

99-039

CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT.

Reasonableness of sheriff's use of drug-sniffing dogs to search person of students attending public school depends on whether facts support suspicionless search that is relatively unobtrusive coupled with government's interest in conducting search.

The Honorable W. Edward Meeks III
Commonwealth's Attorney for Amherst County
November 12, 1999

You ask whether, at the request of public school officials, the sheriff may conduct a general search of students at a public school to determine whether drugs exist on the person of any student.

You ask that I assume that information exists to suspect that drugs are being carried on the person of public school students to a degree that warrants investigation to protect the educational environment. The contemplated search method that you describe would be to have the sheriff, at the request of school officials, appear at the school with a drug-sniffing dog. You indicate that the students would be lined up, and the dog would proceed in front of the students to determine whether drugs exist on the person of any student.

The Fourth Amendment to the Constitution of the United States requires that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." "Searches and seizures carried out by school officials are governed by the same Fourth Amendment principles that apply in other contexts."¹ "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."²

[A] search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases, "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field."³

The Supreme Court of the United States has not yet addressed the issue you present. Cases decided in other courts involving the use of drug-sniffing dogs in schools to detect narcotics on students have resulted in varying conclusions. In *Doe v. Renfrow*,⁴ the court held that the sniffing of the air surrounding students' person by drug-sniffing dogs did not implicate any normal or justifiable expectation of privacy, and that the dog sniffing therefore did not violate the students' Fourth Amendment rights. In the case of *Horton v. Goose Creek Independent School District*,⁵ however, the Fifth Circuit held that public school students have a reasonable expectation of privacy in the airspace around their persons, and that the random use by school officials of drug-detecting dogs to sniff students' bodies violated the Fourth Amendment. Similarly, in *Jones v. Latexo Independent School District*,⁶ the court held that public school students had a reasonable expectation of privacy in their bodies which was infringed upon by the random sniffing by drug-detecting dogs. In Virginia, a court dealing with the sniffing of a student's hands by a school official found that the sniffing of students' hands by school officials did not infringe upon students' reasonable expectations of privacy.⁷ This court cites *Doe v. Renfrow* in support of this finding and distinguishes *Jones*, stating that the *Jones* case suggests that "sniff[s] by school officials instead of canines would not have been a search" for constitutional purposes.⁸

In 1995, the Supreme Court was called upon for the first time to assess the validity of a suspicionless school search.⁹ This case arose from a school district's decision to implement a random urinalysis drug-testing program for student athletes in an effort to curb a documented increase in the use of drugs among students.¹⁰ The Court analyzed the reasonableness of the program by balancing the students' legitimate privacy interests against the government's interests in conducting the search.¹¹ The Court upheld the drug testing as a reasonable search, finding that the student athletes enjoyed a lessened expectation of privacy when compared to students in general.¹² This case is also significant because it is the Court's first pronouncement that searches by school officials need not be based on individualized suspicion in order to be reasonable and therefore constitutional. The Court notes that "public school children in general ... have a diminished expectation of privacy"¹³ and states:

Taking into account all the factors we have considered ...—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude [the policy of random urinalysis drug testing of student athletes] is reasonable and hence constitutional.^[14]

Ultimately, the determination of whether the situation you present passes constitutional muster depends on a complete and detailed set of facts. For example, whether the students' right to privacy is implicated by the dog sniffing turns upon exactly how this conduct is undertaken.¹⁵ If such right to privacy is implicated, how reasonable or unreasonable the search is requires a balancing of the students' interest in privacy against "the nature and immediacy of the governmental concern at issue," as well as the efficacy of the means for meeting it.¹⁶ Indeed, the reasonableness of any search necessarily depends on the facts of each particular case.¹⁷ Accordingly, while I am unable to render any definitive opinion due to a lack of knowledge of all the pertinent and particular facts in this case, it is my general opinion that all such searches need to be viewed through the lens of the decision of the United States Supreme Court in *Vernonia School District 47J v. Acton*¹⁸ and an assessment of the particular facts relative to whether a strong need for such a search exists and whether such search would be considered relatively unobtrusive.

¹DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998) (citing New Jersey v. T. L. O., 469 U.S. 325, 333-37 (1985)).

²Chandler v. Miller, 520 U.S. 305, 313 (1997).

³DesRoches, 156 F.3d at 575 (quoting New Jersey v. T. L. O., 469 U.S. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. 648, 655 (1979) (citation omitted))).

⁴475 F. Supp. 1012, 1022 (N.D. Ind. 1979).

⁵690 F.2d 470, 476-82 (5th Cir. 1982).

⁶499 F. Supp. 223, 231-33 (E.D. Tex. 1980).

⁷Burnham v. West, 681 F. Supp. 1160, 1164 (E.D. Va. 1987).

⁸*Id.*

⁹See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

¹⁰*Id.* at 648-51.

¹¹ *Id.* at 652-53.

¹² *Id.* at 656-57.

¹³ *Id.* at 659 n.2.

¹⁴ *Id.* at 664-65.

¹⁵ Compare *Doe v. Renfrow*, 475 F. Supp. at 1016-17 (students were instructed to sit quietly in their seats with their hands and purses on their desk tops while dog handler led dog up and down desk aisles for approximately five minutes) with *Horton v. Goose Creek*, 690 F.2d at 479 (dog sniffing technique involved sniffing around each child and putting dog's nose on child).

¹⁶ *Vernonia School Dist. 47J v. Acton*, 515 U.S. at 660.

¹⁷ 1989 Op. Va. Att'y Gen. 204, 206 (reasonableness of school board's adoption of policy requiring drug testing before readmitting students expelled for drug offenses).

¹⁸ See *supra* notes 9-14, 16, and accompanying text.