Fourth Amendment Forum

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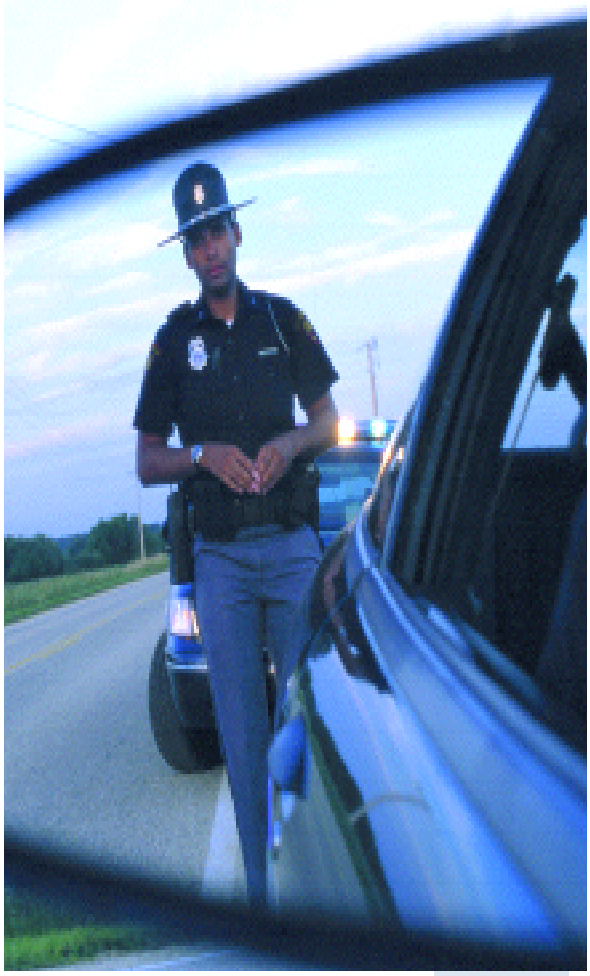

No more colliding tubas: *Board of Education v. Earls*

Like the pond in Dr. Seuss's "Yertle the Turtle," Tecumsah,Oklahoma was "a nice little p[lace]/it was clean, it was neat/the water was warm/there was plenty to eat/the turtles had everything turtles could need/and they were all happy — quite happy indeed." Tecumsah, Oklahoma was, in short, an unlikely battleground in the War on Drugs. But the middle and high schools in Tecumsah are operated by the Board of Education of Independent School District No. 92 of Pottawatomie County, and in 1998 the Board adopted a policy requiring all "students to consent to drug testing in order to participate in any extracurricular activity." *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559 (2002). Specifically, students were "required to take a drug test before participating in an extracurricular activity, [to] submit to random drug testing while participating in that activity, and . . . to be tested at any time upon reasonable suspicion." Respondent Earls sought to participate in such activities as the choir, the academic team, the marching band, and National Honor Society. He challenged the drug testing policy on Fourth Amendment grounds.

Writing for a bare majority upholding the school policy, Justice Thomas began by asserting the continuing vitality of the "special needs" doctrine — a filigree of Fourth Amendment jurisprudence thought to be moribund, or nearly so, after the Court's opinions in *Ferguson v. Charleston*, 532 U.S. 67 (2000) (THE CHAMPION, July 2001) and *Indianapolis v. Edmond*, 121 S. Ct. 447 (2000)(THE CHAMPION, March 2001).According to the "special needs" doctrine, traditional Fourth Amendment requirements such as probable cause and individual suspicion are applicable only in the criminal investigative context, and inapplicable in any other context in which the Fourth Amendment might be invoked. The drug testing mandated by the school board in Tecumsah was not part of the criminal investigative process, but was conducted in the discharge of the schools' "custodial and tutelary responsibility" for their students.

Special needs doctrine

Applying the "special needs" doctrine to the facts of the Oklahoma case involved, according to Justice Thomas, three inquiries: an inquiry into "the nature of the privacy interest allegedly compromised by the drug testing;" an inquiry into "the character of the intrusion imposed by the" policy; and an inquiry into "the nature and immediacy of the [school board's] concerns and the efficacy of the [drug-testing policy] in meeting" those concerns.

