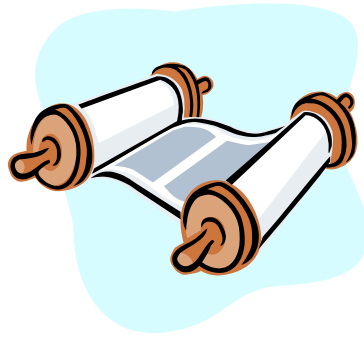


# FIFTH ANNUAL!

## CONSTITUTION IN THE CLASSROOM



### CONSTITUTION DAY TEACHING MODULE:

#### The Fourth Amendment, Public Schools, and Safford v. Redding

September 17, 2009

Produced by the **Marshall-Brennan Constitutional Literacy Project** at American University Washington College of Law. Professors Jamin Raskin and Maryam Ahranjani wish to thank third year law student Caleb Medearis for his invaluable assistance in producing this year's module.

## The Fourth Amendment, Public Schools, and Safford v. Redding

Description: This unit can be taught during the week of Constitution Day or afterwards. The goal is to commemorate this important day in our Nation's history by teaching students about the significance of the Constitution as a living document that confers rights upon them as young people.

Objectives:

- 1) To learn about the right of students to be free from unreasonable searches and seizures by school officials while on school premises.
- 2) To learn about Safford Unified School District v. Redding, the 2009 Supreme Court case that helped defined what limits the Fourth Amendment of the Constitution places on the school officials' right to strip search students on school premises.

Length of Lesson: 2-3 class periods

**DAY ONE:** Background discussion, primary source group activity analyzing the Fourth Amendment, review of vocabulary (homework: read Safford. v. Redding excerpt and complete case review sheet)

**DAY TWO:** discussion of Fourth Amendment case law, Safford v. Redding review (homework: hand out role cards and ask students to think about their roles before the final class)

**DAY THREE:** policy summit

Supplies Needed: This packet

Age Group: 9th-12th grade

## OVERVIEW OF TEACHING MODULE

### **Part One: Background for the Teacher's Preparation (pp. 4-13)**

- 1) Brief overview of the Constitution and Bill of Rights
- 2) What is the Fourth Amendment?
  - Review of the text of the Fourth Amendment
  - Exercise on the meaning of the Fourth Amendment
  - Analysis of exercise on the meaning of the Fourth Amendment
  - Review of key vocabulary terms (Handout 1 in Part Two)
  - Case law on the application of the Fourth Amendment to the public school context
  - Safford v. Redding case excerpt (Handout 3 in Part Two)
  - Safford v. Redding case review (Handout 4 in Part Two)

### **Part Two: Handouts for the Student (pp. 14-24)**

- 1) Handout 1: Text of the Fourth Amendment
- 2) Handout 2: Vocabulary for the module
- 3) Handout 3: Safford v. Redding case excerpt
- 4) Handout 4: Safford v. Redding case review
- 5) Handout 4: Role cards for policy summit

### **Part Three: Policy Summit to Create a School Policy on Strip Searches of Students (pp. 25-26)** (using Handout 5 in Part Two)

### **Part Four: Resources for Further Study (pp. 27)**

The lesson plan can be taught in two or three class periods, depending on the length of your class periods and your students' preexisting knowledge and exposure. Discrete sections of this teaching module can be highlighted and integrated into other lesson plans depending on the time and interest of the students. Handouts are included at the end of the lesson to supplement lessons within the teaching module.

## **Part One: Background for the Teacher**

### **Brief Overview of the Constitution and the Bill of Rights**

The Constitution is the central organizing document of our nation. It sets up the structure of government and explains what rights and powers are granted to the government.

- Article I explains the structure and powers of the legislative branch.
- Article II explains the structure and powers of the executive branch.
- Article III explains the structure and powers of the judicial branch.

In simple terms, the legislature creates the laws, the executive administers the laws, and the judicial branch interprets the laws. The power in our constitutional system is thus divided up between three separate powers (this is called the “separation of powers”). Power is also divided between the federal government and the state governments (this is called “federalism”). The Constitution intentionally divides the power of government – both among its branches and between the states and the federal government – to create a system of “checks and balances” protecting citizens from a single source of power.

