

**ORIGINAL**

**LIBRARY**  
SUPREME COURT, U.S.  
WASHINGTON, D.C. 20543

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 83-712

**TITLE** NEW JERSEY, Petitioner v. T.L.O.

**PLACE** Washington, D. C.

**DATE** October 2, 1984

**PAGES** 1 thru 58

**AR**  
ALDERSON REPORTING

(202) 628-9300  
20 F STREET, N.W.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -x

NEW JERSEY, :

Petitioner, :

v. : No. 83-712

T.L.O. :

- - - - -x

Washington, D.C.

Tuesday, October 2, 1984

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:02 a.m.

APPEARANCES:

ALLAN J. NODES, ESQ., Deputy Attorney General of New  
Jersey, Trenton, New Jersey; on behalf of the  
Petitioner.

LOIS DE JULIO, First Assistant Deputy Public  
Defender, East Orange, New Jersey; on behalf of  
the Respondent.

C O N T E N T S

<u>STATEMENT OF</u>	<u>PAGE</u>
ALLAN J. NODES, ESQ.,	
on behalf of the Petitioner	3
LOIS DE JULIO, ESQ.,	
on behalf of the Respondent	28
ALLAN J. NODES, ESQ.,	
on behalf of the Petitioner - rebuttal	55

1 P R O C E E D I N G S

2 CHIEF JUSTICE BURGER: We will hear arguments  
3 first this morning in New Jersey against T.I.C.

4 Mr. Nodes, you may proceed whenever you are  
5 ready.

6 ORAL ARGUMENT OF ALLAN J. NODES, ESQ.,

7 ON BEHAIF OF THE PETITIONER

8 MR. NODES: Mr. Chief Justice, and may it  
9 please the Court, last term the State of New Jersey  
10 argued before this Court that the Fourth Amendment  
11 exclusionary rule should be held inapplicable to school  
12 searches conducted by school teachers and school  
13 administrators.

14 Following argument, this Court requested  
15 additional briefing and argument on the issue of whether  
16 under the facts and circumstances of this particular  
17 case the vice principal's search of the student's purse  
18 violated the Fourth Amendment at all.

19 We suggest that there was no constitutional  
20 violation in this case. We argue firstly that the  
21 Fourth Amendment should be held inapplicable to school  
22 searches. That amendment was intended as a deterrent to  
23 law enforcement officers and police officers, and was  
24 not intended to be used against private citizens or  
25 against those who act in loco parentis.



1           We believe that school teachers do act in loco  
2           parentis. I will address the in loco parentis functions  
3           of school teachers later in my argument, and I would  
4           refer to my brief for the remainder of the argument  
5           concerning the applicability of the Fourth Amendment.

6           We would also urge that --

7           QUESTION: You mean of the exclusionary rule,  
8           don't you?

9           MR. NODES: I beg your pardon?

10          QUESTION: You mean of the exclusionary rule?

11          MR. NODES: Of the exclusionary rule or the  
12          Fourth Amendment. We would rely on the briefs for the  
13          exclusionary rule and for the application of the Fourth  
14          Amendment. I would like to argue the standard to be  
15          applied assuming that the Fourth Amendment is held to be  
16          applicable to school searches.

17          And we believe that the standard which should  
18          be applied to school searches should be lower than  
19          probable cause, and in fact should be a standard of  
20          reasonable suspicion.

21          QUESTION: Mr. Nodes, assuming the  
22          applicability of the Fourth Amendment, do you think that  
23          on this record there was probable cause for the search?

24          MR. NODES: Yes, I do, Your Honor. I believe  
25          that what we had in this case was an instance where a

1 person who was very, very reputable witnessed an action  
2 which was a violation of a school regulation. He  
3 reported this violation to another person, who is also  
4 reputable.

5 Now, what he said was, he saw a cigarette in a  
6 person's hand, and I believe that it is pure common  
7 sense to believe that when one sees a cigarette in a  
8 person's hand, that that person will also be carrying  
9 cigarettes in a pack somewhere on their person. So,  
10 I --

11 QUESTION: Or, that the person is holding it  
12 in the hand because they intend to smoke it or are  
13 smoking it? Because they are going to smoke it?

14 MR. NODES: Yes. The fact that they have the  
15 cigarette indicates firstly that they are smoking it,  
16 secondly, that they have cigarettes, and I believe that  
17 that is all the vice principal actually needed in this  
18 case.

19 QUESTION: Well, Mr. Node, assuming again the  
20 applicability of the Fourth Amendment, if you are right  
21 that there was probable cause shown here, why should we  
22 address the question whether something less would  
23 satisfy?

24 MR. NODES: Well, I believe for two reasons.  
25 Firstly, I don't believe that it is settled that

1 probable cause should be the standard to which school  
2 teachers should be held. In this case, of course, the  
3 New Jersey Supreme Court found that there wasn't  
4 probable cause and there wasn't even reasonable  
5 suspicion, even though we argued all along that probable  
6 cause was present.

7 The mere fact that we have met the highest  
8 possible standard, or that we argue that we have met the  
9 highest possible standard which could be enunciated does  
10 not mean that this Court could not set forth the  
11 appropriate standard for lower courts to follow in  
12 future cases.

13 I believe that --

14 QUESTION: Or that this Court could disagree  
15 with you that there was probable cause in this  
16 particular case.

17 MR. NODES: Very clearly this Court could  
18 disagree with that, and then it would be necessary to  
19 determine what lower standard would apply and whether or  
20 not we had met that lower standard.

21 QUESTION: What was the rule of the school?  
22 It was no smoking, right?

23 MR. NODES: There were school rules that there  
24 was no smoking in certain areas. T.L.O. --

25 QUESTION: And she was smoking in that area?

1 MR. NODES: Yes, that is correct.

2 QUESTION: Isn't that the end of the case?

3 Why do you have to go and search?

4 MR. NODES: Well, I think that, Your Honor,

5 the reason why we did go and search, and it may very

6 well be that we did not have to go and search, but the

7 reason that we did go and search was that the principal

8 was trying to be fair to the student. Rather than

9 merely accepting the word of the teacher who said, I saw

10 two students smoking, he had a --

11 QUESTION: Well, suppose that the teacher

12 reported that the child had cursed. Would that be

13 enough? You wouldn't have to get additional proof for

14 it, would you?

15 MR. NODES: No, I don't believe that it would

16 be necessary to get additional proof.

17 QUESTION: Why do you need extra proof here?

18 MR. NODES: I don't believe that we had --

19 QUESTION: Well, didn't she deny it?

20 MR. NODES: I do not believe we had to have

21 additional proof here. That does not mean that it is

22 wrong for us to obtain additional proof.

23 QUESTION: Well, I am just raising the

24 question. Is it necessary to violate somebody's rights

25 in order to add on to the necessary ingredients for



1 conviction?

2 MR. NODES: No, we would not advocate  
3 violating somebody's rights in order to add additional  
4 evidence.

5 QUESTION: I can understand -- you didn't need  
6 to search to get the -- I don't mean conviction, the  
7 action of the school board. You didn't need the  
8 search.

