Supplementary Material

Chapter 11: The Contemporary Era—– Criminal Justice/Search and Seizure

---

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

Lindsay Earls was a member of the choir, band, academic team, and National Honor Society at Tecumseh High School in Tecumseh, Oklahoma. In 1998, the local school board required all middle and high school students who wished to participate in extracurricular activities to submit to random drug testing. Ms. Earls brought a lawsuit against the school district, claiming that suspicionless drug testing of students violated the Fourth and Fourteenth Amendments. The local federal district court rejected the lawsuit, but the policy was declared unconstitutional on appeal by the Court of Appeals for the Tenth Circuit. The Board of Education appealed to the Supreme Court of the United States.

The United States and the National School Boards Association field amicus briefs urging the justices to sustain the drug testing policy. The brief for the Bush administration declared,

> *The Court should conclude that the drug-testing policy in this case is reasonable and thus constitutional. Adopting a different approach would create a standardless inquiry under which the constitutionality of each school's drug-testing policy would turn on finely-drawn distinctions over the state of the record of drug use at that particular school, or among a particular class of students, or whether a destructive problem is already out of control. There is no reason to invite such fact-intensive litigation in every case, or to demand a school-specific inquiry into what is clearly a pervasive national problem. The Court should leave school administrators with flexibility to adopt common-sense, drug-deterrence measures like the policy at issue in this case.*

The American Academy of Pediatrics, the National Association of Criminal Defense Lawyers, and numerous public interest groups that work with children filed amicus briefs urging the Supreme Court to declare the drug testing policy unconstitutional. The brief for the American Academy of Pediatrics stated,

> *For such students, for whom low self-esteem and weak connection to school are often critical problems, the potential benefits of extracurricular involvement are substantial. But young people recovering from substance abuse will be most unlikely to run a gauntlet like the one erected here. Not only are they less likely to have friends already involved in activities, but adolescents who have been through treatment are very conscious of the likelihood of relapse, and to the extent that they have successfully kept past troubles with alcohol or drugs from peers and teachers, the prospect of airing their problems in the school setting is likely to be an especially daunting one.*

The Supreme Court by a 5–4 vote declared that schools could require drug tests for all students who participated in extracurricular activities. Justice Thomas's majority opinion declared drug problems in schools created a "special need" that justified dispensing with individualized suspicion. Both the majority and dissenting opinions in Earls *discussed at significant length the Supreme Court's previous decision in* Vernonia School District 47J v. Acton *(1995). In that case, a 7–2 majority ruled that schools could require student athletes to consent to random drug tests. Why did Justice Thomas think the result in* Acton *compelled the same result in* Earls*? How did Justice Ginsburg distinguish the two cases? Who correctly interpreted the precedent?* Earls *is the rare case in which Justice Breyer provided the fifth vote for the conservative result. What in Breyer's judicial philosophy might explain his vote in this case?*

JUSTICE THOMAS delivered the opinion of the Court.

. . .

In the criminal context, reasonableness usually requires a showing of probable cause. The probable-cause standard, however, "is peculiarly related to criminal investigations" and may be unsuited to determining the reasonableness of administrative searches where the "Government seeks to prevent the development of hazardous conditions." The Court has also held that a warrant and finding of probable cause are unnecessary in the public school context because such requirements "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed.'"

. . . [W]e have long held that "the Fourth Amendment imposes no irreducible requirement of [individualized] suspicion." "[I]n certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion." Therefore, in the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' "

Significantly, this Court has previously held that "special needs" inhere in the public school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

. . .

A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.

. . .

[S]tudents who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes. Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole. For example, each of the competitive extracurricular activities governed by the Policy must abide by the rules of the Oklahoma Secondary Schools Activities Association, and a faculty sponsor monitors the students for compliance with the various rules dictated by the clubs and activities. This regulation of extracurricular activities further diminishes the expectation of privacy among schoolchildren. We therefore conclude that the students affected by this Policy have a limited expectation of privacy.

. . .

[T]his Court must consider the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them. This Court has already articulated in detail the importance of the governmental concern in preventing drug use by schoolchildren. . . . Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school.

Additionally, the School District in this case has presented specific evidence of drug use at Tecumseh schools. Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. . . . We decline to second-guess the finding of the District Court that "[v]iewing the evidence as a whole, it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy."

. . .

Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *National Treasury Employees Union v. Von Raab* (1989) the Court upheld the drug testing of customs officials on a purely

preventive basis, without any documented history of drug use by such officials. . . . Likewise, the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

. . .

We also reject respondents' argument that drug testing must presumptively be based upon an individualized reasonable suspicion of wrongdoing because such a testing regime would be less intrusive. In this context, the Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use. . . .

JUSTICE BREYER, concurring.

. . .

In respect to the school's need for the drug testing program, I would emphasize the following: First, the drug problem in our Nation's schools is serious in terms of size, the kinds of drugs being used, and the consequences of that use both for our children and the rest of us.