Most people think that the Constitution grants them individual rights and freedoms including the freedom of speech, freedom of religion, right against self-incrimination, right to a jury, right to a lawyer, and the right against cruel and unusual punishment. However, those rights and freedoms were not included in the articles of the Constitution, but instead they are in the Bill of Rights. The Bill of Rights refers to the first ten amendments to the Constitution. The Bill of Rights was not ratified until four years after the Constitution was approved by the citizens.

The Bill of Rights limits government interference in certain areas of life. Ask your students whether they know where the Constitution discusses the right to privacy? The answer is that the word “privacy” is not mentioned in the text of the Constitution or its amendments. However, the U.S. Supreme Court—remember its role to interpret our Constitution—has held that the Bill of Rights grants citizens a right to privacy even though the words “right to privacy” are not mentioned anywhere in the Bill of Rights. The Supreme Court found that the right to privacy is inherent in many of the amendments in the Bill of Rights. The most important of these amendments is the Fourth Amendment. The Fourth Amendment guarantees that all Americans will be free from unreasonable searches or seizures. We will see in this lesson that the Fourth Amendment provides the right to live free from unreasonable governmental intrusion.

## **The U.S. Supreme Court and the Common Law System Based on Case Precedent**

The Supreme Court is the most powerful court in America. It is the final decisionmaker (or arbiter) when it comes to interpreting what the Constitution means. Ask your students whether they know how a case arrives to the Supreme Court.

A question about how to interpret the Constitution must first be argued in one of the federal district courts. The ninety-four federal district courts hear practically all cases involving federal civil and criminal laws. Decisions of the district courts are typically appealed to the district's court of appeals. Each of the twelve U.S. Circuit Courts of Appeals hears appeals to decisions of the district courts located within its circuit. The Supreme Court hears and decides cases involving important questions about the interpretation and fair application of the Constitution and federal law.

Cases often come to the Supreme Court as appeals from decisions of the U.S. Circuit Courts of Appeals. Unlike Circuit Courts of Appeals, the Supreme Court gets to decide whether it wants to hear cases by granting certiorari, and in fact it grants "cert" to a very small number of cases (less than 1%) each year. On the other hand, Circuit Courts of Appeals must hear cases appealed to them. The Supreme Court's decisions become the supreme law of the land on constitutional issues.

Our common law system is based on case precedent (previously decided cases). All courts decide cases by looking at how other courts have decided similar issues in the past, and Supreme Court decisions are the most important and binding.

There is a vast body of cases about each section of the Constitution that binds future judges when they decide cases about the meaning of those sections in the Constitution. Judges look to past cases, legislative history, and other legal principles to answer the question of how to decide the cases before them. In this teaching module, we focus on the Supreme Court cases that have considered the Fourth Amendment's application to the public school context.

## **The Fourth Amendment**

The Fourth Amendment is at the center of the Constitution's general right to privacy. What does the Fourth Amendment mean? What kind of protection, if any, does the Fourth Amendment grant students? First, students should read the text and then try to decipher its meaning.

The Fourth Amendment (Handout 1) reads:

"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."

### **Exercise – The Fourth Amendment at School**

Divide the class into groups, distribute Handout 1 (the text of the Fourth Amendment) and ask students to discuss what they think the Fourth Amendment means and what protections it provides to citizens. After a period of discussion, bring the class back together to allow each group to discuss what they think the Fourth Amendment protects and why.

Some questions the groups might think about while they deliberate:

- To whom does the Fourth Amendment apply? (Answer: the people, and it protects their "persons, houses, papers and effects.")
- Does the Fourth Amendment prohibit searches and seizures entirely, or are some searches allowed? What part of the Amendment helps us answer that question? (Answer: It prohibits "unreasonable searches and seizures")
- What is required before a search and seizure can occur? (Answer: a warrant)
- Upon what must the warrant be based? (Answer: probable cause)

Additional points to explore:

- Does the Fourth Amendment only apply to searches by police officers or does it restrict other government officials as well? (Answer: it restricts other government officials as well – any state action)
- Some common places and things we use are not specifically listed in the Fourth Amendment. For example, the Fourth Amendment does not say the people have a right to be secure in their schools or their automobiles

from unreasonable searches and seizures. Does that mean the Fourth Amendment does not apply to schools or automobiles? (Answer: No. Courts have interpreted the Fourth Amendment to mean that students in schools and people in cars do have Fourth Amendment protection, although the level of protection is not as high as it is in other contexts because the expectation of privacy in some contexts is not as great as it is in others.)