9 MR. NODES: We could have -- the vice  
10 principal could have disciplined T.L.C. without the  
11 search. I do not agree that we had to violate  
12 somebody's rights in order to get additional evidence.  
13 I believe that the vice principal was able to get the  
14 additional evidence with absolutely no violation of the  
15 person's rights.

16 What the vice principal ended up doing was  
17 listening to what the student had to say. The student  
18 presented a defense. The vice principal talked to the  
19 student, and asked the student what the student had to  
20 say for herself. Under Goss v. Lopez, this was the  
21 proper standard.

22 I believe that it is appropriate, not  
23 mandatory, but appropriate then --

24 QUESTION: What is the defense to -- because  
25 she wasn't smoking?

1 MR. NODES: The defense was a total denial of  
2 smoking, and the additional element --

3 QUESTION: Did she say that?

4 MR. NODES: -- that she couldn't have been  
5 smoking then because she never smoked at all. And I  
6 believe that by demonstrating whether or not this person  
7 smoked, the vice principal had a much better idea of  
8 whether or not she was smoking on that particular  
9 occasion.

10 Yes, the vice principal could have said to  
11 T.L.O., T.L.C., I am going to believe the teacher, who is  
12 totally credible, and I am going to assume without  
13 checking anything that you are lying to me. I think the  
14 vice principal tried to act more reasonably than that.

15 I think the vice principal tried to ensure  
16 that the school regulations were followed, but at the  
17 same time was also trying to ensure that a possibly  
18 innocent person wasn't punished. And I think that an  
19 action of that type should be condoned rather than  
20 criticized.

21 QUESTION: All I can say is, schools are  
22 different from when -- when I went to school, if a  
23 teacher said something, the vice principal believed the  
24 teacher and not the student.

25 (General laughter.)

1 QUESTION: That was when I went to school.

2 MR. NODES: That could very well be the case.

3 (General laughter.)

4 MR. NODES: Your Honor, I would suggest also  
5 when I went to school searches were allowed much more  
6 easily.

7 QUESTION: I never got one hearing the whole  
8 time I was in school.

9 MR. NODES: But this Court has now decreed  
10 that in certain circumstances there will be at least  
11 limited hearings, and I think that this is what the vice  
12 principal followed. He did give a limited hearing  
13 before imposing discipline, and he didn't just give a  
14 pro forma hearing and at the end of the hearing say,  
15 okay, now I am going to ignore what you said.

16 He checked what the juvenile had said, and he  
17 checked what the juvenile said, in an extremely  
18 reasonable manner, because we believe that at the very  
19 least he had a reasonable suspicion that an infraction  
20 had occurred, and that evidence of the infraction --

21 QUESTION: May I ask you, in the prior  
22 argument you seemed to accept the standard that the New  
23 Jersey Supreme Court laid down. I am not sure whether  
24 you still do or not.

25 MR. NODES: The standard reasonable suspicion,

1 the name reasonable suspicion is --  
2 QUESTION: That is not my question.  
3 MR. NODES: Yes, we --  
4 QUESTION: My question can be answered yes or  
5 no.  
6 MR. NODES: Do I accept the standard -  
7 QUESTION: That they laid down.  
8 MR. NODES: No, I do not.  
9 QUESTION: I didn't think -- you have changed  
10 your position, haven't you?  
11 MR. NODES: I think that that is a proper  
12 interpretation. I believe that the name reasonable  
13 interpretation is an appropriate name for a standard.  
14 QUESTION: But the question, I suppose, is  
15 reasonable suspicion of what, and in your view I gather  
16 it is a suspicion of any violation of any school  
17 regulation would justify a search, whereas they say it  
18 has to be suspicion of a crime or of something, a major  
19 disorder. Is that right?  
20 MR. NODES: No. I believe that they said  
21 crime or violation of school disciplinary regulations.  
22 QUESTION: Would seriously interfere with  
23 school discipline or order.  
24 MR. NODES: Yes, I don't think that first of  
25 all it would have to be a serious infringement, and I



1 don't think --

2 QUESTION: So you disagree with that part.

3 MR. NODES: So I disagree with that part, but  
4 more than that, I disagree with their application of the  
5 announced standard to this case.

6 QUESTION: I understand, but you also do  
7 disagree with their standard. You would take the view,  
8 I take it, that if there was reasonable suspicion that  
9 the purse contained, say, a note or a diary or something  
10 that would disclose a violation of any rule, the rule  
11 requiring students to be on time for athletic games or  
12 something like that, they could still search?

13 MR. NODES: I think that you have to evaluate  
14 the need for the evidence and whether or not --

15 QUESTION: Well, the purpose is exactly the  
16 same, to find out if there is evidence of infraction of  
17 a school regulation that does not involve harm, physical  
18 harm or anything like that, just the child may have been  
19 late to school. Could they search to determine that?

20 MR. NODES: Yes, I believe that they could,  
21 provided that student is carrying that diary and that  
22 information with them. I believe that that would be  
23 constitutionally permissible.

24 QUESTION: Mr. Nodes, would you believe that  
25 if a reasonable suspicion standard is applied, that it

1 would have justified a strip search of the pupil in this  
2 case?

3 MR. NODES: I believe that when we are dealing  
4 with what we are classifying generally as school  
5 searches, we are talking about searches which would  
6 normally be made for violations of school regulations  
7 and school disciplines rather than law enforcement  
8 searches.

9 QUESTION: What standard do we apply to  
10 determine the validity of the search, assuming one is  
11 authorized? How far can you go in the search?

12 MR. NODES: I believe that a search of, for  
13 instance, lockers, items which a person carries into  
14 school, or searches of clothing or pockets would be  
15 within the normal area which a teacher under the normal  
16 functions of a teacher could search. I believe --

17 QUESTION: Do you think then that a male  
18 teacher could conduct a pat-down search of a young woman  
19 student at age 16 to find the cigarettes?

20 MR. NODES: I believe that that would be  
21 constitutionally permissible. I would note that as in  
22 the area with airplane searches and with most police  
23 searches, if it can be avoided, that simply is not  
24 done. I don't expect that that is something which would  
25 occur.

1           Now, if that does occur, if there is a  
2       pat-down of a female by a male teacher or administrator,  
3       or if there is a strip search, and that search is for  
4       anything except a constitutionally permissible purpose,  
5       if there is any evidence of harassment or anything of  
6       that type, of course, other actions can be brought, the  
7       same as they could against --

8           QUESTION: Well, do you concede that there  
9       would be a further requirement in any event that the  
10      extent of the search itself would have to be reasonable  
11      under the circumstances considering the age and sex of  
12      the child and the circumstances?

13          MR. NODES: Yes, I would agree with that. I  
14      would agree that we are not advocating strip searches of  
15      students to find out whether or not they have been  
16      smoking cigarettes, and I don't think that that is what  
17      is normally held to be a school search, and in fact I  
18      believe that there are the laws, the regulations, and  
19      possibly other parts of the Constitution --

20          QUESTION: Well, I am more concerned with your  
21      view of what the Constitution requires rather than your  
22      view of what is normally done in the school scene.

