THE RIGHT OF THE PEOPLE TO BE
FOURTH
SECURE IN THEIR PERSONS, HOUSES,
AMENDMENT
PAPERS, AND EFFECTS, AGAINST
SEARCHES
UNREASONABLE SEARCHES
& SEIZURES
AND SEIZURES ...
4 The Origins of the Fourth Amendment
Carolyn Long traces the history of the Fourth Amendment to the U.S. Constitution and the Founders’ values regarding searches and seizures.

8 Search Warrants: The Facts Jeffrey Cole explains the ins and outs of search warrants and offers readers an inside look—from the bench—of the Fourth Amendment at work.

10 The Changing Definition of Search or Seizure Tom McInnis contrasts Supreme Court rulings in two cases of the twentieth century—Olmstead v. U.S. and Katz v. U.S.—to illustrate how applications of the Fourth Amendment have changed over time.

14 The Fourth Amendment in Public Schools David Hudson Jr. examines how the Fourth Amendment affects the lives of young people in public schools, and how the lives of young people challenge notions of privacy and search rights.


20 Students in Action: Students Advising Students A Social Networking Awareness Program Safety Tiffany Middleton highlights the Internet Safety Alliance at Shippensburg (PA) Area Senior High School, where students are teaching their peers about smart social networking and online sharing.

22 Learning Gateways: Search Me Catherine Hawke offers a lesson that introduces students to applications of the Fourth Amendment in real-life scenarios.

Director’s Note

“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.”

This Fourth Amendment right was of central importance to our nation’s founders, yet, some argue, has been reduced to a mere technicality in contemporary courts. Why did the founders value this right? What constitutes a “reasonable” search or seizure? How have these ideas changed over time, particularly with the evolution of technology? This issue of Insights explores the origins and evolution of the Fourth Amendment in our society, and the implications for individual rights.

As our issue opens political science professor Carolyn Long examines the origins of the Fourth Amendment, including why the nation’s founders viewed its provisions as essential for the new republic. Next, magistrate judge Jeffrey Cole provides a basic introduction to search warrants. Political scientist Tom McInnis follows with a discussion of how applications of the Fourth Amendment have changed over time. Legal expert David Hudson Jr. explores how the Fourth Amendment affects the lives of young people and how their circumstances challenge notions of privacy and search rights. Learning Gateways rounds out this discussion with a lesson plan focused on how Supreme Court interpretations of the Fourth Amendment affect us in our everyday lives. Our Perspectives columns explore the question: Do the security measures at U.S. airports appropriately balance privacy and national security? Add to this rich roundup of topics Insights online, www.insightsmagazine.org, which offers teachers additional resources and supports, including articles, lessons, and primary sources.

We hope that this issue adds a lasting resource to your collection. Let us hear from you. We would like to have your feedback, along with ideas about how you might incorporate it into your classroom. And let us know if there are topics that you would like to see us tackle in these pages.

As always, enjoy the issue, and best wishes as you wind down the school year.

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The Origins of the Fourth Amendment

The history and text of the Fourth Amendment tell us about its meaning today and shed light on current controversies over unreasonable searches and seizures.

by Carolyn N. Long

Historian Jacob Landynski has explained that the Fourth Amendment “is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England.” Insight into the origins of the Fourth Amendment can be found in popular and judicial resistance to general warrants and writs of assistance, which led to protection against such abuses in state constitutions, and later, the federal Constitution. This debate at the founding contributes to both our understanding of, and confusion about, the meaning of the Fourth Amendment to the Constitution.

General Warrants and Writs of Assistance

Our constitutional ancestors knew first hand of the abuse of executive authority. At the founding, general search warrants, which did not specify what or where would be searched and which items would be seized, were often used by British officials to conduct indiscriminate searches. Also common were writs of assistance, which empowered customs officers to search cargo ships, warehouses, businesses, and private dwellings for contraband. Because colonial merchants frequently smuggled goods from non-English territories to evade customs duties put in place to protect English businesses, the writs empowered British authorities with a means to enforce trade regulations. To secure a writ the official need only make a request; justification did not have to be supported by sworn information presented before a magistrate or specification about the places to be searched or items seized. The writs also empowered customs officers to “commandeer” civil officials and other persons present to assist them in their execution. Writs of assistance were authorized by the British Parliament, which directed the highest court in the colonies to issue them, and were in effect during the sovereign’s lifetime in which they were granted. On occasion, writs were also issued by colonial governors, although whether they had the authority to do so is suspect. Writs were not, therefore, a general warrant as much as they were a court order that served as identification that the person was a custom officer empowered to engage in searches. As a result, they were more subject to abuse.

Colonial hostility to indiscriminate searches and seizures under general warrants and writs of assistance was widespread throughout New England. There were incidents of armed resistance and customs officers encountered difficulty enforcing them. Dissatisfaction also extended beyond the body politic. In many states, colonial judges began to question their legitimacy.

“At the founding, general search warrants, which did not specify what or where would be searched and which items would be seized, were often used by British officials to conduct indiscriminate searches.”

Carolyn N. Long is a political science professor at Washington State University Vancouver. She is the author of Mapp v. Ohio: Guarding Against Unreasonable Searches and Seizures.
James Otis and the Speech That Would Start the Revolution

Shortly after King George II died in 1760, public outcry against writs of assistance was at a high point. The death of George highlighted the controversy because, according to custom, the writs would expire six months after the death of the sovereign and officials were required to request their reissue. Sensing an opportunity, sixty-three Boston merchants launched a legal challenge to reissuance of the writs in Massachusetts Superior Court. They were represented by James Otis Jr., and Oxenbridge Thatcher, local Boston attorneys. In a five-hour speech Otis challenged the writ as a violation of American liberties and the common law. He called for greater restrictions on the writ, such as limiting them to a single search, requiring that they be based on particularized information and mandating judicial oversight.

Vowing to oppose the writ “to [his] dying day,” he called them the “worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law, that was ever found in an English law book.” He called attention to one’s vulnerability against officials armed with a writ. “This was a power that placed the liberty of every man in the hands of every petty officer. Anyone with this general warrant could be a tyrant and reign secure in his petty tyranny. That a man’s house was his castle was one of the most essential branches of English liberty, a privilege totally

James Otis, Excerpt of “Against Writs of Assistance,” February 1761

MAY it please your Honors: I was desired by one of the court to look into the books, and consider the question now before them concerning Writs of Assistance. I have accordingly considered it, and ... I will to my dying day oppose, with all the powers and faculties God has given me, all such instruments of slavery on the one hand and villainy on the other as this Writ of Assistance is.

It appears to me the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book ... Your Honors will find in the old books concerning the ... precedents of general warrants to search suspected houses. But in more modern books you will find only special warrants to search such and such houses, specially named, in which the complainant has before sworn that he suspects his goods are concealed; and will find it adjudged that special warrants only are legal. In the same manner I rely on it, that the writ prayed for in this petition, being general, is illegal. It is a power that places the liberty of every man in the hands of every petty officer. I say I admit that special Writs of Assistance, to search special places, may be granted to certain persons on oath; but I deny that the writ now prayed for can be granted, for I beg leave to make some observations on the writ itself ...

In the first place, the writ is universal, being directed “to all and singular justices, sheriffs, constables, and all other officers and subjects”; so that, in short, it is directed to every subject in the King’s dominions. ... In the next place, it is perpetual ... In the third place, a person with this writ, in the daytime, may enter all houses, shops, etc., at will, and command all to assist him. ...

Now, one of the most essential branches of English liberty is the freedom of one’s house. A man’s house is his castle ... This writ, if it should be declared legal, would totally annihilate this privilege. Custom-house officers may enter our houses when they please; we are commanded to permit their entry. Their menial servants may enter, may break locks, bars, and everything in their way; and whether they break through malice or revenge, no man, no court can inquire. Bare suspicion without oath is sufficient. ...

But to show another absurdity in this writ: if it should be established ... The words are: “It shall be lawful for any person or persons authorized,” etc. What a scene does this open! Every man prompted by revenge, ill-humor, or wantonness to inspect the inside of his neighbor’s house, may get a Writ of Assistance. Others will ask it from self-defence; one arbitrary exertion will provoke another, until society be involved in tumult and in blood. ...
annihilated by such a general warrant ... Every man prompted by revenge, ill humor, or wantonness to inspect the inside of his neighbor’s house may get a writ of assistance.”

Otis’s speech left a lasting impression among those in the audience, including future President of the United States John Adams. In a letter to William Tudor, Adams characterized him as “a flame of fire” and suggested his “oration against the Writs of Assistance breathed into this nation the breath of life.” It was the very spark needed for a country primed for revolution. “Then and there,” said Adams, “then and there was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born.”

But the battle at hand was lost. In The Writs of Assistance Case of 1761, also known as Paxton’s Case, Otis failed to persuade the Massachusetts Superior Court, which upheld the legitimacy of the writ. Lieutenant Governor Thomas Hutchinson, “a man pliable to the wishes of the monarchy” and recently appointed Chief Justice to the Court, was armed with advice from British authorities on the validity of the writ, and he convinced his colleagues of their legality.