- What other sources could we consult to help understand what the Fourth Amendment protects? (Answer: Supreme Court cases interpreting the application of the Fourth Amendment.)

### **Analysis of Group Activity: Translating the Fourth Amendment**

In your class discussion, you should make sure students understand that the Fourth Amendment protects the people from “unreasonable searches and seizures” of their “persons, houses, papers and effects” by state actors. Any search held by a court to be “unreasonable” is a violation of the Constitution and therefore illegal.

Reasonable searches and seizures are fair game. But what does “reasonable” mean? State actors (people working on behalf of the government) may conduct searches that are held to be reasonable by the courts. So we must turn to different factual scenarios considered by the courts to determine the limits of reasonableness.

When a court considers whether a particular search and/or seizure situation is reasonable, the court must first answer an initial question: was there a reasonable expectation of privacy present? Determining whether a reasonable expectation of privacy exists is a two-part analysis:

1. First, you must have a subjective expectation of privacy in the place or thing being searched.

- a. Most of us have an expectation that the places we frequent and the things we possess will not be searched. For example, you probably expect the items in your backpack and in your locker will remain private, or you might also expect that you will have a certain level of privacy when you are in your home. Ask: Where do you expect privacy?

- b. Some items or places might not involve an expectation of privacy. For example, if your house is very close to a public sidewalk and you keep your curtains open, you probably don't have much expectation that what goes on inside your house will

remain very private. Ask: Do you agree?

2. Second, this subjective expectation of privacy must be one that others in society agree is reasonable.

a. This is usually the more difficult question. While I might expect all my belongings to remain free from search, the greater society might disagree with me. For example, I might have an expectation that my luggage will not be searched when I fly. However, most people in society agree that allowing the government to conduct limited searching of luggage to protect air travelers' safety is reasonable.

Ask your students whether they think there should be an expectation of privacy in...

- school lockers?
- backpacks?
- cars parked on school property?
- wallets and purses?

If the court finds no reasonable expectation of privacy, then the Fourth Amendment protections do not apply. Why not? Because if we have no expectation of privacy, then there is nothing to invade. However, if a reasonable expectation of privacy is found, the court then looks to see if the government obtained a warrant before conducting the search to determine whether the search itself was reasonable or unreasonable.

The second half of the Fourth Amendment (starting "and no Warrants") describes the process by which the government obtains a warrant. The Supreme Court has held that any search conducted without a warrant is presumptively unreasonable, which means that the government must have a really good excuse for not obtaining a warrant. If the government does not have a really good excuse, the court will hold the search to be unreasonable and therefore illegal.

The Supreme Court has found many exceptions to the Fourth Amendment warrant requirement over the years. For example, the government is allowed to search without a warrant if they obtain consent from the individual being searched. The government can also conduct a search without a warrant if they have reason to believe important evidence is in the process of being destroyed.

The Supreme Court has also created an exception that covers certain settings, including public schools. It is called the "special needs" exception, and it applies to cases where the court finds that the warrant requirement is not an



appropriate measure of the reasonableness of the government's search—where the government has special needs. In these cases, the court must balance society's interest against the rights of the individual.

Understanding how the Fourth Amendment operates in the school context requires a brief review of Supreme Court case law.

## **Brief Review of the Case Law Interpreting the Fourth Amendment in Schools**

The Supreme Court has often said that students do not shed their constitutional rights at the schoolhouse gate. Nevertheless, the Fourth Amendment does not apply in the same way in schools as it does outside the schools. This divergence crystallized into a constitutional rule in the case New Jersey v. TLO. The Supreme Court has considered and ruled on issues related to students' Fourth Amendment rights in public schools a total of four times, in New Jersey v. TLO (1985), Vernonia v. Acton (1995), Board of Education v. Earls (2002), and most recently in Safford v. Redding (2009). To really understand what the Fourth Amendment means for public school students, one must understand the case precedent in this area.

In 1985, the Supreme Court decided New Jersey v. TLO, which involved a teacher at a New Jersey high school who discovered a 14-year-old freshman and her companion smoking cigarettes in a school lavatory in violation of a school rule. In the Principal's office, the Assistant Vice Principal demanded to see her purse. Upon opening the purse, he found a pack of cigarettes and a package of cigarette rolling papers. He then proceeded to search the purse thoroughly and found some marijuana, a pipe, plastic bags, a fairly substantial amount of money, an index card containing a list of students who owed respondent money, and two letters that implicated her in marijuana dealing.