23          MR. NODES: I believe that the extent of the  
24      search could become part of the standard, and while it  
25      might be reasonable to search a person's pockets, search

1 a person's jacket, the person's locker, or person's  
2 purse for a certain item, it would not in many  
3 instances, possibly the same circumstances, be  
4 permissible to strip search the student.

5 I think it would almost never be permissible.

6 QUESTION: If the school official suspected  
7 the commission of a crime and called a policeman to the  
8 scene, would the policeman conducting a search at the  
9 school have a higher standard in any event, in your  
10 view?

11 MR. NODES: I believe when it becomes a police  
12 search --

13 QUESTION: Probable cause?

14 MR. NODES: -- yes, a higher standard,  
15 possibly probable cause, depending on the circumstances,  
16 would apply.

17 QUESTION: Is there any regulation against the  
18 possession of cigarettes?

19 MR. NODES: In this particular case, there was  
20 no regulation in this school against the possession of  
21 cigarettes. It was permissible for the student to  
22 possess cigarettes. The search which --

23 QUESTION: Are you going to get to the  
24 question of whether there is a difference between people  
25 on the street and students in the school?



1 MR. NODES: I am not sure I fully understand  
2 Your Honor's question.

3 QUESTION: The difference between a man or a  
4 woman walking on the street, downtown Washington, and a  
5 student, a minor, in a school.

6 MR. NODES: Well, I believe that there are  
7 many differences between a person on the street -- I  
8 believe that first of all there may be a difference  
9 between a minor on a street carrying a purse --

10 QUESTION: Well, we don't have to worry about  
11 a minor on the street. We are worrying about a minor in  
12 the school here, and the comparison I am surprised you  
13 haven't made in your analysis is that there is a  
14 difference between a student who has been sent to school  
15 by the parents and is required by law to go to school in  
16 the school quarters and a person walking on the street,  
17 an adult.

18 MR. NODES: Well, I believe that when a  
19 student is sent to school, of course, the school and the  
20 state takes on a responsibility for ensuring not only  
21 that that student is educated, but also that that  
22 student is safe and secure while in school, and that  
23 discipline is maintained while in school.

24 QUESTION: Well, Mr. Nodes, you think there is  
25 such a difference that the Fourth Amendment shouldn't

1       apply at all?

2               MR. NODES: I believe --

3               QUESTION: That was your first submission.

4               MR. NODES: Yes, I believe that there is such  
5       a significant difference in the function performed by  
6       the school teacher during the school day that the Fourth  
7       Amendment shouldn't apply. However, the same arguments  
8       would also be applicable concerning a reduced standard.

9               QUESTION: Right.

10              MR. NODES: The teacher does act in an in loco  
11     parentis manner during the school day. Now, it is  
12     possible that since the advent of mandatory compulsory  
13     education up until a certain age, that the traditional  
14     Blackstonian views and reasons for imposing the in loco  
15     parentis doctrine would no longer apply.

16              However, when we look at what is happening in  
17     fact, it is clear that as far as the supervision of  
18     juveniles, the teacher acts in loco parentis. Firstly,  
19     the student spends as much as a third of his or her day  
20     attending a public school. During that period, the  
21     teachers and administrators provide the only supervision  
22     which that juvenile, that student has, and in many ways  
23     they take the place of and perform the functions of  
24     parents.

25              QUESTION: That's correct.

1           QUESTION: And does that mean that their  
2 authority then to make searches, if the Fourth Amendment  
3 is completely inapplicable, extends to any kind of  
4 search, strip search or otherwise?

5           MR. NODES: I believe that if the Fourth  
6 Amendment is inapplicable, of course, the Fourth  
7 Amendment would not itself forbid strip searches.  
8 However, I think that strip searches are such an  
9 egregious example, and the courts, the Circuit Courts  
10 have continuously held this, that there could quite  
11 possibly be another constitutional violation.

12           QUESTION: What one?

13           MR. NODES: It is possible that under Roshen,  
14 for instance, this would be considered such an invasion  
15 of the person's privacy, and such an unwarranted  
16 invasion that it would be constitutionally  
17 impermissible. However, I think that even that, it would  
18 not be necessary to use that.

19           I believe that strip searches can be stopped  
20 very easily without the Constitution, and I might note  
21 that in many of the strip search cases there has been  
22 either a finding of no constitutional violation or there  
23 has been no punishment of the violators. I believe  
24 primarily the cases say no punishment of the violators  
25 because of the circumstances.

1 But for two reasons, those searches will be  
2 stopped. First of all, I believe that in all states  
3 people are becoming more sensitive to strip searches  
4 whether they are conducted by law enforcement  
5 authorities or by other persons, and there are laws now  
6 which limit even the authority of a police officer to  
7 conduct a strip search.

8 However, maybe even more importantly, the  
9 factors which were noted in *Ingraham v. Wright* by this  
10 Court --

11 QUESTION: Well, if I understand your  
12 argument, though, Mr. Nodes, it is that because the  
13 Fourth Amendment is inapplicable, nothing in the Fourth  
14 Amendment can restrain a strip search of a student by a  
15 teacher?

16 MR. NODES: I believe that that would be  
17 correct, yes.

18 QUESTION: What is the basis for that  
19 argument? You are saying they are not unreasonable  
20 searches? Is that what it is? In terms of the text of  
21 the Fourth Amendment.

22 MR. NODES: As far as the text of the Fourth  
23 Amendment, I believe that the Fourth Amendment was  
24 directed at the state acting as the state. Now, in  
25 certain circumstances I believe that the state can take



1 on a role which is traditionally held by private  
2 persons.

3 QUESTION: So what you are saying is, it is  
4 not unreasonable.

5 MR. NODES: It is not unreasonable --

6 QUESTION: Even a strip search is not  
7 unreasonable.

8 MR. NODES: Yes. That is not unreasonable.  
9 It would not be unreasonable for a private person, and  
10 in this instant it is not unreasonable for the state.

11 QUESTION: Are you saying that the school and  
12 the teachers and the authorities stand in the shoes of  
13 the parent?

14 MR. NODES: Yes, at least as far as the  
15 supervision and welfare of the student is concerned.  
16 The school teachers and administrators ensure that the  
17 students arrive at school properly. They ensure that  
18 they behave while they are in school. They maintain  
19 discipline.

20 If there is an injury or sickness, the school  
21 teacher or school administrator is the first person  
22 responsible for taking care of that. In many instances,  
23 a parent can't be contacted. The school makes the  
24 decision as to whether or not a doctor or a hospital  
25 will be called in.

1 QUESTION: Well, Mr. Nodes, we are dealing  
2 here with a public school, are we not?

3 MR. NODES: Yes, we are.

4 QUESTION: And there are laws requiring  
5 children to attend that school, whether they want to or  
6 whether their parents want them to or not. Isn't that  
7 so?

8 MR. NODES: That's correct.

9 QUESTION: And you contend that this isn't  
10 state action then, when the state acting in the school  
11 setting conducts a search? Is that your position?

12 MR. NODES: No, I would not say that there is  
13 no state action involved in this case. What I would  
14 say --

15 QUESTION: Now, we found state action, I  
16 suppose, for occupational and health safety inspections,  
17 and for welfare workers, and in other administrative  
18 agency searches, have we not?