Massachusetts would be an exception to the rule, as the next several years preceding the Revolution saw resistance grow, especially after Parliament enacted the Townshend Act (1767) which reauthorized custom officials’ authority to use writs of assistance to search and seize smuggled goods. As popular resentment grew, colonial judges echoed the objections raised by Otis, and either ignored or frequently refused to issue the new writs. As historian O. M. Dickerson noted, this was at their own peril. “It took courage for judges to refuse writs of assistance when demanded by the customs officers, since they held their commissions at the will of the Crown and were dependent for their salaries upon the revenues collected by Customs Commissioners.”

**State Constitutions**

Precedent for the Fourth Amendment is also found in early state constitutions. Seven of the eleven state constitutions adopted between 1776–1787 included prohibitions against searches and seizures in their declarations of rights. In 1776,
Virginia, the first to include such a provision, banned general warrants. It declared “[t]hat general warrants, whereby any officer or messenger may be commanded to search suspected places without evidence of a fact committed or to seize any person or persons not named, or whose offence is not particularly described and supported by evidence, are grievous and oppressive, and ought not to be granted.” Later that year Maryland, Delaware, and North Carolina included similar provisions in their Declaration of Rights specifying the required criteria for valid warrants. Pennsylvania’s approach was more expansive, beginning with a statement establishing an affirmative right to be free from searches and seizures. Its Declaration of Rights, copied by Vermont in 1777, declared, “That the people have a right to hold themselves, their houses, papers, and possessions free from search and seizure; and therefore warrants without [oaths and affirmations first made, affording a sufficient foundation for them, and whereby any officer or messenger may be commanded or required to search suspected places, or to seize any person or persons, his or their property, not particularly described,] are contrary to that right, and ought not be granted.”

The 1780 Massachusetts Declaration of Rights, drafted by John Adams, elaborated on Pennsylvania’s more expansive approach and most clearly resembles the Fourth Amendment contained in the federal Constitution. Article XIV states, “Every subject has a right to be secure from all unreasonable searches, and seizures of his person, his houses, his papers, and all his possessions. All warrants, therefore, are contrary to this right, if the cause or foundation of them be not previously supported by oath or affirmation; and if the order in the warrant to a civil officer, to make search in suspected place, or to arrest one or more suspected persons, or to seize their property, be not accompanied with a special designation of the persons or objects of search, arrest, or seizure; and no warrant ought to be issued but in cases, and with the formalities, prescribed by the laws.” It would later be copied by New Hampshire and ratified in 1783.

These early state experiments strongly influenced the Framers of the Fourth Amendment, who were primarily concerned with the abuse of general warrants. However, the historical record also includes calls for protection against unreasonable searches and seizures as declared in the Massachusetts Constitution, continued on page 27.
Search Warrants: The Facts

A judge offers straight answers about search warrants

by Jeffrey Cole

Jeffrey Cole answers *Insights* editor Tiffany Willey Middleton’s questions about search warrants, from how they are issued to how they are executed.

1. What is a search warrant? Who issues search warrants? For what reasons?
Generally speaking, a search warrant is a court order authorizing law enforcement officers to conduct a search of a person or location for evidence of a crime and to seize that evidence. Search warrants must be issued by a judicial officer and must be based upon “probable cause” to believe that the evidence described in the warrant will be found in the place to be searched. The requirement of a search warrant as a prerequisite to most searches and seizures stems from the command of the Fourth Amendment to the Constitution of the United States, which guarantees the right of “the people” to be free from unreasonable searches and seizures and provides that a warrant shall issue only upon presentation of an oath or affirmation demonstrating probable cause and particularly describing the place to be searched and the persons or things to be seized. The intent of those who drafted the Fourth Amendment was to prohibit the hated “general warrants” and “writs of assistance” that English judges had employed against the colonists and which allowed British soldiers to search homes and other places without restraint and on mere surmise.

2. How are they executed?
Search warrants are executed by law enforcement officers, municipal, state, or federal. Depending upon the nature of the crime involved, the officers typically work in teams. The teams can be quite extensive where there is a potential risk to the officers executing the warrant. In most instances, the officers must announce their office before entry and must provide a copy of the warrant to the appropriate individual on the scene. If no one is home, the officers must leave a copy on the premises after they have completed the search. In some instances, although few in number, law enforcement officers may enter a home or business without first knocking and announcing their office. The circumstances under which this can occur are often governed by statute.

3. What are some legal exceptions to the requirement for a search warrant?
The Supreme Court has held that law enforcement officers may make a warrantless entry onto private property to fight a fire and investigate its cause, to prevent the imminent destruction of evidence, to engage in “hot pursuit” of a fleeing suspect, or where the exigencies of the situation otherwise make the needs

“The requirement of a search warrant … stems from the command of the Fourth Amendment to the Constitution of the United States … .”

Jeffrey Cole is a magistrate judge in the U.S. District Court for the Northern District of Illinois in Chicago.
of law enforcement so compelling that
the warrantless search is objectively
reasonable. An example of this would
be the need to assist persons who are
seriously injured or threatened with
imminent injury or harm. Searches of
automobiles, at American borders, or
searches incidental to a lawful arrest may
also be conducted without a warrant in
some circumstances.

Another instance where a search
warrant is not required is so-called
“consent search,” where a person con-
ents to a search of either his or her
person or property. A consent search can
also be proper in some circumstances
even though the person consenting
does not own the property. Also, where
evidence is in the plain view of police who
are otherwise lawfully on the premises
or lawfully observing the property, a
warrant is usually not necessary as a
prerequisite to a lawful seizure. For
instance, an officer who makes a rou-
tine traffic stop and observes an illegal
firearm on the passenger seat of the car
does not need to obtain a warrant before
seizing the item.

When police lawfully take custody
of property, proper inventory proce-
dures can allow warrantless searches to
protect the owner’s property, protect
the police department from disputes
and claims, protect the police and pub-
lic from danger, and to determine the
owner’s identity. Warrantless searches
are also permissible where property has
been abandoned.

Finally, it may be noted that the
Fourth Amendment applies only to
action by a governmental actor and
consequently, searches by private per-
sons are not constrained by the Fourth
Amendment. This allows the police to
use information obtained by private parties and turned over to the police
even though the material was obtained
without a warrant.

(Note: The case law involving the Fourth
Amendment is quite extensive and the dis-
cussion here is not intended as a complete
itemization of the circumstances in which
strict compliance with the Fourth Amend-
ment is excused.)

4. What rights do individuals have
when they are served with a search
warrant?
A person always has the right to refuse
to consent to a search. When served with
a search warrant, however, the police
have the right to search regardless of
that person’s consent. Nevertheless, an
individual served with a search warrant
has the right to review the warrant and
to ensure that the officers do not over-
step the proscribed bounds. Any person
served with a search warrant has the
right to (and should) obtain legal counsel
to help maintain that person’s privacy
and legal rights.

5. Is there a “hot topic” regarding
search warrants in the legal world?
There are several legal issues that arise
with “sneak and peek warrants”—a kind
of search warrant that came into exist-
tence following the passage of the Patriot
Act in 2001. Sneak and peek warrants
are a kind of “delayed-notice” warrant,
where the search is conducted without
the owner’s presence or knowledge.

6. What do you think students
should learn about search warrants?
The Fourth Amendment is designed to
protect against unreasonable searches
and seizures and it is one of the most
important parts of our Constitution. Its
history is fascinating and informative.
All students should be taught about the
meaning of the Fourth Amendment
and the pivotal role it plays in the history
of our country and its importance to
our core values.

7. Do you have any interesting stories
to share about search warrants?
At one time, some courts held that the
police had to have a search warrant for
items thrown in the garbage, even though
they were obviously abandoned. These
courts held that one had a right of privacy
in garbage, effectively to the same extent
as was enjoyed in their own homes. Often,
the result of a motion to suppress seized
evidence turned on whether the garbage
had cleared the lip of the garbage truck
or was in the process of being dumped.
The results were unpredictable and no
one’s legitimate privacy interests were
being protected. Rather, the insistence
on a warrant even for abandoned prop-
erty served only to protect individuals
who were seeking to dispose of evidence
of criminal conduct. Those decisions are
no longer the law.)
The Changing Definition of Search or Seizure

Interpretations of the Fourth Amendment have changed over the last century

by Tom McInnis

There is constant tug-of-war over the interpretation of the Fourth Amendment and its prohibition on unreasonable search and seizures. Questions exist, and the answers have real-life consequences for citizens. One of the most crucial and interesting questions is: What constitutes a search or seizure under the Fourth Amendment? The answer has evolved over time and is dependent on the decisions of the Supreme Court. Put simply, the Fourth Amendment has meant different things at different points in our history. This can clearly be illustrated by comparing two cases dealing with wiretapping, decided almost four decades apart, Olmstead v. United States, 277 U.S. 448 (1928), and Katz v. United States, 389 U.S. 347 (1967).