Second, the government's emphasis upon supply side interdiction apparently has not reduced teenage use in recent years.

Third, public school systems must find effective ways to deal with this problem. Today's public expects its schools not simply to teach the fundamentals, but "to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services," all in a school environment that is safe and encourages learning.

Fourth, the program at issue here seeks to discourage demand for drugs by changing the school's environment in order to combat the single most important factor leading schoolchildren to take drugs, namely, peer pressure. It offers the adolescent a nonthreatening reason to decline his friend's drug-use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.

. . . [N]ot everyone would agree with this Court's characterization of the privacy-related significance of urine sampling as "'negligible.'" Some find the procedure no more intrusive than a routine medical examination, but others are seriously embarrassed by the need to provide a urine sample with someone listening "outside the closed restroom stall." When trying to resolve this kind of close question involving the interpretation of constitutional values, I believe it important that the school board provided an opportunity for the airing of these differences at public meetings designed to give the entire community "the opportunity to be able to participate" in developing the drug policy. The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program.

[T]he testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.

[A] contrary reading of the Constitution, as requiring "individualized suspicion" in this public school context, could well lead schools to push the boundaries of "individualized suspicion" to its outer limits, using subjective criteria that may "unfairly target members of unpopular groups or leave those whose behavior is slightly abnormal stigmatized in the minds of others. . . .

I cannot know whether the school's drug testing program will work. But, in my view, the Constitution does not prohibit the effort. . . .

JUSTICE O'CONNOR, with whom JUSTICE SOUTER joins, dissenting.

. . .

JUSTICE GINSBURG, with whom JUSTICE STEVENS, JUSTICE O'CONNOR, and JUSTICE SOUTER join, dissenting.

. . .

The *Vernonia School District 47J v. Acton* (1995) Court concluded that a public school district facing a disruptive and explosive drug abuse problem sparked by members of its athletic teams had "special needs" that justified suspicionless testing of district athletes as a condition of their athletic participation.

This case presents circumstances dispositively different from those of *Vernonia*. . . .

Vernonia cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities. . . .

. . .

Schools regulate student athletes discretely because competitive school sports by their nature require communal undress and, more important, expose students to physical risks that schools have a duty to mitigate. For the very reason that schools cannot offer a program of competitive athletics without intimately affecting the privacy of students. . . . Interscholastic athletics similarly require close safety and health regulation; a school's choir, band, and academic team do not.

. . .

Competitive extracurricular activities other than athletics serve students of all manner: the modest and shy along with the bold and uninhibited. Activities of the kind plaintiff-respondent Lindsay Earls pursued—choir, show choir, marching band, and academic team—afford opportunities to gain self-assurance, to "come to know faculty members in a less formal setting than the typical classroom," and to acquire "positive social supports and networks [that] play a critical role in periods of heightened stress." On "occasional out-of-town trips," students like Lindsay Earls "must sleep together in communal settings and use communal bathrooms." But those situations are hardly equivalent to the routine communal undress associated with athletics; the School District itself admits that when such trips occur, "public-like restroom facilities," which presumably include enclosed stalls, are ordinarily available for changing, and that "more modest students" find other ways to maintain their privacy.

. . .

Finally, the "nature and immediacy of the governmental concern," faced by the Vernonia School District dwarfed that confronting Tecumseh administrators. Vernonia initiated its drug testing policy in response to an alarming situation: "[A] large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . fueled by alcohol and drug abuse as well as the student[s'] misperceptions about the drug culture." Tecumseh, by contrast, repeatedly reported to the Federal Government during the period leading up to the adoption of the policy that "types of drugs [other than alcohol and tobacco] including controlled dangerous substances, are present [in the schools] but have not identified themselves as major problems at this time." . . .

. . .

At the margins, of course, no policy of random drug testing is perfectly tailored to the harms it seeks to address. The School District cites the dangers faced by members of the band, who must "perform extremely precise routines with heavy equipment and instruments in close proximity to other students," and by Future Farmers of America, who "are required to individually control and restrain animals as large as 1,500 pounds." . . . . Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the 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.

Nationwide, students who participate in extracurricular activities are significantly less likely to develop substance abuse problems than are their less-involved peers. . . . Tecumseh's policy thus falls short doubly if deterrence is its aim: It invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.

To summarize, this case resembles *Vernonia* only in that the School Districts in both cases conditioned engagement in activities outside the obligatory curriculum on random subjection to urinalysis. The defining characteristics of the two programs, however, are entirely dissimilar. The Vernonia district sought to test a subpopulation of students distinguished by their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use. The Tecumseh district seeks to test a much larger population associated with none of these factors. It does so, moreover, without carefully safeguarding student confidentiality and without regard to the program's untoward effects. A program so sweeping is not sheltered by *Vernonia*; its unreasonable reach renders it impermissible under the Fourth Amendment.

. . .