19 MR. NODES: Yes, the Court has.

20 QUESTION: But you think somehow schools are  
21 different, even though the law requires the student to  
22 be there?

23 MR. NODES: Yes, I do, and maybe it isn't even  
24 though the law requires the student to be there, quite  
25 possibly. I believe it is because the law requires the

1 student to be there. The state has intentionally taken  
2 on a function which the parent normally exercises. The  
3 state does have, obviously, the ultimate parens patriae  
4 function, to ensure the welfare of all students.

5 However, that function is normally taken over  
6 by the parent. When the state takes that function back  
7 and says for a period of time, and for as much as a  
8 third of the student's day, we will take custody of the  
9 student, and we will ensure that during this period the  
10 student's wellbeing is maintained, in addition to  
11 educating the student, then I believe it becomes  
12 reasonable for the person who has not only these  
13 functions but also these responsibilities to act under  
14 different standards than the state would normally act  
15 under.

16 QUESTION: Would that go to a reform school?

17 MR. NODES: I believe that a reform school --

18 QUESTION: Are you saying that the Fourth  
19 Amendment doesn't apply in the reform school?

20 MR. NODES: I believe that either my argument  
21 that the Fourth Amendment doesn't apply or that a lower  
22 standard is required would apply to a reform school,  
23 yes.

24 QUESTION: Why don't you take the position it  
25 is not involved in this case?

1 MR. NODES: I beg your pardon?

2 QUESTION: Why don't you take the position  
3 that the question is not involved in this case? Isn't  
4 it that you want the broadest rule you can get?

5 MR. NODES: No, I am not --

6 QUESTION: Isn't that what you are up to?

7 MR. NODES: No, no, I am not asking for the  
8 broadest rule I can get. I was attempting to answer --  
9 only answer Your Honor's question. I don't believe that  
10 that is necessary for this case.

11 However, I do believe that it is an example of  
12 the function which the state takes over. Your Honor  
13 used the term reform school. Very often the state takes  
14 custody of a juvenile even though the juvenile has done  
15 nothing wrong.

16 In New Jersey we have shelters for juveniles  
17 who are in need of supervision, and juveniles placed in  
18 these facilities can be there simply because their  
19 parents haven't taken care of them, and I believe that  
20 that would be similar to the school situation, where the  
21 state has taken over part of the function of the  
22 parent.

23 QUESTION: You are arguing the Fourth  
24 Amendment issue because the Court directed you to argue  
25 it. Is that not so?



1           MR. NODES: That's correct. We do believe,  
2           again, that if the Fourth Amendment does apply, that a  
3           standard lower than probable cause is warranted, and I  
4           think that although the in loco parentis arguments would  
5           also have application here, and although I think it is  
6           apparent that students have a lesser expectation of  
7           privacy while attending a public school than they would  
8           have on the street, I believe that very simply the  
9           educational system cannot properly operate if teachers  
10          are required to abide by a probable cause standard.

11          We must have discipline in the schools, and  
12          this discipline cannot be maintained by teachers who are  
13          encumbered by the same rules and regulations as police  
14          officers are.

15          QUESTION: Mr. Nodes, assume for a moment that  
16          the New Jersey court is correct in saying that the  
17          Fourth Amendment applied, that a reasonable suspicion  
18          standard was the appropriate standard for review.

19          Do you think that that means individualized  
20          suspicion under the New Jersey rule, or would that mean,  
21          for example, that if the school authorities suspected  
22          there were drugs being used in the restrooms, they could  
23          install two way mirrors or listening devices based on a  
24          generalized suspicion?

25          MR. NODES: Your Honor, I think that that

1 probably would be determined by the type of  
2 investigation which they were attempting to conduct. I  
3 am not sure exactly how far they could go with minor  
4 school violations.

5 QUESTION: Well, I was curious to know what  
6 you thought the New Jersey rule was, whether it required  
7 individualized suspicion or something else.

8 MR. NODES: I believe that the New Jersey  
9 court was, because of the contours of this case, talking  
10 about individualized suspicion, and they simply weren't  
11 faced with a standard where a school had to take care of  
12 a situation, for instance, where knives were being  
13 brought to school every day, and they might have to  
14 search students coming into the school to make sure  
15 there were no knives being brought in.

16 That could raise a whole new set of problems,  
17 but the New Jersey court didn't have to deal with those  
18 questions in this case.

19 QUESTION: Mr. Nodes, you are not adopting the  
20 New Jersey court standard, and I would be interested to  
21 know your answer to Justice C'Connor's question.  
22 Supposing the school had reasonable suspicion that the  
23 restroom was being used to smoke in, as was the case  
24 here. Could they put in two-way mirrors?

25 That you can answer yes or no.

1 MR. NODES: I believe that they could put in  
2 two-way mirrors. I believe other things --

3 QUESTION: Under your standard, they clearly  
4 could.

5 MR. NODES: Yes, they could. I believe even  
6 if the Fourth Amendment applied under the reasonable  
7 suspicion standard they could, or they could search  
8 students on their way into the restroom.

9 QUESTION: Why would you need reasonable  
10 suspicion of anything under the Fourth Amendment to put  
11 two-way mirrors in a restroom? That is -- you know, why  
12 is that a violation of the Fourth Amendment at all, to  
13 do that?

14 MR. NODES: I am not sure that it would be.

15 QUESTION: No, I am not either.

16 QUESTION: You don't think there is any  
17 expectation of privacy in a restroom?

18 (General laughter.)

19 MR. NODES: There are many --

20 QUESTION: That is a serious question.

21 MR. NODES: I understand.

22 QUESTION: Apparently you don't.

23 MR. NODES: I understand that, but I would  
24 assume that the two-way mirrors would replace the  
25 mirrors which would already be up in the mens' room, and

1 I assume that that would be the mirrors in front of  
2 which you normally stand to comb your hair or make sure  
3 that your clothing is appropriate, and things like  
4 that.

5 I don't believe that the more private areas of  
6 a men's room are going to have mirrors, two-way or  
7 otherwise. So that was the assumption that I was making  
8 in my question -- I mean, in my answer.

9 In this case, we believe that the problem with  
10 the standard as enunciated by the New Jersey Supreme  
11 Court, again, assuming the Fourth Amendment applies, is  
12 that the court acted as if it were actually operating  
13 under a probable cause standard, and as if it were  
14 actually evaluating the actions of a police officer.

15 The Court first drew a line between a good  
16 hunch and a reasonable suspicion. They admitted that  
17 there was probably a good hunch, but said that there  
18 wasn't a reasonable suspicion.

19 I believe it is very hard to draw a line of  
20 this type, and as I said before, I believe that at the  
21 very least there was a reasonable suspicion in this  
22 case. However, I think more importantly what the Court  
23 should be looking to is a common sense approach to the  
24 problems that school teachers face each day while trying  
25 to maintain order and discipline in schools.



1           And I don't believe that if the courts are  
2 going to evaluate situations like this with the  
3 strictness that they evaluate police officer searches,  
4 that it is going to be possible for teachers, first of  
5 all, to know what they can and cannot do, and secondly,  
6 for them to be able to maintain any order and  
7 discipline.