Search and Seizure Under Olmstead v. United States

Olmstead v. United States (1928) came to the Court due to the United States government’s desire to prosecute Roy Olmstead and his associates for violation of the National Prohibition Act. Olmstead was not a small-time bootlegger. He employed fifty people, used two sea-going vessels, multiple smaller boats, and had storage facilities throughout Seattle, Washington. The operation brought in about two million dollars a year, which today would be the equivalent of about twenty-five million dollars. The government had difficulty gathering evidence against the conspirators and, in 1924, resorted to tapping into phone lines between Olmstead’s home and the business enterprises he managed. When Olmstead was placed on trial, he unsuccessfully objected to use of the evidence that was gathered through wiretaps claiming, in part, that it violated the Fourth Amendment. After his conviction, Olmstead successfully appealed to the U.S. Supreme Court.

In a 5-4 decision, with the majority opinion written by Chief Justice William Howard Taft, the Court ruled there was no violation of the Fourth Amendment. Chief Justice Taft explained that while letters posted in the U.S. mail were protected by the Fourth Amendment, phone conversations were not, for two main reasons. First, letters were specifically implied in the language of the amendment, as papers, and were carried by the U.S. government, which was bound by the amendment. Phone conversations, on the other hand, were not covered by the language of the amendment. Chief Justice Taft also pointed out that telephone and telegraph lines are not controlled by the government. Furthermore, since there was no trespass onto the property of Olmstead and evidence was gathered through the sense of hearing, which was not forbidden by the Constitution, there was no search or seizure, so the Fourth Amendment did not limit the government’s actions.

“… the Fourth Amendment has meant different things at different points in our history.”

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Justice Louis Brandeis wrote a dissent in *Olmstead*, which suggested a very different approach to interpreting the Fourth Amendment. Brandeis believed that the purpose of the amendment was to secure those conditions favorable to the pursuit of happiness. For that reason he argued that the amendment created zones of privacy, which the government could not intrude upon without probable cause. He believed in a flexible Constitution that could be adapted to a changing society. Justice Brandeis was concerned that, if unchecked by the Fourth Amendment, the government might, in the future, develop the psychic and related sciences to the extent that it could discover the unexpressed thoughts of people. He pointed out that the Court had not been shy in expanding the powers of Congress to meet the needs of contemporary society and thought that the same should be done to protect civil liberties. For Brandeis, a search or seizure took place anytime the government initiates a process by which it attempts to gather evidence to be used against an individual.

After *Olmstead*, a search or seizure regulated by the Fourth Amendment involved a two-part inquiry. First, had the government intruded upon an area which was protected by the Constitution? Second, if it had, did the intrusion involve a physical invasion or trespass which was constitutionally impermissible? *Olmstead*’s claim failed on both parts. Phone conversations were not protected by the Constitution, and the government had not trespassed on *Olmstead*’s property to gain access to them so there was no search or seizure.

### Changing Interpretations: *Katz v. United States*

In *Katz v. United States* (1967) the Court, under the leadership of Chief Justice Earl Warren, reexamined the issue as to whether a physical trespass of a constitutionally protected area was required to trigger the Fourth Amendment. This was an important question because technology was increasingly allowing governmental intrusion into people’s lives without physical trespass. *Katz* came before the Court due to the efforts of officers who bugged a phone booth that Charles Katz used in his gambling business. The bug was placed on top of a phone booth that government agents knew was used by Katz. When the recorded conversation was introduced at trial, Katz objected to no avail and was convicted.

In an 8-1 decision, the Court overturned the precedent established in *Olmstead v. United States* by declaring that evidence that was gained through electronic surveillance of a phone conversation without a warrant violated the Fourth Amendment. Justice Potter Stewart’s majority opinion rejected both the constitutionally protected area and trespass approach to the Fourth Amendment which had existed since announced by Chief Justice Taft in *Olmstead*. Instead, he favored an approach closer to Justice Brandeis’s dissent from *Olmstead*, which argued that the Fourth Amendment protected zones of privacy surrounding individuals. Justice Stewart’s opinion declared that the Constitution protects people, not places, and made it clear that the Court desired to expand the protections of the Fourth Amendment beyond a literal interpretation of the words. Justice Stewart explained that those things which a person knowingly exposes to the public are not protected by the Fourth Amendment, but that those activities which a person seeks to
preserve as private, even in an area accessible to the public, may be protected by the Constitution. Stewart explained that, even though Katz could be seen in the phone booth, the fact that he shut the door meant that he expected privacy. The Court went on and ruled that future use of wiretaps would be unreasonable without a warrant unless the circumstances fit into one of the established exceptions for a warrant.

Justice Stewart’s majority opinion provided little analysis as to how later courts should determine when a person’s individual privacy should be protected against governmental intrusion under the Fourth Amendment. Justice John Harlan’s concurring opinion in Katz has, as a result, proven to be more influential to later courts, which have applied Katz to other factual situations. Justice Harlan reasoned that the Fourth Amendment would provide a person protection from unreasonable search and seizure when two requirements were met. The first was that the person had to demonstrate an actual (subjective) expectation of privacy in their activity. Second, society had to be willing to accept the privacy expectation as reasonable. Beyond this statement, Justice Harlan left open the precise methods by which the Court should determine when a person had developed an expectation of privacy or how it would be determined if society would recognize that expectation as reasonable.

The Warren Court, which was well known for its support of civil liberties, willingly rejected past precedent and used Katz to enlarge what constituted a search or seizure under the Fourth Amendment. As a result, wiretapping was now considered a search. Katz’s change in approach had the potential to enlarge the protections of the Fourth Amendment beyond those things specifically mentioned or directly implied in the amendment to include a wide variety of other human activities. Under Katz, when a person’s actions have a privacy interest that the Court finds society is willing to accept as reasonable and the government engages in activity to discover those actions, it is a search under the Fourth Amendment requiring a warrant unless it fits into one of the exceptions to the warrant requirement.

**Effects of Katz v. United States**

Scholars agree that Katz was meant to expand the boundaries of the Fourth Amendment and make it more flexible for purposes of protecting citizens against ever-increasing and invasive methods of surveillance. It seemed that the Court had embraced the spirit of Justice Brandeis’s dissent in Olmstead. Today, scholars are in agreement that Katz has not lived up to its potential of dramatically expanding the protections of the Fourth Amendment. The essential holding of Katz, that wiretapping is illegal without a warrant, still stands.

Despite this, the post–Warren Courts have used Justice Harlan’s concurring opinion to halt the expansion of the protections of the Fourth Amendment. Justice Harlan instructed the Court to ask two questions regarding whether an activity was protected by the Fourth Amendment: (1) Did the person have an actual expectation of privacy in their activity; and (2) Was that expectation one that society would recognize as reasonable? This determination is supposedly objective, but without a standardized method for determining what personal expectations of privacy society is willing to accept, the conclusion has been dependent on the shifting social and political views of the members of the Court. Due to their desire to prevent crime through more aggressive police tactics and their dislike of the exclusionary rule, which prevents illegally gathered evidence from being used at trial, the Burger and Rehnquist Courts relied on the language of Katz to actively narrow the scope of the Fourth Amendment.

The post–Warren Courts have applied the reasoning and language of Katz to enlarge the area of permissible
governmental activity and narrow what constitutes a search or seizure under the Fourth Amendment by using two primary methods. First, by ruling that even though a person has an expectation of privacy, it is not reasonable for society to respect that expectation. The Court has found a number of reasons to explain why it is not reasonable for society to respect an individual’s expectation of privacy. One has been to declare that the individual took on an assumption of risk by exposing his or her activities to others. In United States v. Miller, 425 U.S. 435 (1976), the Court ruled that because a person willingly shares bank records with their bank, individuals assume the risks that the bank will not share the records with others, so those records are not protected by the Fourth Amendment. The Court has also found that society would not be willing to respect a person’s expectation of privacy when the emerging technology under scrutiny merely enhances the government’s ability to observe what is already visible to the government and others. An example is California v. Ciraolo, 467 U.S. 207 (1986), when the Court ruled that aerial surveillance does not violate the Constitution because anyone can look down from an airplane, therefore the government should not be banned from such activity.

In another case involving aerial surveillance, Dow Chemical Co. v. United States, 358 U.S. 307 (1986), the Court held that surveillance techniques that do not reveal intimate details about a person’s life, in this case use of highly detailed cameras, do not interfere with a person’s subjective expectation of privacy. In all these scenarios it has become increasingly clear that the Court’s view of the societal reasonableness prong of Katz is quite narrow. Expectations of privacy will only be deemed reasonable to the extent to which persons do not expose their activities to other people. In the post–Warren Court era, it does not matter how unlikely it is that a third party would actually engage in the same activity as law enforcement; the mere possibility has been enough for the Court to find a person’s expectation of privacy to be unreasonable and thus rule that no search as regulated by the Fourth Amendment occurred.

