6127 Library

The State of South Carolina
OFFICE OF THE ATTORNEY GENERAL

CHARLES MOLONY CONDON
ATTORNEY GENERAL

January 29, 1997

Boone Walters, Chief of Police
Town of Branchville
Post Office Box 85
Branchville, South Carolina 29432

Re: Informal Opinion

Dear Chief Walters:

You have sought our opinion regarding the validity of video equipment in classrooms. Presumably, you wish to know whether video cameras can be placed in the classroom for surveillance purposes.

LAW \ ANALYSIS

In a recent Informal Opinion, dated February 22, 1996, we reviewed the general constitutional law in this area in the context of the use of drug enforcement dogs in public schools. We referenced therein the seminal United States Supreme Court decision of New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). This decision addressed the "legality of searches conducted by public school officials ...". The Court held that the privacy interests of school children requires a balancing with the "substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds." 105 S.Ct. at 741. Accordingly, the Court held that

> [w]e join the majority of courts that have examined this issue in concluding that the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that

> searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception," Terry v. Ohio, 392 U.S., at 20, 88 S.Ct., at 1879; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place," ibid. Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a 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.

105 S.Ct. at 742-743. Moreover, we quoted from National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91, 103 L.Ed.2d 685 (1985) wherein the Court noted that "it is necessary to balance the individual's privacy expectations against the government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."

And in United States v. Taketa, 923 F.2d 665 (9th Cir.1988), the Court commented generally upon the use of video cameras in terms of the Fourth Amendment. There, the Court stated:

> [v]ideo surveillance does not in itself violate a reasonable expectation of privacy. Videotaping of suspects in public places, such as banks, does not violate the fourth amendment; the police may record what they normally may view with the naked eye. See Sponick v. City of Detroit Police Dept., 49 Mich.App. 162, 211 N.W.2d 674, 690 (1973) (tavern a public place where videotaping suspect did not violate fourth amendment). Persons may create temporary zones of privacy within which they may not reasonably be videotaped,

> however, even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means. See People v. Dezek, 107 Mich.App. 78, 308 N.W.2d 652, 654-55 (1981) (reasonable expectation of privacy from videotaping in restroom stalls).

923 F.2d at 676.

There is not a great deal of precedent dealing with the use of video cameras in schools, however. Two cases should, nevertheless, be mentioned. In Roberts v. Houston Independent School Dist., 788 S.W.2d 107 (Tex.Ct.App.Houston (1st Dist.)), a teacher was terminated for inefficiency or incompetency. She brought an action against the school district and among her claims was the fact that the district had taped her classroom performance as part of the evaluation process. She contended that the classroom taping violated her right of privacy. Rejecting that argument, the Court stated, however, that

> [a]ppellant has not cited any authority, and we have found none, relating to her claim of "involuntary videotaping" of her performance as a teacher. Based on the record before us, we conclude that appellant has not demonstrated that she had a "reasonable expectation of privacy" in her public classroom. The record shows that appellant was videotaped in a public classroom, in full view of her students, faculty members, and administrators. At no point, did the school district attempt to record appellant's private affairs.
>
> The activity of teaching in a public classroom does not fall within the expected zone of privacy. To fall within the "zone of privacy," the activity must be one about which the individual possesses a reasonable expectation of privacy in the activity. Katz v. United States, 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967).
>
> The right of privacy has been defined as the right of an individual to be left alone, to live a life of seclusion, to be free from unwarranted publicity. Billings v. Atkinson, 489 S.W.2d 858, 859 (Tex.1973). There is no invasion of the right of privacy when one's movements are exposed to public

> views generally. United States v. Arredondo-Morales, 624 F.2d 681, 685 (5th Cir.1980).