8           I think that a much more common sense approach  
9 is needed in judicial review of the standard, assuming  
10 that a reasonable suspicion standard is adopted. I  
11 believe that the vice principal in this case did take a  
12 very reasonable and did take a very common sense  
13 approach to ensuring that both school regulations were  
14 followed and that a student wasn't punished  
15 unnecessarily, and that the New Jersey Supreme Court  
16 rather should have condoned this action, and viewed in  
17 this light the actions of the school vice principal were  
18 totally appropriate and should have been affirmed by the  
19 New Jersey Supreme Court.

20           I would reserve the rest of my time for  
21 rebuttal.

22           CHIEF JUSTICE BURGER: Very well.

23           Ms. DeJulio?

24           ORAL ARGUMENT OF ICIS DE JULIO, ESQ.,

25           ON BEHALF OF THE RESPONDENT

1 MS. DE JULIC: Mr. Chief Justice, and may it  
2 please the Court, throughout the course of this  
3 litigation, the juvenile respondent has maintained that  
4 the search of her purse by the vice principal of her  
5 high school violated her Fourth Amendment rights, and  
6 that as a result the evidence which was seized from her  
7 could not be admitted against her in a criminal  
8 proceeding.

9 The State of New Jersey suggests that no  
10 constitutional violation occurred because the Fourth  
11 Amendment does not apply to searches conducted by school  
12 personnel.

13 The great majority of state and lower federal  
14 courts that have considered this question have agreed  
15 with the Supreme Court of New Jersey that searches  
16 conducted by school personnel do come within the ambit  
17 of the Fourth Amendment, and we would submit that this  
18 conclusion is constitutionally required.

19 As a matter of historical fact, it is true  
20 that the framers of the Constitution adopted the Fourth  
21 Amendment in response to the repression that they had  
22 experienced at the hands of the King's colonial revenue  
23 agents. The compulsory government-sponsored system of  
24 education which we now have simply did not exist at the  
25 time, so it is unlikely that the framers considered

1 either including or excluding school personnel from the  
2 ambit of the Amendment.

3 QUESTION: What would be your view, Ms.  
4 DeJulic, about the same factual situation in a private  
5 school, not a public school?

6 MS. DE JULIO: Your Honor, I would submit that  
7 that would be outside the scope of the Fourth Amendment,  
8 since the Fourth Amendment has never been applied to  
9 purely private action.

10 QUESTION: In other words, there is no state  
11 action then?

12 MS. DE JULIO: No, Your Honor.

13 QUESTION: Then you are going to have two  
14 different rules on searches.

15 MS. DE JULIO: Yes, Your Honor, you would.  
16 You would have --

17 QUESTION: All parochial and private schools  
18 will have one rule, and the public schools another.

19 MS. DE JULIO: That would be correct, Your  
20 Honor. The Fourth Amendment has never been applied to  
21 purely private action, even though in certain cases, for  
22 example, the case of a search by an employer of an  
23 employee, there might certainly be significant --

24 QUESTION: I suppose it isn't relevant to this  
25 case, but is it possible that that might lead parents

1 who want their children to be in schools where  
2 cigarettes aren't floating around and drugs aren't being  
3 used to take their children out of public schools and  
4 put them in private schools?

5 MS. DE JULIO: Your Honor, I think that that  
6 is somewhat oversimplifying the situation for two  
7 reasons. One is that the standard promulgated by the  
8 court below does not prevent public school officials  
9 from conducting searches when they are reasonably  
10 necessary for the pursuit of their educational  
11 responsibilities, and when there are some reasonable  
12 grounds to believe that the student is either engaging  
13 in criminal conduct or has violated some school rule  
14 that would disturb or disrupt safety and order in the  
15 school.

16 We would submit that that is a very workable,  
17 flexible standard, and is --

18 QUESTION: Ms. DeJulio, do you think there is  
19 any school rule not related to safety that would justify  
20 a search of a child's pockets or purse or lunch bag or  
21 whatever?

22 MS. DE JULIO: I would have to concede that  
23 there might be. It is difficult to know the many  
24 circumstances which might arise. I would certainly  
25 submit that the offense of smoking in the restroom would



1 not be the type of infraction which would in itself  
2 justify the search of a student.

3 The threat to safety and school order is  
4 simply not at the level that would warrant such an  
5 extreme intrusion into the area of personal privacy.

6 QUESTION: What about smoking marijuana in a  
7 restroom?

8 MS. DE JULIO: Certainly smoking marijuana or  
9 use of drugs, because of the dangers to the student,  
10 might very well justify a search under proper  
11 circumstances.

12 QUESTION: You would distinguish marijuana  
13 from tobacco then on the basis that marijuana is more  
14 harmful, or on the basis that probably smoking marijuana  
15 might be a crime?

16 MS. DE JULIO: I would suggest that both  
17 factors would be taken into consideration. Obviously,  
18 many dangerous activities also violate the law. So  
19 there are times when both of those considerations would  
20 converge.

21 QUESTION: Well, suppose there was the same  
22 report as occurred in this case, except the report was  
23 that the student was smoking marijuana in the restroom,  
24 and that that is contrary to not only school rules but  
25 to the law.

1           Now, would that furnish whatever cause might  
2 be required to search the purse?

3           MS. DE JULIO: Well, Your Honor, it would  
4 certainly be the type of infraction that might justify a  
5 search. The question --

6           QUESTION: Of the purse.

7           MS. DE JULIO: Well, that would be a second  
8 question.

9           QUESTION: The inference would be, if you are  
10 smoking marijuana, maybe you have got it in your purse.  
11 Is that it?

12          MS. DE JULIO: Well, I think the information  
13 would have to be evaluated, as we do with the police.

14          QUESTION: Well, let's evaluate it on the  
15 facts of this case. They call a student in. She denies  
16 that she was smoking marijuana at all. She never smokes  
17 marijuana. And the official says, well, I would like to  
18 ---the teacher says you were smoking. Now, I want to  
19 look in your purse. And she says, no. And so he  
20 searches it anyway.

21          Now, would that be reasonable suspicion? If  
22 the reasonable suspicion standard is the proper one,  
23 would it be satisfied in that situation?

24          MS. DE JULIO: I think not, simply because the  
25 information did not implicate that the marijuana was

1 being possessed by her either in her clothing, her  
2 purse, or anywhere else. Even with regard to the  
3 police, the police may observe a criminal violation  
4 taking place. That does not necessarily lead  
5 immediately to the conclusion that a search can be  
6 conducted.

7 QUESTION: Ms. DeJulic, at most we are talking  
8 about probable cause, not mathematical certainty. What  
9 about Mr. Nides' argument that if you see someone  
10 puffing on a cigarette, it is a reasonable inference  
11 that he has got more on his person where that came from,  
12 whether it is marijuana or tobacco?

13 MS. DE JULIC: Well, Your Honor, I think in  
14 the facts of this case that isn't necessarily the proper  
15 inference to be drawn. There were a number of students  
16 in the girls' restroom, one of whom did candidly  
17 acknowledge that she was smoking.

