Student Privacy Rights
Search and Seizure in the Schools

Background

The Fourth Amendment to the U.S. Constitution protects people from unreasonable searches and seizures. In *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the U.S. Supreme Court examined whether these protections applied to students in school settings. A majority of the U.S. Supreme Court justices held that the Fourth Amendment's protections did apply to searches of students in school settings. The majority held that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." However, in its decision the majority noted that the Court had to strike a "balance between the school child's legitimate expectation of privacy and the school's equally legitimate need to maintain an environment in which learning can take place."

Subsequent U.S. Supreme Court cases have further applied standards of "reasonableness" of searches and examined student expectations of privacy in school settings. For instance, in Vernonia School District 47J v. Action, 515 U.S. 646 (1995), the Court upheld random drug testing of student athletes.

Objectives

In this activity, students will

- Learn about key Fourth Amendment concepts by examining two Fourth Amendment decisions: (1) *Katz v. United States*, 389 U.S. 347 (1967); and (2) *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002)
- Discuss the extent to which the Fourth Amendment's protections apply to their daily lives in and outside school.

Target Group: Secondary
Time Needed: 2-4 class periods
Materials: Handout 1, A Reasonable Expectation of Privacy (for Part One, B); Handout 2, Comparing/Contrasting Opinions in *Pottawatomie County v. Earls* (for Part Two A and B); and Handout 3, Comparing/Contrasting the Application of Precedent in Two Opinions: *Pottawatomie County v. Earls* (for Part Two C and D).

Procedures
Part One: Key Concepts

A. Begin class by asking students to read the text of the Fourth Amendment:

> The right of 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 search, and the persons or things to be seized.

Ask students if there are any words they do not understand (such as "effects," "seizures," "warrant," "oath" or "affirmation"). Then ask students to identify what they think are the key clauses or concepts in the test of the amendment (e.g., right to be secured in one's person and home, protection against unreasonable searches and seizures, or need for probable cause to issue a warrant).

Be sure students understand that government authorities do not always need a warrant to make a reasonable search or seizure under the Fourth Amendment.

B. Explain to students the Supreme Court's holding in *Katz v. United States*, 389 U.S. 347 (1967). The *Katz* decision held that the Fourth Amendment "protects people, not places." The question of whether the Fourth Amendment was violated depends upon a person's reasonable expectation of privacy in a given situation.

In a concurring opinion in *Katz*, Justice Harlan defined a twofold test for determining whether a reasonable expectation of privacy exists.

1. A person must have exhibited an actual (subjective) expectation of privacy.

2. The expectation is one that society is prepared to recognize as "reasonable."

Ask students to discuss how well they think Justice Harlan's test conforms to the key Fourth Amendment clauses and concepts they identified in Part 1A of this exercise. Then ask them to apply this test to determine whether they think an individual should have a reasonable expectation of privacy in the following situations:

- In the living room of a private home
- In a telephone conversation with another person made from a private home
- In a cell phone conversation made on a quiet public street
- In a cell phone conversation on a crowded bus
- In an automobile parked in a private garage
- In an automobile parked in a public parking lot
- In an empty classroom at school
- In an online chat room.

(See Handout 1, A Reasonable Expectation of Privacy.)

Part Two: Students and the Fourth Amendment

A. Explain to students the Supreme Court's holding in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). That decision upheld a school policy that required all middle and high school students who participated in any extracurricular activity to consent to urinalysis testing for drugs.

Ask students to read the two following excerpts from the *Pottawatomie County* decision:

1. From Justice Thomas's opinion for the majority:

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety… Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adult.

2. From Justice Ginsburg's dissenting opinion:

> In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial [i.e., caretaking] obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary [i.e., teaching] obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections.

(See Handout 2, Comparing/Contrasting Opinions in *Pottawatomie County v. Earls.)*

B. Ask students to discuss the following questions.

1. What do the two statements from the majority and dissenting opinions have in common (e.g., both recognize the school's role as guardian of students, or both recognize that students might be subject to certain limitations on their rights in a school setting)?

2. What are the primary differences between the statements (e.g., Justice Ginsburg's argument that a school's obligations as guardian must be balanced with its obligation to teach)?

3. Do you agree with Justice Ginsburg's suggestion that schools must balance an obligation to care for their students' health or safety (a "custodial" obligation) with an obligation to "teach by example" on matters of constitutional rights (a "tutelary" obligation)? Why or why not? Would you give greater weight to either of these obligations? Why?

C. Explain *Vernonia School District 47J v. Action*, 5515 U.S. 646 (1995). In that decision the Supreme Court upheld random drug testing of school athletes. Ask students to read these excerpts from the *Pottawatomie County* decision.

1. From Justices Thomas's opinion for the majority:

> [T]he safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.
>
> …[W] e find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia** there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

2. From Justice Ginsburg's dissenting opinion:

> At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address…the great majority of students the [Pottawatomie] School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.
>
> The *Vernonia* district, in sum, had two good reasons for testing athletes: Sports team members faced special health risks and they "were the leaders of the drug culture." No similar reason, and no other tenable justification, explains Tecumseh's decision to target for testing all participants in every competitive extracurricular activity.
>
> Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers.