The second method by which the framework from Katz has been used to enlarge the legitimacy of governmental activity is by linking the definition of whether a search occurred to the nature of the item that is the object of the search. In this regard, the Court has ruled that there is no legitimate expectation of privacy with regard to contraband items. As a result, in United States v. Place, 462 U.S. 696 (1983), the Court ruled that even though a person may have an expectation of privacy in luggage, use of drug-sniffing dogs to determine if luggage contained illegal drugs is not a search under the Fourth Amendment because it merely disclosed whether a person was in possession of drugs in which they could have no legitimate expectation of privacy. The end result is that now under Katz a search occurs only when individuals have a reasonable and legitimate expectation of privacy in their activities. Therefore, inspections.

Suggested Reading

Searches in schools have inspired many Fourth Amendment challenges to the Supreme Court. David Hudson explores how some of these cases affect the everyday lives of students and teachers.

"School officials regularly conduct searches and seizures of students ostensibly to fulfill their paramount duty of providing a safe learning environment."
New Jersey v. T.L.O.
The U.S. Supreme Court addressed the constitutionality of school searches in its 1985 decision New Jersey v. T.L.O. The case arose out of a March 1980 incident at Piscataway High School. A teacher discovered two girls in the laboratory smoking. The teacher sent them to vice principal Theodore Choplick, who interrogated the two girls. One girl admitted to smoking but a girl identified in court papers by her initials “T.L.O.” denied the charge.

Choplick then searched her purse, finding a pack of cigarettes and a pack of rolling papers. He knew that rolling papers were associated with marijuana so he continued to search her purse, finding a pipe, a small amount of marijuana, plastic bags and index cards with initials beside small amounts of money. He suspected T.L.O. of selling marijuana and contacted the girl's mother and the police. The state pursued delinquency charges against T.L.O.

In juvenile court, T.L.O.’s attorney argued that the evidence of marijuana should be suppressed because Choplick violated her Fourth Amendment rights and engaged in an unreasonable search. The state countered that the Fourth Amendment did not apply in public schools and that Choplick was justified. The juvenile court ruled that the Fourth Amendment did not apply in public schools and that Choplick was justified. The Supreme Court determined that, in accordance with the Fourth Amendment, student searches must be justified and reasonably related in scope to the circumstances that justified the search in the first place.

The Supreme Court determined that, in accordance with the Fourth Amendment, student searches must be justified and reasonably related in scope to the circumstances that justified the search in the first place.

The state appealed to the U.S. Supreme Court, and argued that the Fourth Amendment applied to govern public school searches but that Choplick's search was reasonable. The state of New Jersey argued that school officials were acting “in loco parentis”—or were simply parents of the students. Just as parents are not subject to the Bill of Rights, the state reasoned, neither are school officials.

The Court rejected that far-reaching argument, noting that public school officials act not from parents' permission but from state-imposed duties and rules. “In carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents, and they cannot claim the parents' immunity from the strictures of the Fourth Amendment,” Justice Byron White wrote in his majority opinion.

However, the Court also rejected T.L.O.'s argument that the traditional requirements of a warrant and probable cause were required. The majority reasoned that the warrant requirement was too impractical for the public school environment: “The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.”

The Court also relaxed the level of suspicion in the school environment,
YES, as Transportation Security Evolves to Ensure International Security
by John Pistole

[The] Transportation Security Agency (TSA) has an incredibly difficult and complex mission. Over the years, terrorists have set their sights on all modes of transportation—including rail, as evidenced by the attacks in Madrid in '04, London in '05 and on the Moscow subway in March 2010. At the same time, we know that commercial aviation remains a top terrorist target. We were reminded of the ongoing, evolving nature of the threat in October 2010 when terrorists tried to ship bombs on cargo planes destined for the United States. In January 2011, a suicide bomber detonated a device in the baggage claim area of Moscow’s airport. And several recent incidents brought into sharp focus the fact that we continue to face a significant terror threat here at home. A 19-year-old college student plotted to blow up a Christmas tree lighting ceremony in Portland, Oregon. In February 2011, the FBI and the Joint Terrorism Task Force arrested a young Saudi man suspected of plotting terror attacks in Texas as a “lone-wolf” jihadist.

Understanding the nature of the threat is the first step in the process of determining the best way to mitigate it. That word—mitigate—is important. We are not in the risk elimination business—and we never will be. We look for the best way to mitigate risk and make our transportation systems as safe as possible.

In the United States, we have long been aware of the threat to commercial aircraft. The threat hasn’t always looked the same, but it has always been there. In what was likely the world’s first fatal hijacking, three Romanian terrorists killed a crewmember on board a Romanian Airlines flight on July 25, 1947. We saw the first act of criminal violence against a U.S. airliner on November 1, 1955. A man placed a bomb in the suitcase of his unwitting mother in hopes of collecting her life insurance policy. The plane blew up after taking off in Denver and all 44 people on board were killed. And some of us remember May 1961, when the first U.S. airliner was diverted to Cuba [the first in a series of highjackings]. These early incidents rightly caused the U.S. government to take a variety of actions to try to step up aviation security.

In an odd bit of historical irony, it was on September 11, 1970, that President Nixon established the first incarnation of what would ultimately become the Federal Air Marshal Service. Three years later, the FAA established the foundation for the security framework we know today—mandating inspection of carry-on baggage and the physical screening of all passengers.

Like those early acts of terrorism against commercial aircraft all those years ago, the events of September 11, 2001, prompted the government to take action. After the initial emergency measures were lifted, a longer-term vision began to take shape. Our understanding of the enemy quickly grew more sophisticated. We faced a determined enemy, and they were plotting our destruction every day. They lived on our soil, knew how to assess our weaknesses and could adapt their tactics as needed. It was in this environment that Congress decided it was time for a federalized counterterrorism security network. We needed a cohesive, nimble force that could assess intelligence and quickly implement new security measures without interruption.

Almost overnight, Congress created TSA to deploy personnel across the nation and assume responsibility for transportation security. From Day One, TSA’s marching orders have been difficult, and critical to our nation.

Today, the United States has an aviation security system that deploys multiple
NO, Transportation Security is Invasive, Annoying—and Unconstitutional
by Jeffrey Rosen

There have been high-profile acts of civil disobedience in response to the two controversial procedures recently deployed by the TSA for primary screening—the body-scanning machines and the intrusive full-body pat-downs—including software programmer John Tyner’s unforgettable warning to a TSA official: “If you touch my junk, I’ll have you arrested.” But the public seems less opposed to the scanners than civil libertarians had hoped. In a recent Washington Post-ABC News poll, only 32 percent of respondents said they objected to the full-body scans, although 50 percent were opposed to the pat-downs offered as an alternative.

That means opponents of the new measures will have to shift their efforts from the airports to the courts. One advocacy group, the Electronic Privacy Information Center, has filed a lawsuit, calling the body scanners unconstitutional. Could this challenge succeed?

Courts evaluating airport-screening technology tend to give great deference to the government’s national security interest in preventing terrorist attacks. But in this case, there’s a strong argument that the TSA’s measures violate the Fourth Amendment, which prohibits unreasonable searches and seizures.

Although the Supreme Court hasn’t evaluated airport screening technology, lower courts have emphasized, as the U.S. Court of Appeals for the 9th Circuit ruled in 2007, that “a particular airport security screening search is constitutionally reasonable provided that it ‘is no more extensive nor intensive than necessary, in the light of current technology, to detect the presence of weapons or explosives.’ ”

In a 2006 opinion for the U.S. Court of Appeals for the 3rd Circuit, then-Judge Samuel Alito stressed that screening procedures must be both “minimally intrusive” and “effective”—in other words, they must be “well-tailored to protect personal privacy,” and they must deliver on their promise of discovering serious threats. Alito upheld the practices at an airport checkpoint where passengers were first screened with walk-through magnetometers and then, if they set off an alarm, with handheld wands. He wrote that airport searches are reasonable if they escalate “in invasiveness only after a lower level of screening disclose[s] a reason to conduct a more probing search.”

As currently used in U.S. airports, the new full-body scanners fail all of Alito’s tests. First, as European regulators have recognized, they could be much less intrusive without sacrificing effectiveness. For example, Amsterdam’s Schiphol Airport, the European airport that employs body-scanning machines most extensively, has incorporated crucial privacy and safety protections. Rejecting the “backscatter” machines used in the United States, which produce revealing images of the body and have raised concerns about radiation, the Dutch use scanners known as ProVision ATD, which employ radio waves with far lower frequencies than those used in common hand-held devices. If the software detects contraband or suspicious material under a passenger’s clothing, it projects an outline of that area of the body onto a gender-neutral, blob-like human image, instead of generating a virtually naked image of the passenger. The passenger can then be taken aside for secondary screening.

TSA Administrator John Pistole acknowledged in recent testimony that these “blob” machines, as opposed to the “naked” machines, are the “next generation” of screening technology. His concern, he said, is that “there are currently a high rate of false positives on that technology, so we’re working through that.”