788 S.W.2d at 110.

And in Thompson v. Johnson Co. Community College, 930 F.Supp. 501 (D.Kan.1996), plaintiffs, members of a community college's security force, sued a community college and three of its officials for the college's video surveillance of the workplace. In particular, defendants installed a video surveillance camera in the storage room/locker area due to reported incidents of theft and weapons being brought on campus. The camera was a "video only" recorder, lacking an audio capacity, which recorded activity in the locker area between the hours of 10:30 p.m. and 6:30 a.m. Plaintiffs attacked the validity of the surveillance mechanism on three grounds, i.e. that it violated Title I of the Electronic Communications Privacy Act. (18 U.S.C. § 2510 et seq.), the Fourth Amendment of the United States Constitution and Kansas state law.

With respect to the Electronics Communications Privacy Act, the Court noted that such statute "is silent regarding video surveillance." 930 F.Supp. at 504. Title I of the federal law prohibits a person from intentionally intercepting, endeavoring to intercept, or procuring any other person to intercept or endeavor to intercept "any wire, oral or electronic communication." 18 U.S.C. § 2511(1)(a). The Act defines "wire communication" as "any aural transfer made ... through the use of facilities for the transmission of communication by the aid of wire, cable, or other like connection between the point of origin and the point of reception ... ." 18 U.S.C. § 2510(1). The term "oral communication" is defined by the Act as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation ... ."

The Court noted that "[v]irtually every circuit that has addressed the issue of silent video surveillance has held that Title I does not prohibit its use." Id. at 505. Finding that "defendant's installed a silent video surveillance camera in the security personnel locker area", the Court concluded that Title I of the federal law was not violated. There was no need for the Court to go beyond this holding in view of the fact that the college did not attempt to conduct an audio surveillance.

Concerning the Fourth Amendment claim, the Court likewise concluded that the use of the video surveillance camera was reasonable and did not intrude upon plaintiffs privacy interests. Said the Court,

> [i]n the instant action, viewing the facts in a light most favorable to plaintiffs, the court finds that they did not have a reasonable expectation of privacy in the security personnel locker area. This area was not enclosed. Plaintiffs' activities could be viewed by anyone walking into or through the storage room/security personnel locker area. Additionally, plaintiffs cannot maintain that the security personnel locker area was reserved for their exclusive use considering that other college personnel also had regular access to this area. ... The court concludes that plaintiffs' lack of a reasonable expectation of privacy in the security personnel locker area defeats their claim that defendants violated their Fourth Amendment right to privacy.

930 F.Supp. at 507. The Court further commented that if

> [t]he court finds that both the inception and the scope of the video surveillance defendants conducted was reasonable. It is uncontroverted that defendants' purpose for the video surveillance was work-related; they were investigating reports of employee misconduct in the locker area. Security personnel complained to supervisors that items were stolen from their lockers and that some security officers were bringing weapons on campus. Defendants established the video surveillance for a limited period of time to confirm or dismiss those allegations. Thus, the court concludes that the video surveillance of the security personnel locker area was reasonable and that, as a matter of law, summary judgment on this issue is appropriate.

Id. at 508.

Based upon the foregoing authority, it is my opinion that there is no expectation of privacy in a public school classroom. Therefore, certainly, a "video only" surveillance system in a public school classroom would likely be upheld in the courts against any attack that it violates the Fourth Amendment or Title I of the Electronic Communications Privacy Act. The question of audio surveillance is a closer question, but I believe that a good argument can be made that because there is no expectation of privacy in a public classroom, the federal Electronic Communications Privacy Act is not violated by audio

surveillance. As a matter of caution, however, school officials may want to consider "video only" surveillance to avoid the possibility of conflict with the federal Act. And of course, the installation of video cameras as surveillance tools is a matter of policy for the school district to determine.

This letter is an informal opinion only. It has been written by a designated Assistant Deputy Attorney General and represents the position of the undersigned attorney as to the specific questions asked. It has not, however, been personally scrutinized by the Attorney General nor officially published in the manner of a formal opinion.

With kind regards, I am

Very truly yours,

Robert D. Cook
Assistant Deputy Attorney General

RDC/ph