(See Handout 3, Comparing/Contrasting the Application of Precedent in Two Opinions: *Pottawatomie County v. Earls*.)

D. Ask students to discuss the following questions about the excerpts:

1. What are the primary differences between the two opinions (e.g., Justice Thomas argues that a drug testing policy isn't required to test the population most likely to use drugs; Justice Ginsburg argues that the Court should consider whether a drug testing policy is tailored to the particulars involved. Justice Thomas argues that the benefits of drug testing athletes and nonathletes alike are substantial; Justice Ginsburg argues nonathletes are less likely to have substance abuse problems…)

2. Do you agree or disagree with Justice Ginsburg that students involved in extracurricular activities would be less likely to develop substance abuse programs? Why?

E. Conclude by posing these questions to students:

1. Whose opinion do you most closely agree with—Justice Thomas or Ginsberg—or do you agree with some aspects of Justice Thomas's opinion and some aspects of Justice Ginsburg's opinion? Why?

2. After completing this activity and reading the excerpts from the *Pottawatomi*e decision, how would you define the term "reasonable expectation of privacy" for a student in a public school? In what circumstances, if any, do you think students should be able to have a reasonable expectation of privacy in a school setting?

Extension: Ask students to compose an essay on the questions in Part Two, E.2. Share/compare definitions of "reasonable expectation of privacy" with the whole class.

This lesson was adapted from activities written by James H. Landman for *Social Education*. See "Looking at the Law, Search and Seizure in the Schools, Teaching Activities," *Social Education* 71(1): 31-32, National Council for the Social Studies, 2007.

Handout 1

A Reasonable Expectation of Privacy

Applying the following twofold test, do you think an individual should have a reasonable expectation of privacy in the situations listed below? Why?

Test*
1. A person must have exhibited an actual (subjective) expectation of privacy.
2. The expectation is one that society is prepared to recognize as "reasonable."

Situations
- In the living room of a private home
- In a telephone conversation with another person made from a private home
- In a cell phone conversation made on a quiet public street
- In a cell phone conversation on a crowded bus
- In an automobile parked in a private garage
- In an automobile parked in a public parking lot
- In an empty classroom at school
- In an online chat room

*From Justice Harlan's concurring opinion in *Katz v. United States*, 389 U.S. 347 (1967).

Handout 2

Comparing/Contrasting Opinions in
Pottawatomie County v. Earls

Read the following two excerpts from *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

1. From Justice Thomas's opinion for the majority:
   A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety… Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adult.

2. From Justice Ginsburg's dissenting opinion:
   In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school's custodial [i.e., caretaking] obligations may permit searches that would otherwise unacceptably abridge students' rights. When custodial duties are not ascendant, however, schools' tutelary [i.e., teaching] obligations to their students require them to "teach by example" by avoiding symbolic measures that diminish constitutional protections.

Be prepared to discuss these questions.

1. What do the two statements from the majority and dissenting opinions have in common?

2. What are the primary differences between the statements?

3. Do you agree with Justice Ginsburg's suggestion that schools must balance an obligation to care for their students' health or safety (a "custodial" obligation) with an obligation to "teach by example" on matters of constitutional rights (a "tutelary" obligation)? Why or why not? Would you give greater weight to either of these obligations? Why?

Handout 3

Comparing/Contrasting the Application of Precedent in Two Opinions:
Pottawatomie County v. Earls

Read these excerpts from *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

1. From Justices Thomas's opinion for the majority:

> [T]he safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike. We know all too well that drug use carries a variety of health risks for children, including death from overdose.
>
> …[W] e find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. While in *Vernonia** there might have been a closer fit between the testing of athletes and the trial court's finding that the drug problem was "fueled by the 'role model' effect of athletes' drug use," such a finding was not essential to the holding. *Vernonia* did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities. Evaluating the Policy in this context, we conclude that the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students.

2. From Justice Ginsburg's dissenting opinion:

> At the margins, of course, no policy of *random* drug testing is perfectly tailored to the harms it seeks to address…the great majority of students the [Pottawatomie] School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree. There is a difference between imperfect tailoring and no tailoring at all.
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> The *Vernonia** district, in sum, had two good reasons for testing athletes: Sports team members faced special health risks and they "were the leaders of the drug culture." No similar reason, and no other tenable justification, explains Tecumseh's decision to target for testing all participants in every competitive extracurricular activity.
>
> Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers.

Handout 3, page 2

Be prepared to discuss the following questions.

1. What are the primary differences between the two opinions?

2. Do you agree or disagree with Justice Ginsburg that students involved in extracurricular activities would be less likely to develop substance abuse programs? Why?

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* Recall that in *Vernonia School District 47J v. Action*, 515 U.S. 646 (1995), the Court upheld random drug testing of student athletes.