But courts might hold that, even with false positives, “blob” imaging technology that leads to a secondary pat-down is less invasive and more...
effective than imposing a choice between “naked” machines and intrusive pat-downs as primary screening for all passengers.

In the Netherlands, there’s another crucial privacy protection: Images captured by the body scanners are neither stored nor transmitted. Unfortunately, the TSA required that the machines deployed in U.S. airports be capable of recording, storing and transmitting images when in “test” mode. The agency promised, after this capability was revealed by a Freedom of Information Act lawsuit filed by the Electronic Privacy Information Center, that the test mode isn’t being used in airports. But other agencies have abused the storage capability of the machines. The U.S. Marshals Service admitted in August that it had saved more than 35,000 images from body scanners at the Orlando federal courthouse.

In evaluating the constitutionality of these scanners, U.S. courts might hold that the machines can’t be considered “minimally invasive” as long as images can be stored and recorded.

In January 2011, the European Commission’s information commissioner criticized the scanners’ “privacy-invasive potential” and their unproven effectiveness. And tests have shown that the machines are not good at detecting low-density powder explosives: A member of Britain’s Parliament who evaluated the scanners in his former capacity as a defense technology company director concluded that they wouldn’t have stopped the bomber who concealed the chemical powder PETN in his underwear Christmas 2010.

So there’s good reason to believe that the machines are not effective in detecting the weapons they’re purportedly designed to identify. For U.S. courts, that’s yet another consideration that could make them constitutionally unreasonable.

Broadly, U.S. courts have held that “routine” searches of all travelers can be conducted at airports as long as they don’t threaten serious invasions of privacy. By contrast, “nonroutine” searches, such as strip-searches or body-cavity searches, require some individualized suspicion—that is, some cause to suspect a particular traveler of wrongdoing. Neither virtual strip-searches nor intrusive pat-downs should be considered “routine,” and therefore courts should rule that neither can be used for primary screening.

Will the Supreme Court recognize the unconstitutionality of body-scanning machines? It might have ruled against them five years ago, when the balance of power was controlled by Justice Sandra Day O’Connor.

O’Connor was an eloquent opponent of intrusive group searches that threatened privacy without increasing security. In a 1983 opinion upholding searches by drug-sniffing dogs, she recognized that a search is most likely to be considered constitutionally reasonable if it is very effective at discovering contraband without revealing innocent but embarrassing information. The backscatter machines seem, in O’Connor’s view, to be the antithesis of a reasonable search: They reveal a great deal of innocent but embarrassing information and are remarkably ineffective at revealing low-density contraband.

The Supreme Court might not view the matter differently today, now that O’Connor has been replaced by Alito, who wrote the lower-court opinion insisting that screening technologies had to be both effective and “minimally intrusive.” Last year, with Safford Unified School District v. Redding, the court struck down strip-searches in schools by a vote of 8 to 1.

In many cases, furthermore, Supreme Court justices are influenced by public opinion, consciously or unconsciously, and some polls suggest that opposition to these screening measures has grown in recent months. That reflects a basic truth of the politics of privacy: People are most likely to be outraged over a particular privacy invasion when their own privacy has actually been violated.

It’s possible, of course, that the TSA will respond to the backlash by rethinking its screening policies or that Congress will step in with regulations. But if not, the Supreme Court may be asked to hear a constitutional challenge to the body scanners before long. If the justices take the case, they should strike down the use of “naked” machines and intrusive pat-downs as an unreasonable search and a violation of what Justice Louis Brandeis called “the most comprehensive of rights”—namely, “the right to be let alone.”

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layers of risk-based, intelligence-driven security measures. The system begins long before a traveler arrives at an airport and continues all the way to the cockpit—providing security throughout a passenger’s trip, not just at the security checkpoint. So how do we do it? [The] newly implemented Secure Flight program fulfills a key 9/11 Commission recommendation by using basic biographical information provided by each passenger to vet them against terrorist watch lists. At the airport, numerous layers of security are in place. There are behavior detection officers, explosive-detection canines and closed-circuit video surveillance. And, of course, we do have the physical screening at the checkpoint. You know the drill: passengers take off their shoes, remove liquids from their carry-ons, take off outer layers of clothing, take out their laptops and proceed through the checkpoint.

And last summer, TSA fulfilled a key provision of the 9/11 Act by ensuring that 100 percent of all cargo transported on domestic passenger aircraft is screened. Since the disrupted air cargo bomb plot in October 2010, we have taken additional steps to further strengthen cargo security.

As the threat has changed, so have some of our methods and our detection needs. Today, one of the most significant threats to commercial aviation is well-concealed improvised explosive devices made completely out of nonmetallic material—plastics, powders, liquids, and gels that metal detectors alone cannot detect. While there is no silver bullet, advanced imaging technology gives us the best opportunity to detect nonmetallic explosives.

The latest issues we’ve been working through relate to safety and privacy. All the testing clearly shows that advanced imaging technology is safe for all passengers and employees.

From the outset, TSA implemented significant protections when the new technology was deployed. [TSA is] now testing new software that eliminates passenger-specific images, and instead uses a generic outline of a person to identify potential threats. This software, known as automatic target recognition, is being tested in Las Vegas, Atlanta, and Washington, D.C. If our testing is successful, we anticipate quickly expanding the use of the software across the country. All of these individual measures, and others I have not mentioned, combine to create our multilayered security system that seeks to mitigate risk.

We can all testify to the inconvenience we sometimes experience because of such a comprehensive system. But the other thing we can say with absolute confidence is that this system has effectively secured aviation in this nation since 9/11. However, we will always seek ways to improve.

A key component of our future will be continuing the efforts already underway to engage the international community. We fully recognize that it takes a concerted, global effort to protect the world’s interconnected aviation network. The security of U.S. civil aviation is intimately connected to the security of the international civil aviation system. In October 2010, the International Civil Aviation Organization adopted the Declaration on Aviation Security, which highlights the commitment of the more than 190 member states to collaborate in the effort to enhance aviation security at the international level. This extraordinary global collaboration is making real progress on aviation security a reality. At home, TSA is also engaging in important work to explore checkpoint-of-the-future concepts that incorporate cutting-edge technology to improve security while making the travel experience better.

Recognize that TSA screens more than 628 million airline passengers each year at U.S. airports. The vast majority of the 628 million present little-to-no risk of committing an act of terrorism. If we want to continue to ensure the secure freedom of movement for people and commerce across this great nation and around the world, there are solutions that go beyond the one-size-fits-all system. My vision is to accelerate TSA’s evolution into a truly risk-based, intelligence-driven organization in every way. We want to focus our limited resources on higher-risk passengers, while speeding and enhancing the passenger experience at the airport. I believe what we’re working on will provide better security by more effectively deploying our resources, while also improving passengers’ travel experiences by potentially streamlining the screening experience for many people.

John Pistole is Administrator of the U.S. Transportation Security Administration. These comments were taken from a speech delivered on March 3, 2011 at the American Bar Association 6th Annual Homeland Security Law Institute.
SEARCHES & SEIZURES

Students in Action

Students Advising Students: A Social Networking Awareness Program

by Tiffany Willey Middleton

Recently, Time magazine named Facebook founder Mark Zuckerberg Person of the Year. He was selected over other newsmakers such as WikiLeaks’ Julian Assange and leaders of the Tea Party as the most noteworthy person of 2010. Facebook’s business model allows users to interact with other users at no cost, in exchange for personal information, user-created content, and targeted advertising. Currently, the social networking website Facebook has more than 500 million users and over 900 million objects—pages, groups, events, photos, communities, applications—that people interact with everyday. The website made over $1 billion in advertising revenue in 2010, as users reconnected with old friends, posted personal status updates, uploaded photos, and posted original stories and poetry. Many users, however, are unaware of Facebook’s legal terms of use, privacy settings, and public access. Users may also be unaware that many colleges and employers search for and look at potential student or employee profiles as part of their evaluation processes. One group of students in Shippensburg, Pennsylvania is working to change this, working to educate their peers about the legal responsibilities and potential risks that come with participating in social networking websites.

Students teach students about savvy social networking. Courtesy of the Internet Safety Alliance.

The Internet Safety Alliance at Shippensburg Area Senior High School is comprised of students, armed with videos and PowerPoint slides and more personal experience with social networking websites than some of their teachers. They lead presentations in front of their peers’ social studies classes that highlight the “forever and global” nature of online content, and raise awareness Facebook’s Terms and Agreements suggesting that users own content they post to the site, but in doing so, grant the site exclusive rights to publish or profit from the same intellectual property. Finally, they point out how Facebook can use personal profiles to profit from targeted advertising.

