



Written by [Joe Wolverton, II, J.D.](#) on June 15, 2018

Do Tech-sniffing K9s Violate the Fourth Amendment?

For several years, police and the FBI have been secretly training dogs to sniff out thumb drives, SD cards, and other small electronic devices. These special K9 dogs have been used to detect tiny technology in order to reveal criminal conduct stored on these digital devices.



That sounds like a very effective use of a resource to catch bad guys, but does deploying the tech-sniffing dogs potentially violate the Fourth Amendment?

Before examining possible answers to that critical constitutional question, here's the story of the dogs' use by federal, state, and local law-enforcement agencies, as reported by CNET:

Dogs are built to smell.

Where we might smell pizza, a dog could pick out the wheat in the crust and the tomatoes, oregano, basil and mozzarella in the topping. A dog trainer told the Australian Broadcasting Corp. that if you took all the olfactory receptor cells out of a human and spread them with a butter knife, you would get a smear the size of a postage stamp. A dog's smelling cells would cover a tea towel.

So it made sense when a major in the Connecticut State Police's computer crimes department asked its K-9 academy — the longest-running K-9 police school in the US — if a dog could sniff out thumb drives.

To find out, Jack Hubball, a chemist with Connecticut's Forensic Science Laboratory, ordered thumb drives, SD cards and hard drives from multiple manufacturers. And he learned all memory devices use a chemical compound called triphenylphosphine oxide, or TPPO. That was the break they needed.

Once they had isolated the common chemical, the state's K-9 trainers could begin to train the first ESD [electronic storage detection] dog in 2012. They spent up to six months "imprinting" the chemical odor on a black Lab named Selma.

Over and over again, they got her to smell a white, odorless (to us) powder, and then fed her. Selma eventually associated the scent with food and would search out the smell for a reward. And she found devices that had completely escaped investigators.

They kept the program a secret for four years, says Halligan, to make sure there weren't any surprise issues.

In 2016, the Connecticut State Police told the world what they had been up to, and held their first public class that spring. The five graduating dogs went to the FBI and the police forces in Alaska, Massachusetts, Missouri and Virginia. As of February, there were at least 17 ESD dogs in the US, Hochron estimates.

Reportedly, some of the dogs are very good at detecting the presence of hidden electronics. The CNET story describes a demonstration of one of the dog's skills during which the ESD dog "found 10 items in



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a room she'd never been in before. Some were obvious, like a phone under a couch, but others were inconspicuous devices that would be easy to miss, even for a trained eye."

That last result is where this particular use of K9 dogs runs into the Fourth Amendment's protection against unwarranted searches and seizures.

The Fourth Amendment guarantees that "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."

If a specially trained ESD dog were used to sniff out a USB flash drive, for instance, and the police had no Fourth Amendment-qualifying cause to search either the person carrying the drive, or to seize the drive itself, then the dog's activity wouldn't pass the constitutional smell test (see what I did there?).

Now, I'm the last person who would measure the scope of rights by the opinion handed down by the Supreme Court, but in a recent case that received little if any attention from the media, the justices' reasoning accurately reflects the intent of the Fourth Amendment's prohibition on unwarranted searches without probable cause.

In the 2015 case of *Rodriguez v. United States*, a 6-3 majority held that a drug-sniffing dog deployed at a DUI traffic stop violated the driver's rights under the Fourth Amendment.

During the oral arguments in the case, Justice Sonia Sotomayor telegraphed the likely leaning of the bench and correctly identified the danger involved in shoe-horning all police behavior into the confining limits of the Constitution. "We can't keep bending the Fourth Amendment to the resources of law enforcement," Sotomayor told the attorneys. "Particularly when this stop is not incidental to the purpose of the stop. It's purely to help the police get more criminals, yes. But then the Fourth Amendment becomes a useless piece of paper."

A useless piece of paper. This is what James Madison meant when he made the following observation in *Federalist*, No. 48:

Will it be sufficient to mark, with precision, the boundaries of these departments, in the constitution of the government, and to trust to these parchment barriers against the encroaching spirit of power? This is the security which appears to have been principally relied on by the compilers of most of the American constitutions. But experience assures us, that the efficacy of the provision has been greatly overrated; and that some more adequate defense is indispensably necessary for the more feeble, against the more powerful, members of the government.

While most Americans would agree that reducing crime is a worthwhile endeavor and that we should use all available resources to achieve that goal, we should also agree that an even greater and more important goal is to preserve, protect, and defend the Constitution and ensure that in our zeal to fight crime we do not end up tearing through that venerable vellum.



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