The Supreme Court considered whether the opening of the student's purse and the search were allowable under the Fourth Amendment. The Supreme Court decided that while the Fourth Amendment does apply in schools, school officials did not need to obtain a warrant or have probable cause before searching a student. The school official only needs to have reasonable suspicion that a violation of a school rule and/or a law has, or is about to take place. If reasonable suspicion exists, the school official's search must be justified at its inception and be reasonably related in school to the circumstances that justified it. Under this standard, the Court decided the Assistant Vice Principal did not violate the Fourth Amendment when he searched the student's purse as he had reasonable suspicion she had to believe she had violated a school smoking rule.

Since New Jersey v. TLO, the Supreme Court has decided two cases involving random drug testing in schools: Vernonia v. Acton (1995) and Board of Education v. Earls (2002). It is important to understand the difference between a random search and a particularized search. The level of proof necessary to justify a random search is much lower than a particularized search. In Vernonia, the Court upheld the random drug testing of student athletes. In Earls, the Court

upheld the random drug testing of all students participating in extra curricular activities.

In all of these cases, the Supreme Court recognized the students' interest in being free from intrusive searches by school officials. However, the Court found the school's interest in maintaining an orderly and disciplined school environment outweighed the student's interest. In Safford v. Redding, the Supreme Court heard a challenge by a student who was subjected to a very intrusive search.

This module requires students to read and analyze the holding in Safford v. Redding and learn how to apply it by creating a school policy on reasonable searches and seizures in their schools.

### **Answers to HANDOUT 4: Case Review of Safford v. Redding**

- What is the issue in this case?

The issue is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school.

- Do you agree that the search of Ms. Redding was unreasonable?
  - o What if Ms. Redding was alleged to be hiding a more dangerous drug like heroin or cocaine? Would you still agree with the decision?
  - o What if Ms. Redding had been in caught with drugs prior to the incident in this case? Would you still agree with the decision?

The type of drug and likelihood that the drug will cause harm to other students seems to matter very much to the majority of the Court. In fact, Justice Souter states, "In sum, what were missing from the suspected facts that pointed to Savana were 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."

- The Court applied the test from New Jersey v. TLO and held that although the assistant principal may have had a reasonable suspicion of wrongdoing to justify a search of Ms. Redding's outer garments and bookbag, the strip search was not reasonably related in scope to the circumstances that justified a search. Why does the Court require different justification for searches of outer garments and strip searches?

Students have a greater expectation of privacy in their private parts than in their outer garments.

- What evidence would be necessary for a school to strip search a student after the Safford decision?

See Justice Souter quote from above.

- The majority held that the search of Ms. Redding's outer garments and her backpack was not a violation of the Fourth Amendment? Do you agree? Did the assistant principal have "reasonable suspicion" to think Ms. Redding possessed drugs as is required by the standard announced in New Jersey v. TLO?

The majority of the Court certainly seems to think that the assistant principal had reasonable suspicion to search her outer garments and her backpack. Justice Souter says, "This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall..."

- Why do you think the Court was so lenient in allowing suspicionless drug testing in the Acton and Earls cases, but did not allow the school in this case to aggressively fight its perceived drug problem?

There are a number of possible answers to this question. Participation in after-school activities is generally voluntary and the students signed consent forms to participate in Acton and Earls. Here, the drugs involved were simply ibuprofen and an over-the-counter drug and the level of suspicion that Savana was actually involved in selling or distributing the drugs was very low.

- What argument does Justice Thomas make to support the school's power to strip search students? Do you agree with him? Why or why not?

Justice Thomas believes that the Court should not interfere in school administrators' ability to set and enforce rules and maintain order.

**HANDOUT 1: Primary Source Document – Text of the Fourth Amendment to the U.S. Constitution**

"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."

**POINTS TO PONDER:**

- To whom does the Fourth Amendment apply?
- Does the Fourth Amendment prohibit searches and seizures entirely, or are some searches allowed? What part of the Amendment helps us answer that question?
- What is required before a search and seizure can occur?
- Upon what must the warrant be based?