“Students don’t understand what happens when they are on Facebook, and they must be aware of all aspects and how public their information can be,” explains Rodney Tosten, Vice President for Information Technology at Gettysburg College, not far from the school district. Tosten developed the presentations, then contacted Shippensburg School District Superintendent Kris Carroll about implementing a program in schools. Carroll and Shippensburg Area Senior High School guidance counselor Michelle Dubbs agreed with Tosten that “there was a need to include

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Parents and teachers are not always well informed about current technology and students might not want to listen to their parents’ advice. Waiting until students are in college is simply too late. “It’s pretty scary,” Dubbs said. Tosten and Dubbs met with students, who suggested that a student-led effort might be more effective among their peers. “We were all really shocked,” explained senior Anna Thiessen, and “knew it wouldn’t be as effective” without students teaching other students.

Twice this year, first with junior and senior classes, then with freshmen and sophomore classes, the ten students from the Internet Safety Alliance work in five pairs, making presentations to social studies classes. They receive training in making the presentations, which make their peers aware of Facebook’s terms of use, and offer best practice tips for maintaining online privacy. Tosten reminds students that it is most important that they put their feelings in their own words. “It’s not fair” was one comment.

“What are they selling?” asks senior Kara Dubbs. “They are selling you.” Tosten explains that students think Facebook is free, and they do not understand that the site offers them a service in exchange for personal information and original content. Presenter Coulson Shaw explains that “students didn’t know” about Facebook’s use of their information. “[They] knew there was a risk, but so many thought ‘it won’t happen to me.’” Students are now more informed and less likely to think that these issues affect “everyone else.” One student is concerned because her brother posts parts of a book he is writing online. Dubbs stresses that the Internet Safety Alliance is “not trying to scare you,” but rather make students aware realize that “everything you do is global and forever.” Thiessen advises, “If you wouldn’t put it on a bumper sticker, don’t put it on Facebook.”

At the end of each presentation, all of the students are provided with business cards with best practices for online safety and privacy. Tosten is working with students to develop a website that will offer more information and serve as a lasting resource. He also works directly with faculty to offer additional training, so that they might serve as examples and resources for students. He and Shippensburg Area School District administrators hope to see the Internet Safety Alliance program grow. They would like to expand training to elementary and middle schools and neighboring districts, as well as raise awareness of the terms of other frequently used social networking applications like Skype and Twitter.

In the meantime, the Internet Safety Alliance continues to make their peers aware of the risks that can come with social networking online. One student, Casey, explains, “I want to make the decisions about how I interact with social networking websites.”

The Average Facebook User

- Has 130 friends.
- Is connected to 80 community pages, groups, and events.
- Creates 90 pieces of content—web links, news stories, blog posts, notes, photo albums—each month.
- Lives overseas: 70% of all Facebook users live outside the United States.
- Spends approximately 23 hours at the site each month.
- Who connects to the site via a mobile device is twice as active as a typical nonmobile user.

Source: Facebook.com

Resources

Internet Safety Alliance
www.internetsafetyalliance.org/

Visit the Internet Safety Alliance website for training presentations, schedules, and additional resources for creating a similar program in your school.
**Walk the Line (Intro Activity)**

1. Ask students to stand at the front of the room in a single horizontal line, all facing forward (not facing the person in front/behind of them).

2. Explain to students that they will be presented with a variety of searches/seizures. If a student thinks that the search/seizure should be permitted under the law/evidence can be used, they should step forward. If they think the search/seizure should be illegal/evidence cannot be used, they should step backwards.

3. Scenarios:
   a. School officials conduct random searches of student lockers. No notice is given of the searches, although they are mentioned in a student handbook distributed at the start of each school year.
   b. The police stop a car for running a red light. Besides the driver, there are two passengers in the car. The police make the driver and the passengers get out of the car and search them. The police find a stolen gun in the purse of one of the passengers.
   c. A police officer sees a man walking down the street. The man keeps walking back and forth in front of a jewelry store, looking over his shoulder. The man is wearing a bulky coat, even though it is 82 degrees and sunny. The officer searches the man and finds a gun and a knife on him.
d. After a robbery at a local bank, a bulletin is sent out to police with the description of the getaway car. Two officers see a car matching this description, pull the car over and arrest the occupants. The police then search the car and find bags of money and two guns.

e. The police have a warrant to arrest Tom for mail fraud. Tom is currently staying at his mother’s. When the police arrive at Tom’s mom’s house, Tom gives himself up without any problems. The police then search Tom’s mother’s house, even though she tells them not to. They find evidence that Tom’s mother has been growing marijuana in the home.

f. At the local high school, there have been problems with students using prescription-strength ibuprofen and selling it amongst themselves. The principal gets one report about a freshman girl selling some pills. The principal and another school official call the girl to the office and ask her to undress down to her underwear, looking for some ibuprofen.

g. The police have been keeping tabs on a local man alleged to be a drug dealer. One afternoon after he takes out his trash, leaving it in a dumpster in an alley, the police go through it, finding records of the drug dealing and drug paraphernalia.

h. There have been no drug problems at Smithville High School. However, at the school in the town just south of Smithville, in the last five months, there has been an explosion of drug use. Officials at Smithville have decided to start randomly drug testing students.

i. The police get a tip that Susan has been selling drugs. The police go to Susan’s home, which is an RV parked at her mom’s house. The police peek in the window and see drug paraphernalia. They then arrest Susan for selling drugs.

j. A bank is robbed. The police get a description of the robber—and two officers see him driving down the street. They pull the robber over and arrest him. After they arrest him, they see a gun sitting on the front seat. The police go in and search the rest of the car and find evidence indicating that the robber has committed other bank robberies over the last 20 years. The police charge the robber for these historic robberies.

Debriefing/Follow-Up — 5 MINUTES
1. Ask students to list the circumstances that the courts look to when deciding whether a search is permissible. These should be listed on the board, including:
   a. Reasonableness of the search;
   b. Seriousness of the crime;
   c. Age/sensitivity of the person being searched;
   d. Where the search is occurring.

2. Important take aways:
   a. Different standards in different locations;
   b. Balancing act between keeping community/police safe and protecting constitutional rights.

3. Distribute the Fact Patterns Handout to all students for review. They will examine the earlier scenarios with their new information about searches and seizures, and note legal and illegal searches. This may also serve as an assessment.

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In 2004, eight states and the City of New York sued five power companies, including American Electric Power Company, Inc. (AEP), and the federal Tennessee Valley Authority (TVA) in federal court, alleging that emissions from the defendants’ power plants contribute to global warming and resulting threats to themselves and their citizens. The court heard the cases together. The plaintiffs brought their claims under the common law of public nuisance—a court-created claim, not based on a specific statutory cause of action, in which a defendant allegedly interferes unreasonably with “a right common to the general public,” for example, public health, public safety, and public comfort. They alleged that the defendants’ emissions contribute to an “risk of an abrupt change in climate due to global warming,” higher surface temperatures, and greater threats, and that reduced emissions would decrease these threats. In particular, the plaintiffs alleged that emissions and resulting global warming would cause increased smog and heat-related mortality in Los Angeles and New York City; shrinking mountain snowpack, reducing the amount of drinking water in California; rising sea levels, affecting low-lying property in New York City; reduced crop and livestock yields in Iowa; lower water levels in the Great Lakes, harming commercial shipping and hydropower production in New York; and the destruction of several species of hardwood trees.

The plaintiffs alleged that the defendants were contributing to and exacerbating these threats by emitting 650 million tons of carbon dioxide each year, 10 percent of the entire country’s annual emissions. They further alleged that the defendants had feasible, cost-effective alternatives for generating power with lower emissions. The plaintiffs sought injunctive relief to reduce the defendants’ carbon-dioxide emissions, but they did not seek damages. The district court dismissed on the ground that the case raised a nonjusticiable political question more appropriate for the legislative and executive branches. A two-judge panel of the Second Circuit reversed. (The third judge on the panel, then-Judge Sonia Sotomayor, was elevated to the Supreme Court during the pendency of the appeal. Because the two judges agreed, they decided the case without a replacement for Justice Sotomayor.) The panel ruled that the plaintiffs’ claims did not involve a political question because it was based on well-settled principles of public nuisance law, not public policy. It also ruled that the plaintiffs had standing and that the federal Clean Air Act did not displace the plaintiffs’ claims.

**Separation of Powers**

This case is about the separation of powers. In particular, it is about the powers of the federal courts—the power to hear certain kinds of disputes, and the power to craft certain claims—and the point at which these powers run up against the powers of the other branches.

In order to protect this kind of intrusion by the judiciary, the Supreme Court has developed several doctrines. One is “standing,” the requirement that federal court plaintiffs allege (and ultimately establish) that they suffered a concrete and particularized injury, traceable to the defendant’s conduct, that can be redressed by their lawsuit. Standing rules limit the kinds of cases that come before the federal courts and ensure that those cases are appropriate for judicial resolution. In addition to this “constitutional” standing, the Supreme Court has also created “prudential” standing rules—rules based on practical considerations of judicial administration and judicial economy.

A second doctrine that protects separation of powers relates to the federal courts’ powers to craft common law (or judge-made law). This doctrine says that federal courts cannot craft common law or rule on federal common-law cases when Congress has legislated, or when the executive has regulated, on the matter. When this happens, the Court has ruled that the federal laws or regulations have “displaced” the federal lawsuit.