18 I think that the inference that all of them  
19 possessed tobacco cigarettes, or in the alternative  
20 hypothetical that they all possessed marijuana in their  
21 purse would not be reasonable. It may well have been,  
22 and may have been the case, that perhaps they were all  
23 passing one cigarette around, and no one possessed  
24 anything.

25 QUESTION: Don't you recognize the difference

1       that marijuana is contraband and cigarettes are not?

2               MS. DE JULIO: Certainly that is a very  
3       important difference in this case, and the problem with  
4       the search conducted here is that even if the  
5       information had been that the student was seen tucking a  
6       package of cigarettes into her purse, there was no  
7       reason for the principal to locate and seize that  
8       package.

9               QUESTION: Well, is it customary in New Jersey  
10      schools for students to pass one tobacco cigarette  
11      around to several different people?

12              MS. DE JULIO: Your Honor, I believe that  
13      occurs with a fair amount of frequency, or so I am  
14      told. But I think that the problem here is simply that  
15      the search was for something which was not against  
16      school rules to possess, was not illegal or contraband  
17      per se, and also had --

18              QUESTION: Well, it was a violation of the  
19      rule to smoke in the location of the restroom, was it  
20      not?

21              MS. DE JULIO: Yes, certainly it was.

22              QUESTION: What if the school official just  
23      said, hand over any cigarettes that you have, and the  
24      student handed them over, and the school official  
25      confiscated them? Is that a violation of the Fourth



1 Amendment?

2 MS. DE JULIO: Well, I guess it would be there  
3 the question of whether the student's consent to  
4 relinquish the materials was a knowing and voluntary  
5 one. Assuming that it were, then I suppose it would  
6 be --

7 QUESTION: Well, suppose it is not. Is that a  
8 violation then of the Fourth Amendment?

9 MS. DE JULIO: I believe that it would be,  
10 since the --

11 QUESTION: And if a third grader is chewing  
12 gum in school, in violation of the teacher's established  
13 rule of preventing that, would it be a violation of the  
14 Fourth Amendment if the teacher confiscated the child's  
15 gum?

16 MS. DE JULIO: Well, I think in that  
17 circumstance the rule may be that the student is not  
18 permitted to possess bubble gum in school. The problem  
19 here in this particular school, and I certainly think --

20 QUESTION: Well, let's assume that's the  
21 rule. May the teacher then search the child's pocket,  
22 or confiscate the gum?

23 MS. DE JULIO: Well, again, I would certainly  
24 break down a bubble gum situation in that it may not be  
25 a serious enough threat to school order to warrant a

1 search, but if it were a situation where the item was --  
2 for example, the case involving firecrackers. The item  
3 was certainly one that could jeopardize safety and order  
4 in the school.

5 QUESTION: What about a crib sheet, evidence  
6 of cheating on a test?

7 MS. DE JULIO: That might under proper  
8 circumstances, yes, support a reasonable search. Again,  
9 the contours of the search under the New Jersey court  
10 standard, the search has to be reasonable in light of  
11 the purpose.

12 QUESTION: Incidentally, Ms. DeJulio, I gather  
13 you don't agree with your colleague that even a probable  
14 cause standard would be satisfied here, assuming the  
15 applicability of the Fourth Amendment.

16 MS. DE JULIO: No, we do not believe that the  
17 information which the principal had satisfies even the  
18 lesser standard of reasonable grounds, and certainly the  
19 extent of the search went far beyond any scope that  
20 would be constitutionally permitted, even if he had  
21 arguably had reasonable grounds to open the purse.

22 QUESTION: Incidentally, am I correct that as  
23 a matter of state law consent is no justification unless  
24 those consenting have been told they didn't have to?

25 MS. DE JULIO: There is a component in the New

1 Jersey standard for consent search that the individual  
2 be aware that he has a right to refuse. With regard to  
3 a student, I am --

4 QUESTION: That is a matter of state law, is  
5 it?

6 MS. DE JULIO: Yes, Your Honor. The student  
7 in New Jersey is required by state law to submit to the  
8 authority of teachers, so it would be doubtful that a  
9 student could realize that he could refuse, because  
10 under a state statute, I am not sure that he could, and  
11 that fact, the fact that students are by law required to  
12 submit to the authority of a teacher we submit is one of  
13 the most important reasons why school officials must be  
14 considered governmental action for Fourth Amendment  
15 purposes.

16 I private citizen could stop a child on the  
17 street, ask to see what he had in his pockets, and the  
18 child could say no, and walk away. But in the school  
19 context, the lawful authority, the teacher, the school  
20 administrator, can compel the student to submit to the  
21 intrusion of a search, and the student has no recourse  
22 but to submit.

23 This is exactly the type of governmental  
24 harassment which we submit the framers of the Fourth  
25 Amendment designed the Amendment to protect against.

1 QUESTION: May we come back to the standard  
2 for just a moment? You used the term reasonable  
3 grounds. Do you distinguish that from reasonable  
4 suspicion?

5 MS. DE JULIO: Your Honor, I don't believe  
6 that the New Jersey Supreme Court intended to  
7 distinguish from reasonable suspicion or reasonable  
8 cause. The school case literature, of which there is  
9 now a large number of reported decisions, about equally  
10 use the term reasonable cause, reasonable grounds, or  
11 reasonable suspicion.

12 All of those terms have been used and have a  
13 body of case law.

14 QUESTION: You would accept reasonable  
15 suspicion, would you?

16 MS. DE JULIO: I don't believe that there is  
17 any meaningful difference, or that there was intended to  
18 be any meaningful difference. The New Jersey Supreme  
19 Court, I believe, adopted reasonable grounds because  
20 that standard had been used by several prominent cases  
21 in the area, and was one that was recognized and  
22 understood by persons involved with the school search  
23 issue.

24 QUESTION: Would you ever require probable  
25 cause?



1 MS. DE JULIO: Yes, Your Honor. I think that  
2 the New Jersey Supreme Court very clearly stated that as  
3 the intensity of the intrusion increases, the standard  
4 of reasonable grounds may very well approach or become  
5 that of probable cause. Certainly in the area of strip  
6 searches, I would submit that the search cannot be  
7 reasonable unless there is probable cause at a minimum,  
8 and even then, of course, there may be problems with the  
9 proper scope of the search.

10 But I think the New Jersey Supreme Court  
11 recognized that the term school search could encompass a  
12 broad spectrum of intrusions, some, as is with the case  
13 with the police, are rather minimal, stopping a student  
14 in the hallway and asking a question, but at the  
15 opposite end, of course, there could be much more  
16 intrusive searches into purse, pockets, clothing, and of  
17 course perhaps the ultimate indignity of a strip  
18 search.

19 So, we would submit that as formulated, the  
20 reasonable grounds test covers a certain portion of the  
21 intrusions, but that as the intrusion becomes more  
22 severe, we are talking about probable cause at the  
23 ultimate end.

24 QUESTION: Having in mind the facts of this  
25 case, what more would have been required in your view to

1 satisfy the requirement to make the search of the  
2 purse?

3 MS. DE JULIO: In this case, I don't believe  
4 that a search could be properly made, since it had no  
5 relationship to the offense.