## **HANDOUT 2: Vocabulary Terms for 2009 Constitution Day Lesson on Safford v. Redding**

**Amorphous:** without a clearly defined shape or form

APPLICATION: Justice Thomas' dissent in Safford v. Redding argues that the rule created by the majority's opinion was amorphous and allowed for too much judicial discretion.

**Contraband:** goods whose possession is against the law

APPLICATION: The pills found in the day planner were the contraband at issue in the Safford case.

**En banc:** refers to court sessions where all the judges of a court participate in the hearing rather than just a panel of judges

**Inception:** the starting point, the beginning

APPLICATION: A particularized, non-random search of a student must be justified at its inception. In other words, just because contraband is found doesn't mean the search was reasonable.

**In loco parentis:** a Latin term meaning in the place of a parent

APPLICATION: School officials act *in loco parentis* during the school day to ensure a safe and effective learning environment.

**Intrusive:** an uninvited and unwelcome presence, a violation of privacy

APPLICATION: Most students consider strip searches by school officials to be intrusive.

**Petitioner:** one who signs and/or files an appeal of a lower court ruling

APPLICATION: In the Safford v. Redding case, the school district was the petitioner because it petitioned the Supreme Court to review the opinion of the 9<sup>th</sup> Circuit Court of Appeals.

**Probable cause:** the typical standard by which government officials have the right to conduct a personal or property search

APPLICATION: The police must have probable cause to believe you committed a crime before they can search your house.

**Reasonable suspicion:** the standard school officials must meet before they can legally search a student's person or belongings; school officials must believe a student has been, is, or is about to be engaged in impermissible activity based on specific and articulable facts and inferences

APPLICATION: In New Jersey v. TLO, the Supreme Court decided that school officials did not need probable cause to search students; they only need reasonable suspicion the students are violating school policy and/or the law.

**Respondent:** the person responding to an appeal made by the Petitioner

APPLICATION: Savana Redding was the respondent in the Safford v. Redding Supreme Court case because she responded to the school district's petition to overturn the lower court's ruling.

**Scope:** the extent of the area or subject matter that something deals with or to which it is relevant

APPLICATION: In deciding whether a search is reasonable, the courts look at the scope of the search to see whether government officials went too far.

**Subjective:** personal; peculiar to a particular individual; opposite of objective

APPLICATION: Savana Redding had a subjective expectation that she would not be stripped search by school officials.



### **HANDOUT 3: Case Excerpt of Safford v. Redding**

(Citations and Footnotes Removed)

Supreme Court of the United States  
SAFFORD UNIFIED SCHOOL DISTRICT # 1, et al., Petitioners,

v.

April REDDING.

No. 08-479.

Argued April 21, 2009.

Decided June 25, 2009.

Justice SOUTER delivered the opinion of the Court.

The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on **reasonable suspicion** that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution, but because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to **qualified immunity** from liability.

I

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

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II

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In *T. L. O.*, we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of **probable cause**." We have thus applied a standard of **reasonable suspicion** to determine the legality of a school administrator's search of a student and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively **intrusive** in light of the age and sex of the student and the nature of the infraction."

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III

A

In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including "[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy." A week before Savana was searched, another student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate." On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, "I guess it slipped in when she gave me the IBU 400s." When Wilson asked whom she meant, Marissa replied, "Savana Redding." Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the **contraband**, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this **contraband**, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing. If a student is reasonably suspected of giving out **contraband** pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's **reasonable suspicion** of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search

worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's office, was not excessively **intrusive**, any more than Romero's subsequent search of her outer clothing.

## B

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's **subjective** expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. \*\*\* The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be. \*\*\*

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in *T. L. O.*, that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." The scope will be permissible, that is, when it is "not excessively **intrusive** in light of the age and sex of the student and the nature of the infraction."

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students . . . hid[e] **contraband** in or under their clothing," and cite a smattering of cases of students with contraband in their underwear. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But non-dangerous school **contraband** does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what were missing from the suspected facts that pointed to Savana were 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.

V

The strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment... \*\*\*

*It is so ordered.*

Justice THOMAS, concurring in the judgment in part and dissenting in part.

