruled that schools may force athletes to submit to random drug tests. In *Board of Education of Pottawatomie County v. Earls* (2002), students fought a school rule that required drug testing for all extra-curricular activities, not just sports. The drug test was even a condition to take courses such as band or choir. The Court upheld the policy because it “reasonably serve[d] the School District’s important interest in preventing drug use among students.”

The principle of due process, like other constitutional principles, is a means to an end. In other words, as the Constitution's Preamble states, it is a way to ensure our government establishes justice and secures the blessings of liberty for future generations. While technologies and threats to security change, the inalienable rights protected by the Constitution belong to us by nature. This means it will always be important to understand the protections in our Bill of Rights, and the reasons for them.

Comprehension and Critical Thinking Questions

1. How does the Fourth Amendment's warrant requirement protect you?
 2. What is the Exclusionary Rule?
 3. How has the Supreme Court applied the Fourth Amendment to public school officials? How have they ruled with regard to drug testing in schools? Do you agree with these rulings?
 4. The principle of due process, like other constitutional principles, is a means to an end. What is that end? Explain.
 5. You may have noticed that the Supreme Court has carved out a lot of exceptions to the requirements of the Fourth Amendment. Do you think the Court has allowed government officials (including public school administrators) too much leeway in conducting searches? Just enough? Not enough? Is the Fourth Amendment today being enforced in ways its text commands, and in ways the Founders would agree with?
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Handout B: Interpreting the Fourth Amendment

Amendment IV*

“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.”

*underlines are added for emphasis.

1. What qualifies as “persons”?

2. What qualifies as “houses”?

3. What qualifies as “papers”?

4. What qualifies as an “effect”?

5. What words/phrases come to mind for the word “unreasonable”?

6. How do you know if you or your property have been “seized”? What characteristics define “seizure”?

7. In general, “probable cause” means the facts of a given situation would convince a reasonable person that a crime has been, or is being, committed. What sorts of facts or circumstances might make up probable cause?

Handout C: Should You Expect Privacy?

Directions: Imagine your friend is being charged with a crime. The police have evidence against her which they found in several different ways. For each example, decide whether you believe the government should be able to use that evidence if they didn't have a warrant when they seized it.

Item/location searched without a warrant	Should police be able to use this evidence against her?	Why or why not?
1. Evidence from her public school locker.		
2. Websites that she visited on her home computer.		
3. An email that she sent to a friend.		
4. Information from her Facebook page, including status updates and pictures with locations and other people tagged.		
5. Her movements by car on public streets.		
6. The contents of her cell phone.		
7. Things she said on a land-line phone conversation she had at home.		
8. Trash from her home that her family had placed in a garbage can by the curb.		
9. Something in her fenced backyard, not visible from the street.		

Answer Key

Background Essay: How Have the Protections of the Fourth Amendment Been Interpreted, Applied, and Enforced?

1. The Fourth Amendment's warrant requirement provides for one of the most important individual protections: freedom from unreasonable searches and seizures.
2. The Exclusionary Rule means that government is not allowed to use evidence against a suspect at trial that was gained as a result of an illegal search.
3. Accept reasoned answers. The Court has held that school officials need only "reasonable suspicion" to search students. The Court has upheld policies of drug-testing public school students who play sports or participate in extra-curricular activities because the tests "reasonably serve the School District's important interest in preventing drug use among students."
4. Due process ensures that our government establishes justice and secures the blessings of liberty for future generations.
5. Accept reasoned answers. Some students may say that the numerous and varied exceptions the Supreme Court has carved out -- or that citizens allow by passively accepting them -- violate the letter and spirit of the Fourth Amendment, and that the promise of greater security is not worth the threat to liberty. Others may say that the exceptions, while numerous, strike a good balance between the requirements of the Fourth Amendment and the need for effective law enforcement to maintain a safe and orderly society. Still others may say that the variety of exceptions are appropriate in a large, diverse society, and that the need to identify criminals or terrorists before they do harm is sometimes more important than individual liberty and freedom from searches, even if they are unreasonable.

Handout B: Interpreting the Fourth Amendment

Students may suggest:

1. "Persons": one's body, clothing, blood/bodily fluid, etc.
 2. "Houses": one's home; apartment, residence, mobile home, dwelling place, etc.
 3. "Papers": personal documents (whether paper or electronic) such as contracts, letters, receipts, financial statements, bills, notes, diaries, books, hard drives, emails, etc.
 4. "Effects": one's property contained in one's home, one's belongings outside the home, all other property, etc.
 5. "Unreasonable": having no just or reasoned cause, not fair or acceptable, irrational, etc.
 6. Characteristics of "seizure": something is taken from you, something is closely examined with or without your presence, you are not free to leave or walk away, you are not able to take your property back from whomever has seized it, etc.
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7. Facts that might convince someone of a crime: actually witnessing a crime; seeing/smelling evidence of a crime; receiving information/evidence about a crime from someone else; etc.

Handout C: Should You Expect Privacy?

1. Yes, schools retain ownership of the locker and can search it. Police officers do need a warrant to search a specific locker.
 2. Accept reasoned answers. This type of information can go into privately-owned databases. While these databases are not owned or maintained by government, telecommunication companies who have been asked by government to provide the information have at times handed it over. Courts have upheld a U.S. law granting telecoms immunity from lawsuits by citizens whose information was given over to government without a warrant.
 3. Accept reasoned answers. In *U.S. v. Warshak* (2010), the Sixth Circuit Court of Appeals ruled that there is a “reasonable expectation of privacy” in emails both sent by an individual and stored on third party servers (e.g. Google’s Gmail servers). The issue has not been addressed by the U.S. Supreme Court.
 4. Yes, regardless of steps one may feel one has taken (such as limiting the visibility of activities to “friends”).
 5. Accept reasoned answers. In *U.S. v. Jones* (2012), the Court ruled that one’s daily travel on public thoroughfares possesses a “reasonable expectation of privacy.” (In this case, police put a GPS unit on Jones’ car to trace his movements – without a warrant – for 28 days.)
 6. Accept reasoned answers. While the issue has yet to be addressed by the Supreme Court, some lower courts have ruled that a cell phone is the equivalent of a “closed, non-see-through container,” and therefore its physical contents are private, absent additional probable cause to conduct a search of it. Other lower courts have disagreed.
 7. No, police need a warrant to tap land-line phones.
 8. Yes. In *California v. Greenwood* (1988), the Court ruled that a trash bag at the curb is “readily accessible to animals, children, scavengers, snoops, and other members of the public,” so there was no expectation of privacy.
 9. Yes. In *California v. Ciraolo* (1986), the Court held that a police fly-over was “nonintrusive” and “took place within public navigable airspace,” therefore there was no reasonable expectation of privacy.
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