6 QUESTION: Well, suppose three teachers  
7 observed the girl smcking, actually smcking, and brought  
8 her into the principal's office and said, as soon as we  
9 called her attention to her smcking in violation of the  
10 rules, she put the cigarette out and put it in her  
11 purse.

12 What then? Would they be permitted to search  
13 the purse?

14 MS. DE JULIO: Well, Your Honor, certainly the  
15 information would implicate the purse, but again, I  
16 think that we are talking about a situation where the  
17 fact of a search may just have been completely  
18 inappropriate under the circumstances.

19 QUESTION: Well, would it be appropriate in  
20 these circumstances? Or are you telling us that they  
21 must go down and get a policeman and go to a magistrate  
22 and get a warrant?

23 MS. DE JULIO: No, Your Honor. Certainly I am  
24 not saying that. In this particular case, we are  
25 talking about an infraction which was complete in

1       itself. To borrow Justice Marshall's example, if the  
2       student had been cursing in the hallway, the infraction  
3       is complete in itself. There would be no basis to  
4       conduct a search because there is nothing that a search  
5       could contribute to the --

6                QUESTION: But here the girl denied that she  
7       had cigarettes.

8                MS. DE JULIO: She denied that she smoked.  
9       And certainly the question of whether she smoked or not  
10      would not have been determined by the discovery or the  
11      failure to discover cigarettes in her purse. To take  
12      the opposite approach, if the principal had opened her  
13      purse and had not found a package of cigarettes, if he  
14      had found nothing in her purse, that would not have  
15      acquitted her of the infraction.

16               QUESTION: That may be so, but what if he had  
17      found them, like he did? Do you mean that doesn't  
18      support the inference that she was smoking?

19               MS. DE JULIO: No, Your Honor, simply because  
20      under school rules it was proper to smoke in certain  
21      areas of the school, and --

22               QUESTION: Well, I know. I am not suggesting  
23      that possession would infringe a school rule, but if the  
24      young lady denies that she was smoking, and that she  
25      never smoked, and then it turns out she has got

1 cigarettes in her purse, you don't think that supports  
2 the inference that she had been smoking?

3 MS. DE JULIO: It may support it somewhat, but  
4 I don't believe that it is determinative, simply because  
5 she could have been carrying someone else's cigarettes,  
6 and I think we are talking about a chain of inferences.  
7 Certainly there are any number of things which might in  
8 some way contribute to proof, but when we are talking  
9 about a chain of inferences, we have already gone three  
10 steps away from the infraction at hand.

11 It is not permitted for the police to go  
12 searching or to obtain a warrant when they have some  
13 amorphous idea that there might be something that would  
14 be evidential. They cannot go into the house of a  
15 suspect and take away everything in the house on the  
16 theory that some of it might at some point prove  
17 evidential.

18 QUESTION: May I ask this question? We are  
19 talking about standards a good deal. Ordinarily police  
20 officers or otherwise trained state personnel make the  
21 judgments as to whether there are reasonable grounds,  
22 reasonable suspicion, probable cause.

23 Is it your view that teachers should be held  
24 to the same standard of good judgment as police  
25 officers?



1 MS. DE JULIO: I think so, Your Honor.

2 QUESTION: Whatever the standard?

3 MS. DE JULIO: Whatever the standard, because  
4 I think first of all that the educators operate in a  
5 much more -- an easier environment than the police do.  
6 The police are frequently on the street dealing with  
7 strangers and circumstances that are changing from  
8 minute to minute.

9 The educator deals with a group of students  
10 whom he probably knows very well, whom he will continue  
11 to see on a daily basis, and in many instances has a far  
12 better basis to make an informed judgment. Also in many  
13 instances if he suspects, has a hunch that something is  
14 going on that he feels might be a violation of the law  
15 or school rules, the student will be back in the  
16 classroom on a regular basis. The teacher can simply  
17 continue to make observations and see if that hunch --

18 QUESTION: Does knowing the student well  
19 enable one to make a judgment as to what is reasonable  
20 cause or what is probable cause, reasonable suspicion,  
21 do you think?

22 MS. DE JULIO: One of the factors which the  
23 New Jersey court pointed to in assessing whether  
24 reasonable grounds exist is the age, school record, and  
25 past history of the student, and I think that those are

1 tools which sometimes the police are able to utilize in  
2 their determinations of probable cause, but I think it  
3 would be, of course, appropriate to evaluate those  
4 criteria in determining whether reasonable grounds  
5 existed.

6 QUESTION: Does New Jersey provide any special  
7 training for teachers with respect to making these  
8 judgments?

9 MS. DE JULIO: Well, I believe that New Jersey  
10 provides a great deal of ongoing training for teachers  
11 in a myriad of fields, both academic and professional.

12 QUESTION: Of course.

13 MS. DE JULIO: This would perhaps become part  
14 of it. But I would like to call Your Honor's attention  
15 to a recent recommendation of the National School Board  
16 Association. They recommended that law-related  
17 education as a program be adopted by schools because  
18 they have found that it is very effective in preventing  
19 delinquency and contributing to a safer school  
20 environment.

21 QUESTION: How many teachers are there in New  
22 Jersey, roughly?

23 MS. DE JULIO: I don't know, Your Honor.  
24 Quite a large number.

25 QUESTION: But in this case it was the vice

1 principal. It wasn't a teacher.

2 MS. DE JULIO: It was a vice principal. Yes.

3 QUESTION: Suppose the teacher reports to the  
4 vice principal that a particular young man, student, a  
5 male student has been threatening other students with a  
6 knife, and perhaps brings that student into the office.  
7 Would you say the same thing, they could not ask him to  
8 produce the knife or conduct a pat-down search, not a  
9 strip search, a pat-down search?

10 MS. DE JULIO: I think that under those  
11 circumstances a pat-down search might be appropriate,  
12 yes. Certainly when weapons are involved, the immediate  
13 threat -- we recognize that with regard to the police,  
14 and permit frisks when the circumstances suggest that  
15 there is a weapon and that there is a danger of harm.

16 But again, I think we have to make a  
17 distinction --

18 QUESTION: Well, what makes the -- the fact  
19 that somebody saw the person threatening someone with a  
20 knife, how does that support the inference that it might  
21 be in his pocket?

22 MS. DE JULIO: Well, again, the nature of the  
23 information would have to be -- would have to suggest  
24 that conclusion.

25 QUESTION: I know, but does it or doesn't it?

1 MS. DE JULIO: I think if the information were  
2 fresh that, you know, this was seen right away, the  
3 inference --

4 QUESTION: What was wrong with the inference  
5 about the cigarettes?

6 MS. DE JULIO: Well, again --

7 QUESTION: The information was very fresh.

8 MS. DE JULIO: The fact of the students being  
9 in, first of all, being together in the restroom, that  
10 the cigarettes were not being seen being taken out or  
11 removed, they were being consumed, and also the fact  
12 that possession of cigarettes, again, was not prohibited  
13 by school rules. There was no reason to seize them.  
14 Whereas a knife I would assume would be prohibited by  
15 rules in every school, and a teacher would be well  
16 within his or her rights to seize a knife, even if it  
17 was seen just being displayed, and not being used in a  
18 threatening manner toward another student.