\*\*\* Unlike the majority, I would hold that the search of Savana Redding did not violate the Fourth Amendment. The majority imposes a vague and **amorphous** standard on school administrators. It also grants judges sweeping authority to

second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of **in loco parentis** under which “the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order.” \*\*\*

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#### **HANDOUT 4: Case Review of Safford v. Redding**

- What is the issue in this case?
- Do you agree that the search of Ms. Redding was unreasonable?
  - o What if Ms. Redding was alleged to be hiding a more dangerous drug like heroin or cocaine? Would you still agree with the decision?
  - o What if Ms. Redding had been caught with drugs prior to the incident in this case? Would you still agree with the decision?
- The Court applied the test from New Jersey v. TLO and held that although the assistant principal may have had a reasonable suspicion of wrongdoing to justify a search of Ms. Redding's outer garments and bookbag, the strip search was not reasonably related in scope to the circumstances that justified a search. Why does the Court require different justification for searches of outer garments and strip searches?
- What evidence would be necessary for a school to strip search a student after the Safford decision?
- The majority held that the search of Ms. Redding's outer garments and her backbag was not a violation of the Fourth Amendment? Do you agree? Did the assistant principal have "reasonable suspicion" to think Ms. Redding possessed drugs as is required by the standard announced in New Jersey v. TLO?
- Why do you think the Court was so lenient in allowing suspicionless drug testing in the Acton and Earls cases, but did not allow the school in this case to aggressively fight its perceived drug problem?
- What argument does Justice Thomas make to support the school's power to strip search students? Do you agree with him? Why or why not?

## HANDOUT 5: Group Roles for Policy Summit

You represent the **school principal**. Principals are usually most concerned with maintaining discipline and order within the school. Principals are responsible with enforcing school rules and maintaining an environment where children can learn in a safe environment.

Questions to consider:

- 1) What items will school officials be allowed to search for on students or in students' belongings?
- 2) What kind of infraction must take place before a search can be conducted?
- 3) What is the level of suspicion the school official will need to search a student – reasonable suspicion or something higher?
- 4) Will different types of searches require different levels of suspicion? i.e. strip searches v. locker searches
- 5) Who will be allowed to conduct the searches – teachers, trained staff, the principal, someone else?
- 6) What places and things will be allowed to be searched? Lockers? Bookbags? Pockets? Strip Searches?
- 7) Will the parents have to be notified before any search of their student is conducted?
- 8) Will the school administration ever allow police to conduct searches of students? Under what circumstances?
- 9) Who will make the decision to approve a search?
- 10) Will there be any right of appeal to the decision to search?

You represent the **teachers**. Teachers are usually most concerned with teaching students and with maintaining order and discipline in their classroom. Teachers are responsible with teaching children they need to learn to progress to the next grade level.

Questions to consider:

- 1) What items will school officials be allowed to search for on students or in students' belongings?
- 2) What kind of infraction must take place before a search can be conducted?
- 3) What is the level of suspicion the school official will need to search a student – reasonable suspicion or something higher?
- 4) Will different types of searches require different levels of suspicion? i.e. strip searches v. locker searches
- 5) Who will be allowed to conduct the searches – teachers, trained staff, the principal, someone else?
- 6) What places and things will be allowed to be searched? Lockers? Bookbags? Pockets? Strip Searches?
- 7) Will the parents have to be notified before any search of their student is conducted?
- 8) Will the school administration ever allow police to conduct searches of students? Under what circumstances?
- 9) Who will make the decision to approve a search?
- 10) Will there be any right of appeal to the decision to search?

You represent the **parents** of the student in the school. Parents are usually most concerned with their children being safe at school and learning the information they need to progress to the next grade level. Parents also have a general concern that their children not be subjected to intrusive searches unless they are absolutely necessary.

Questions to consider:

- 1) What items will school officials be allowed to search for on students or in students' belongings?
- 2) What kind of infraction must take place before a search can be conducted?
- 3) What is the level of suspicion the school official will need to search a student – reasonable suspicion or something higher?
- 4) Will different types of searches require different levels of suspicion? i.e. strip searches v. locker searches
- 5) Who will be allowed to conduct the searches – teachers, trained staff, the principal, someone else?
- 6) What places and things will be allowed to be searched? Lockers? Bookbags? Pockets? Strip Searches?
- 7) Will the parents have to be notified before any search of their student is conducted?
- 8) Will the school administration ever allow police to conduct searches of students? Under what circumstances?
- 9) Who will make the decision to approve a search?
- 10) Will there be any right of appeal to the decision to search?

You represent the **students**. Students are usually most concerned with maintaining their privacy and being free from intrusive searches from school officials.