As to the first of these, the majority concluded that a student's privacy interest is diminished by the very act of attending school, because the school necessarily takes responsibility "for maintaining discipline, health, and safety." And an even greater diminution in privacy expectation is a condition of participation in extracurricular activities. Clubs and teams "have their own rules and requirements for participating students that do not apply to the student body as a whole." Some of these "rules and requirements" may involve the sacrifice of privacy. In this regard, the Court cited its prior opinion in *Vernonia School District v. Acton*, 515 U.S. 646 (1995). *Vernonia* justified drug testing of student athletes on the general grounds of the school's standing *in loco parentis*, and on the more particular grounds that the hazards of interscholastic athletics are greatly expanded when players use drugs.

As to the second inquiry — "the character of the intrusion" of the students' privacy — the majority found it to be insignificant. Testing is for only a few commonly-used illegal substances, such as marijuana and cocaine. The students are not observed while they produce the urine specimens, and the test results are never given over to the police. Only after three positive test results is a student rendered ineligible for extracurricular activities.

The third inquiry, however, is where the majority opinion places its emphasis. The Court begins by citing some government statistics which suggest that the problem of student drug abuse has gotten no better since *Vernonia*, and may well have gotten worse. (It apparently does not occur to Justice Thomas,nor to those who joined his opinion, that these statistics — if statistics they are — may support the proposition that the *Vernonia* mandatory model is demonstrably counterproductive and should be abandoned immediately.) The majority necessarily relies upon general concerns about the national drug problem — what it terms "the nationwide epidemic of drug use";

evidence of a drug problem in Tecumsah was scant to the point of being risible. "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." "Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member." Left unsaid is how the mandatory testing policy in Tecumsah, Oklahoma, remedies the nationwide drug epidemic. Students faced with a choice between, on the one hand, continuing participation in the chess club (which will involve repeated subjection to the indignity of urine testing); or, on the other hand, the occasional puff on a marijuana cigarette (which will involve no indignities of any kind), may simply opt for the latter. Forcing students to make such choices seems an unlikely way to win the War on Drugs.

The case came to the Supreme Court from the Tenth Circuit. That court had ruled in favor of respondent students, and in so doing announced the following test:

> [A]ny [school] district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.

The reasonableness of the Tenth Circuit's approach appealed to the four Supreme Court dissenters, for whom Justice Ginsburg wrote. Much of Justice Ginsburg's opinion addressed the majority's over-reading of *Vernonia*. "Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student's blood or urine for drugs, the opinion in *Vernonia* could have saved many words." *Vernonia*, according to Justice Ginsburg, involved a demonstrably rampant drug problem, demonstrably linked to heightened risk of injury in the school's interscholastic athletics program. "Interscholastic athletics [may] require close safety and health regulation; a school's choir, band, and academic team do not." The brief submitted by the United States in support of the school district made much of the dangers to which members of Future Homemakers of America (who handle kitchen knives), members of Future Farmers of America (who handle large farm animals) and members of the marching band (who handle metallic instruments while marching) are exposed. Justice Ginsburg's reply is a classic: "Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumsah, 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."

Term's end

Earls marks the end of a strange Term for the Fourth Amendment. The October 2001 Term saw only five Fourth Amendment cases. Of those five, three were 9-0 decisions. *United States v. Knights*, 534 U.S. 112 (2001); *Kirk v. Louisiana*, 122 S.Ct. 2458 (2002); *United States v. Arvizu*, 122 S.Ct. 744 (2002).

In *Knights*, the Court upheld the warrantless search of a probationer's home based on reasonable suspicion rather than probable cause. Chief Justice Rehnquist, writing for the Court, concluded that "[a]lthough the Fourth Amendment ordinarily requires the degree of probability embodied in the term 'probable cause,' a lesser degree satisfies the Constitution when the balance of governmental and private interests makes such a standard reasonable."

The next unanimous decision was *Arvizu*, which we wrote about in *United States v. Arvizu: the Adjective as Jurisprudence*, The Champion (May 2002). *Arvizu* upheld the stop of a vehicle because it was being driven on a suspicious street and because children in the car were waving at the police officer in a weird manner. As we discussed there, *Arvizu* was an awful case because it affords police officers an enormous amount of discretion in determining whether to pull someone over.

Kirk was the final 9-0 opinion. A *per curiam* opinion, *Kirk* reminded lower state courts that absent exigent circumstances the police may not enter a home to execute an arrest without a judicial warrant. Despite this well-settled proposition, some lower state judges in Louisiana court got a little feisty.

Unfortunately, of no surprise was that 4 of the 5 decisions (*Knights*, *Arvizu*, *Drayton*, and *Earls)* were for the government. Maybe next Term will be better.... And maybe the Cubs will win the World Series. ■

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