A third doctrine that protects separation of powers is the political question...
doctrine. The political question doctrine says that the courts cannot hear certain kinds of cases that, based on the relative institutional characters, are more appropriate for the political branches. This case involves all three doctrines: standing (both constitutional and prudential); displacement; and political question.

**Why This Case is Significant**
On its surface, this case is important for two reasons. First, it is important for its practical effect. The defendants warn that allowing this case to move forward would lead to increased abusive litigation against the business community based on abstract harms, only remotely connected to the defendants’ behavior—harms such as global warming, or anything else that might be considered a public nuisance. Litigation will cost time and money and result in another layer of regulation that could be arbitrary and unpredictable, based on the myriad ways that federal courts might analyze concepts such as reasonableness or causation in these complex cases.

On the other hand, the plaintiffs argue that litigation is essential for states and others to redress their very real harms against actors who have created a public nuisance. In the absence of federal law or regulation, they argue that the federal common law offers them their only means of relief for their injuries at the hands of the defendants.

The case thus pits the business community’s economic interests against plaintiffs’ interests in remedies for harms caused by public nuisances. Because the case comes to the Court on the pleadings and a motion to dismiss, only one of these weighty interests will prevail. (Amicus tort law professors, writing in support of the plaintiffs, however, argue that tort law itself guards against some of the evils envisioned by the defendants. This suggests that victory for the plaintiffs may not lead to increased abusive litigation and other harms.)

Second, the case is important for its doctrinal effect. Standing and the political question doctrine are notoriously squishy areas of constitutional law, and the case presents an interesting and hard question on displacement. Thus, this case gives the Court a limited chance to clarify some points on standing and the political question doctrine and to rule on displacement where the government has not yet regulated in the specific area at issue but seems to be moving in that direction.

But it is hard to imagine that this second point is not just cover for the first, and that both points are not just cover for the underlying dispute. In other words, this case is probably really about global warming and its causes and effects. This is underscored by the lineup of amici on both sides of the case, with business groups arguing for the defendants, and environmental groups arguing for the plaintiffs. And the deep divisions on the underlying issue of responsibility for global warming are underscored by the different groups of law professors, scientists, experts, and states that have weighed in as amici on both sides of the case.

If this case is really a proxy battle on global warming and responsibility for its effects, any ruling will necessarily disappoint, at least in the short run. A ruling for the defendants will merely shift the debate back to the EPA, and a ruling for the plaintiffs will only allow the suit to move beyond the pleadings (after which plaintiffs likely face other significant hurdles in winning their case). But worse, if this case is really a proxy battle, any ruling on standing, the political question doctrine, or even displacement could only further muddy the doctrinal waters in those areas and lend more evidence to the criticism that these doctrines, especially standing and political question, merely provide doctrinal cover for judges to impose their political will in the underlying dispute.

If American Electric Power v. Connecticut is really a battle over global warming, then any ruling will be disappointing.

For more about this case, including full merit and amicus briefs filed with the Court, visit www.supremecourtpreview.org.
purse was reasonable. Applying this two-part standard, the Court determined that Choplick’s search was reasonable. He had reason to believe that T.L.O. had been smoking in the lavatory and the discovery of rolling papers justified a more thorough search of the purse’s contents.

In his dissenting opinion, Justice William Brennan disagreed with the Court’s discarding of the probable-cause standard: “I emphatically disagree with the Court’s decision to cast aside the constitutional probable-cause standard when assessing the constitutional validity of a schoolhouse search.”

In State v. Taylor (La.App. 2010), a Louisiana appeals court applied the T.L.O. standard to find that a search of a student suspected of smoking in the bathroom violated the Fourth Amendment. In this case, a school official caught student Demond Taylor and other students smoking in the bathroom. Then, the official searched Taylor’s shoes and found illegal drugs. A divided Louisiana appeals court upheld a trial court’s ruling that the search of Taylor’s shoes violated the Fourth Amendment, because it was not reasonable to expect that Taylor might have cigarettes in his shoes. The dissent ruled that it was not very intrusive to require Taylor to remove his shoes.

**Strip Searches**

Strip searches are more invasive than other types of searches. The U.S. Supreme Court ruled in Safford Unified School District v. Redding (2009) that school officials violated the Fourth Amendment rights of middle school student Savana Redding when they subjected her to a strip search because they thought she might be carrying prescription drugs.

School officials, including assistant principal Kerry Wilson, had heard that some students had prescription pills at school. A school official had confiscated four pills of Ibuprofen and a pill planner. When queried by Wilson, the student said that the pills and the planner were Savana Redding’s.

Wilson then went to Redding’s math class and removed her from the class. Wilson searched Redding’s purse but found no contraband. He then ordered a school nurse to conduct a personal search of Redding, who had to pull out the elastic of her underwear and expose her breast and pelvic areas. The search revealed no pills or other contraband.

The school officials tried to use the T.L.O. precedent as support for the search of Redding. But the Supreme Court determined that the strip search was excessive because the pills were not dangerous and there was no reason to think that Redding might be carrying contraband in her underwear. The Court made “clear that the T. L. O. concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts.”

The majority concluded: “In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.”

**Drug Testing**

The U.S. Supreme Court has ruled that public school officials can conduct random drug tests of student athletes and all students who participate in extracurricular activities in Vernonia School District v. Acton (1995) and Board of Education v. Earls (2002).

**Relevant Cases**

- Northwestern School Corp. v. Linke, 763 N.E.2d 962 (Ind. 2002)
- State v. Taylor, 50 So.2d 922 (La.App. 2010)

**FOR DISCUSSION**

1. Why do you think the Supreme Court in T.L.O., determined that school searches do not require warrants or probable cause. Do you agree?
2. Do you think that high school athletes should submit to random drug testing? What about students who participate in any extracurricular activity, such as band or glee club?
primarily in the writings of Letters of a Federal Farmer. What is unclear, however, is what constituted an “unreasonable” search or seizure and whether the use of this form was evidence of a broad reasonableness standard independent of a ban on general warrants.

The Fourth Amendment
James Madison’s earliest draft of the Fourth Amendment was similar to many early state constitutions with its emphasis on improper warrants. It stated, “The rights of the people to be secure in their persons, their houses, their papers, and their other property, from all unreasonable searches and seizures, shall not be violated by warrants issued without probable cause, supported by oath or affirmation, or not particularly describing the places to be searched or the persons or things to be seized.” It was introduced to the House of Representatives, where several representatives, including Egert Benson of New York, unsuccessfully tried to strengthen its language. It was next sent to the House Select Committee of Eleven, made up of representatives of each state, which was responsible for arranging the amendments. The Committee made minor changes, including replacing the phrase “other property” to “effects.” After the amendment was sent to the House Floor, there was another change to Madison’s original version either by Benson or by Elbridge Gerry of Massachusetts. It now read, “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, 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.” The change went unnoticed by members of the House and Senate, which adopted it with little discussion in 1789 and it was subsequently ratified by the states in 1791. Discussion during the ratification debates focused, as it did in Congress, on the evils of general warrants and writs of assistance.

This last minute modification of the first part of the Fourth Amendment poses an interesting question as to whether those who framed and ratified it intended to give it a broader reading. As Yale Kamisar, a leading Fourth Amendment scholar, explained, the change significantly altered the meaning of the Fourth Amendment by converting the meaning of Madison’s original proposal from a “one-barreled affair” focused at what was required for a proper warrant to a “double-barreled form” that appeared to not only define the warrant requirement—a procedural standard—but also to give the Fourth Amendment broader scope by announcing a general, substantive right to security against government intrusion of persons, homes, papers, and effects.

The change also introduced a new dilemma—what is the proper relationship between the first clause of the Fourth Amendment, which protects against unreasonable searches and seizures, and the second clause, which specifies what is required by a warrant. Are the clauses to be interpreted separately, meaning that all searches without a warrant must only be “reasonable” and those with a warrant must meet the particularity and specificity requirements, or does the warrant clause somehow explicate or give meaning to the reasonableness clause by announcing that searches without a warrant are assumed to be unreasonable? It is this discussion that animates the modern debate over the meaning of the Fourth Amendment. On one side are those who read the two clauses together and endorse the “warrant preference” construction of the Fourth Amendment, which suggests that warrants are a precondition of a reasonable search or seizure under the Fourth Amendment, with a few clearly articulated exceptions, such as searches in “plain view” or those in which a warrant cannot be secured promptly, such as searches to secure the safety of law enforcement or those that take place after “hot pursuit.” This was the view that dominated the Supreme Court’s interpretation of the Fourth Amendment up until the late 1960s. On the other side are those who read the clauses separately and endorse the “generalized reasonableness” construction of the amendment, which requires that searches and seizures subject to a warrant fulfill the warrant requirements and that all other searches meet a general reasonableness standard. This is the view endorsed by a majority of the Supreme Court since the early 1970s—that reasonableness, not the warrant requirement, is the touchstone of the Fourth Amendment.

continued on page 29
that merely determine if an item is contraband are not defined as a search.