Questions to consider:

- 1) What items will school officials be allowed to search for on students or in students' belongings?
- 2) What kind of infraction must take place before a search can be conducted?
- 3) What is the level of suspicion the school official will need to search a student – reasonable suspicion or something higher?
- 4) Will different types of searches require different levels of suspicion? i.e. strip searches v. locker searches
- 5) Who will be allowed to conduct the searches – teachers, trained staff, the principal, someone else?
- 6) What places and things will be allowed to be searched? Lockers? Bookbags? Pockets? Strip Searches?
- 7) Will the parents have to be notified before any search of their student is conducted?
- 8) Will the school administration ever allow police to conduct searches of students? Under what circumstances?
- 9) Who will make the decision to approve a search?
- 10) Will there be any right of appeal to the decision to search?



### **Part Three: Policy Summit to Create a School Policy on School Searches**

Divide the students into four groups: one group representing the school principal, one group representing the teachers, one group representing the parents, and one group representing the students. The students are to conduct this exercise in their respective role. Pass out Handout 4.

Based on the recent Supreme Court decision, the school board has decided to draft a new policy regarding searches of students by school officials, to make sure that it complies with the Court's requirements. Each group is to draft a proposal as to what would provisions they think the person(s) it is representing would like to see in the new policy. Each group's proposal should be no more than three or four sentences. Once the groups have come up with a draft, they should be brought back together as a class to see if any consensus can be found as to proposals for the new school policy.

Some questions the groups should address in their draft policies:

- What items will school officials be allowed to search?
- What kind of infraction must take place before a search can be conducted?
- What is the level of suspicion the school official will need to search a student?
- Who will be allowed to conduct the searches – teachers, trained staff, the principal, someone else?
- What places and things will be allowed to be searched? Lockers? Bookbags? Pockets? Strip Searches?
- Will the parents have to be notified before any search of their student is conducted?
- Will the school administration ever allow police to conduct searches of students? Under what circumstances?
- Who will make the decision to approve a search?
- Will there be any right of appeal a decision to be searched?

When the groups have finished their discussion, a group representative from each group should report to the class the group's proposals for the new school policy. Once all the groups have been heard from, a class discussion should be initiated to attempt to find consensus in the areas in which the groups disagree.

## Part Four: Resources for Further Study

### ***We the Students: Supreme Court Cases for and about Students*, by Jamin B. Raskin**

Designed to help students achieve "constitutional literacy," *We the Students* examines dozens of interesting and relevant Supreme Court cases pertaining to young people at school. Through meaningful and engagingly written commentary, excerpts of relevant cases, and exercises and class projects, the text provides students with the tools to gain an understanding and appreciation of democratic freedoms and challenges, underscoring students' responsibility in preserving constitutional principles. Topics include bullying on campus, religion in schools, sexual harassment, segregation and desegregation, drug testing, school vouchers, affirmative action, corporal punishment in schools, freedom of speech, and much more. Available through [cqpress.com](http://cqpress.com), [amazon.com](http://amazon.com), and [borders.com](http://borders.com).

### ***Youth Justice in America*, by Maryam Ahranjani, Andrew G. Ferguson, and Jamin B. Raskin**

This textbook covers the rights and responsibilities of young people as they relate to privacy, right to counsel, and other concepts related to crime and punishment. The curriculum focuses on cases that explore the Fourth, Fifth, Sixth, and Eighth Amendments to the U.S. Constitution (including search and seizure, self-incrimination, the right to legal counsel, and cruel and unusual punishment). The book offers an excellent overview of the separate criminal justice systems for youth and adults. Available through [cqpress.com](http://cqpress.com), [amazon.com](http://amazon.com), and [borders.com](http://borders.com).

### **Web sites**

[www.wcl.american.edu/marshallbrennan](http://www.wcl.american.edu/marshallbrennan)

[www.band-of-rights.org](http://www.band-of-rights.org)

[www.constitutioncenter.org](http://www.constitutioncenter.org)

[www.justicelearning.org](http://www.justicelearning.org)

[www.justicetalking.org](http://www.justicetalking.org)

For more information about this teaching module, the Marshall-Brennan Constitutional Literacy Project, please contact Professor Maryam Ahranjani at 202-274-4387 or [mahranjani@wcl.american.edu](mailto:mahranjani@wcl.american.edu). We welcome your thoughts and feedback!