The lesson learned by examining this area of Fourth Amendment jurisprudence is that the meaning of the Fourth Amendment and what constitutes a search and seizure is still evolving and the tug of war continues. The Warren Court, fearing new forms of surveillance, expanded the definition of a search under the Fourth Amendment, whereas, the post–Warren Courts, due to their concerns about crime control, have limited the protection of the Fourth Amendment by narrowing what constitutes a search or seizure. As it has in the past, the debate over the interpretation of the Fourth Amendment will continue to be a point of contention and be subject to change based on the shifting social and political views of the members of the Supreme Court.

### Fourth Amendment Cases from Olmstead to Katz and Beyond

**1928**  
*Olmstead v. United States*  
Court rules that phone calls are not protected by the Fourth Amendment.

**1949**  
*Wolf v. Colorado*  
Fourth Amendment is “incorporated,” and applies to state as well as federal government actions.

**1961**  
*Mapp v. Ohio*  
Exclusionary Rule is incorporated, and evidence obtained in an illegal search and seizure is not admissible at a state or a federal trial.

**1967**  
*Katz v. United States*  
Court rules that Fourth Amendment rights were violated when, without a warrant, police wiretapped a public phone booth used by the defendant, Katz.

**1968**  
*Terry v. Ohio*  
Court recognizes that police, without a warrant, may “stop and frisk” the outside of a suspect’s clothing and search for weapons when they have a reasonable suspicion of illegal activity.

**1969**  
*Chimel v. California*  
Court rules that when arresting a person in their home, officers may not search the entire home without a warrant, but only the immediate area around the arrestee.

**1976**  
*United States v. Martinez-Fuerte*  
Court decides that law enforcement officers may conduct immigration checkpoints without obtaining warrants.

**1984**  
*United States v. Leon*  
Court recognizes a “good faith” exception to the Exclusionary Rule, allowing police to use evidence that was obtained with a warrant issued in good faith, but later found to be invalid.

**1985**  
*New Jersey v. T.L.O.*  
Court determines that school searches of students are constitutional so long as the search is justified at its inception, and is related in scope to those circumstances.

**1986**  
*Ciraolo v. California*  
Aerial surveillance of property, the Court rules, does not violate the Fourth Amendment.

**1990**  
*Michigan v. Sitz*  
Court decides that sobriety checkpoints that briefly detain motorists are constitutional.

**2001**  
*Kyllo v. United States*  
Court holds that use of a thermal imaging device to monitor radiation of heat from a person’s home requires a warrant.

**2002**  
*Veronia School District v. Acton*  
Court rules that a school district’s policy requiring students who participate in interscholastic sports to consent to random drug testing does not violate the Fourth Amendment.

**2009**  
*Safford Unified School District v. Redding*  
School officials, according to the Court, violated defendant Redding’s Fourth Amendment rights when they strip searched her for prescription drugs.

**2009**  
*Arizona v. Gant*  
Court rules that police may search a vehicle after a recent occupant’s arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search, or that the vehicle contains evidence of the offense of arrest.

**2010**  
*City of Ontario v. Quon*  
Court holds that the search of a police officer’s text messages sent with a government-issued pager to private parties was reasonable, and did not violate the defendant’s Fourth Amendment rights.
The Origins of the Fourth Amendment
continued from page 27

In the end, the historical record does illustrate that the Framers were principally concerned with the abuse of general warrants and writs of assistance by British customs officials. And, we know that the use of specific warrants, based on probable cause on evidence presented under oath before a magistrate and particularly listing the places to be searched and items seized, were not opposed at the founding. However, less is known about the Framers’ concerns about warrantless searches, which did take place when the Fourth Amendment was proposed, although the lack of a professionalized police force—law enforcement consisted primarily of night watchmen and privately paid, part time constables who relied on the assistance of bystanders—tells us something about their frequency and purpose. As a result, our original understanding of the Fourth Amendment only goes so far in shedding light on its applicability to twenty-first century controversies involving government power and individual liberty. ■

Remember to visit Insights online for additional resources on the origins of the Fourth Amendment.

... Public Schools
continued from page 26

The Vernonia School District in Oregon required athletes to submit to random drug tests after witnessing an alleged rise in student drug use in the 1980s. Some athletes supposedly were the leaders of the so-called drug culture. District officials initially tried counseling and various antidrug messages, but those did not work sufficiently. The district then initiated a drug-testing program.

James Acton, an incoming seventh-grader, and his parents objected to the drug-testing as an invasion of privacy. They challenged the constitutionality of the program in federal court. A federal district court rejected the lawsuit, but the 9th U.S. Circuit Court of Appeals ruled that the policy violated the Fourth Amendment and a corresponding provision of the Oregon Constitution.

On appeal, the U.S. Supreme Court reversed, ruling 6-3 that the policy was constitutional and reasonable. School officials did not need individualized suspicion before drug testing athletes and that the drug use in the public schools created a “special needs” exception to such testing. The majority also noted that athletes have reduced privacy expectations in the public schools.

“Legitimate privacy expectations are even less with regard to student athletes,” Justice Antonin Scalia wrote in his majority opinion.

The majority cited three factors in support of the drug-testing policy: (1) the decreased privacy expectations; (2) the “relative unobtrusiveness” of the search and seizure; and (3) the severe need for the policy at the school.

Several years later, the Court upheld a drug-testing policy in Tecumseh, Oklahoma, that required all middle and high school students who wished to participate in extracurricular activities to submit to random drug testing. Students Lindsay Earls, a prospective band member, and Daniel James, a prospective member of the Academic Team, challenged the policy.

The Court upheld the policy by a narrow 5-4 ruling in Board of Education v. Earls (2002), extending the rationale of the Acton case from athletes to all students participating in extracurricular activities. “Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease,” the Court noted.

Four justices dissented, including Justice Ruth Bader Ginsberg who had voted to uphold the drug-testing policy in the Acton case. “The particular testing program upheld today is not reasonable, it is capricious, even perverse.”

Even though the U.S. Supreme Court twice has upheld drug-testing programs, students and their parents have challenged these programs under respective state constitutions with mixed results. For example, the Washington Supreme Court invalidated a student athlete drug-testing policy in York v. Wabki-akum School District (Wash. 2008), while the Indiana Supreme Court upheld a drug-testing policy in Northwestern School Corp. v. Linke (Ind. 2002).

Conclusion

Fourth Amendment issues in public schools arise with frequency. Generally, officials comport with the Constitution when they search students based upon individualized suspicion that the student harbors contraband, carries a weapon, or otherwise violates school rules. Highly publicized school shootings dramatize the need for school officials to take safety issues seriously. At the same time, mass searches of students—outside of a general metal detector or drug-testing policies—may be viewed as excessively intrusive. The Court’s recent decision in the Savana Redding case serves as a reminder of the delicate balance between students’ constitutional rights and public school security. ■
Glossary of Terms

Consent Search
Searches made by law enforcement personnel based on the consent of the individual whose person or property is being searched.

Delayed Notice Search Warrant
Like an ordinary search warrant in every respect except that law enforcement agents are authorized by a judge to temporarily delay giving notice to the individual whose property is being searched that the search has been conducted.

Exclusionary Rule
A legal principle in the United States, which holds that evidence collected or analyzed in violation of a defendant’s Fourteenth Amendment rights is sometimes inadmissible for criminal prosecution in a court of law.

Expectation of Privacy
Expectation that one’s actions or possessions will not be seen or heard by someone else that requires law enforcement officials to obtain a search warrant or appropriate authorization before a search.

General Warrant
Broad authorization issued by the English government during the eighteenth century, which, in cases of searches, often lacked specific information about the persons, places, and things to be searched or seized by law enforcement officials.

Hot Pursuit
Immediate pursuit of a suspect by law enforcement officials. “Hot pursuit” is considered an exception to the general warrant requirement.

Incorporation
Selective Extension of the U.S. Constitution and Bill of Rights to bind individual American states through the Fourteenth Amendment.

National Prohibition Act
Also known as the Volstead Act, in 1919, enabled passage of the Eighteenth Amendment to the U.S. Constitution, which prohibited production, sale, and transport of “intoxicating liquors.”

Oath
Solemn declaration, accompanied by a swearing to God or a revered person or thing, that one’s statement is true.

Probable Cause
A reasonable ground that is more than bare suspicion but less than convincing evidence to suspect that a person has committed or is committing a crime or that a place contains a crime.

Search
Examination of a person’s body, property, or other area that the person would reasonably be expected to consider as private, conducted by a law enforcement officer for the purpose of finding evidence of a crime.

Search Warrant
Court order issued by a judge or court official that authorizes law enforcement officers to conduct a search of a person or location for evidence of a crime and to confiscate evidence if it is found.

Seizure
Taking possession of a person or property.

Writ of Assistance
Written order issued by a court instructing a law enforcement official to perform a task. Commonly issued by the British government in the eighteenth century, they served as general warrants that did not expire.
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