19 QUESTION: Getting back to this case, is there  
20 anything in the record where the principal said, if we  
21 don't find cigarettes in your purse, we will drop the  
22 charges?

23 MS. DE JULIO: Absolutely not, Your Honor, and  
24 I would submit that in the face of the eye witness  
25 testimony of the teacher, the principal could not have



1        ignored the infraction based upon the failure to find  
2        cigarettes in the purse.

3                I would also suggest that the principal, if he  
4        cared to investigate further, could have very simply  
5        questioned the other girls in the restroom. One of  
6        those girls was present in his office, and had candidly  
7        admitted that she was smoking.

8                QUESTION: Of course, Ms. DeJulio, a lot of  
9        Fourth Amendment law is based on second guessing of what  
10       people right on the spot did. This would have been more  
11       reasonable. This would have been a little better. But  
12       really the test is whether this particular reaction was  
13       reasonable. It was not whether it was the best, or  
14       whether something could have been proved or not.

15               MS. DE JULIO: That is certainly true, and I am  
16       only suggesting that in response to the concern that  
17       what else could the principal have done to be fair.  
18       Certainly it is quite correct that hindsight is better  
19       than foresight, but once again I think that we have to  
20       recognize that we are not dealing here with an exigent  
21       situation.

22               Smoking in the restroom is certainly an  
23       infraction of school rules, and is certainly a problem  
24       that the school had to deal with, but it just simply  
25       does not rise to the level of a student possessing a

1        weapon and threatening other students, or selling drugs  
2        in the restroom.

3                There was no immediate harm. It was not a  
4        situation, as the police frequently have to contend  
5        with, where a split second decision had to be made.

6                QUESTION: Well, I suppose you do agree in  
7        general, though, that a school needs to respond quickly  
8        and informally to violations of its rules by the  
9        students, do you not?

10               MS. DE JULIO: Certainly, but I --

11               QUESTION: How do you think it would impact  
12        then on that interest of the school to require the  
13        assistant principal to drop everything and go down to  
14        the police station and get somebody to authorize a  
15        search?

16               MS. DE JULIO: I am not suggesting that that  
17        should be a requirement. We have not at any point  
18        during this appeal here argued that a teacher should be  
19        required to get a warrant.

20               In this particular circumstance, I think what  
21        I am trying to -- the distinction that I am trying to  
22        draw is between infractions of school rules which have  
23        to be dealt with in some way but which do not implicate  
24        a search, and which simply are not serious enough.

25               In day to day life there are many adults who

1 smoke cigarettes in places where it is not legal to do  
2 so, but it would be difficult for a police officer to  
3 justify seizing an adult that he sees coming out of an  
4 elevator smoking a cigarette illegally and conducting a  
5 search.

6 The level of the infraction, the level of  
7 harm, the level of jeopardy is just simply not such that  
8 we would authorize that type of conduct.

9 Certainly if the -- another New Jersey case,  
10 State in the Interest of G.C., where the principal was  
11 told by a student that another student was selling drugs  
12 in the restroom, the court found that the principal  
13 acted perfectly reasonably in apprehending that student  
14 and searching her and seizing those drugs.

15 That is the kind of threat where a search may  
16 be immediately required, and where a school  
17 administrator would be found to have acted perfectly  
18 reasonably.

19 QUESTION: Suppose the vice principal had been  
20 apprehensive about the Fourth Amendment problem and said  
21 to the girl, sit down, picked up the phone, called the  
22 mother, said, come over to the school, the mother said,  
23 I can't get there for 15 minutes. The girl was required  
24 to sit there. Is she under arrest?

25 MS. DE JULIO: No, Your Honor, I don't believe

1       that she is under arrest.

2               QUESTION: Can he require her to stay there?

3               MS. DE JULIO: Yes, I believe under New Jersey  
4 law certainly he can.

5               QUESTION: If when the mother got there she  
6 took the purse and opened it, would the mother be  
7 violating the Fourth Amendment?

8               MS. DE JULIO: No.

9               QUESTION: What is the difference between the  
10 mother and the teacher in your view?

11              MS. DE JULIO: Well, the difference is, I  
12 think, the difference between private action and  
13 governmental action. There have been cases which have  
14 recognized that private citizens --

15              QUESTION: Only the state action factor is  
16 different. Is that it, in your view?

17              MS. DE JULIO: Yes, Your Honor, I think --  
18 with regard to the Fourth Amendment.

19              QUESTION: In other words, the parent has an  
20 inherent right to open the purse of the girl, but there  
21 is no inherent right on the part of the teacher?

22              MS. DE JULIO: Certainly the Fourth Amendment  
23 would not be violated by the parent conducting a search  
24 herself or himself.

25              QUESTION: Haven't you got a little bit of



1 state action mixed in with the mother's action when the  
2 mother is there at the command or request of the state,  
3 and the mother is responding to the state's inquiry?

4 MS. DE JULIO: Well, certainly, if it were  
5 found that there had been any coercion or attempt to  
6 mislead or in some way implicate the parent as a tool of  
7 law enforcement, there might be, and the New Jersey  
8 Supreme Court recognized that in certain school searches  
9 if police instigation were found, or some attempt to  
10 circumvent the Fourth Amendment, that might be dealt  
11 with as a Fourth Amendment problem.

12 But in a purely parental situation, where a  
13 parent, acting as a parent, searches a student, searches  
14 their child, that evidence would not be proscribed by  
15 the Fourth Amendment, even if it had been seized under  
16 circumstances that we would not perhaps find to be  
17 proper, such as the employer breaking into the desk of  
18 an employee. That might violate certain criminal  
19 statutes, but it would not prevent the state from  
20 utilizing that evidence in some --

21 QUESTION: Would you have any problem with  
22 metal detectors such as those we have outside the Court  
23 being at the schoolhouse door?

24 MS. DE JULIO: Well, certainly that is well  
25 outside the facts of this case, but assuming that

1 hypothetically the cases allowing the use of a metal  
2 detector on a general basis, such as the airport, or  
3 that line of cases, are based upon the idea that the  
4 individual is voluntarily seeking the service that makes  
5 it necessary for him to go through the gate.

6 Here, with students, they are compelled to  
7 attend school, so by forcing them to walk through a  
8 metal detector, which is a more minimal intrusion into  
9 privacy, certainly, but the element of choice is simply  
10 not there.

11 An adult can choose to take a plane or not,  
12 knowing that a metal detector is one of those things he  
13 will have to submit to, but a child is required to go to  
14 school, and cannot refrain.

15 QUESTION: Even if you had an epidemic of use  
16 of knives in a particular school, no metal detector?

17 MS. DE JULIO: Well, certainly there would  
18 have to be some showing that this particular tool was  
19 necessary, but apart from that, again, I think that the  
20 distinguishing factor, the factor which makes that type  
21 of search possible and constitutionally permissible in  
22 an airport and not in a school is the element of  
23 voluntariness.

24 QUESTION: What about searching purses, as  
25 takes place in this building?

1 MS. DE JULIO: Well, once again, the  
2 individuals who enter this building do so --

3 QUESTION: Is that the only difference, that  
4 they enter the building voluntarily?

5 MS. DE JULIO: I think that that is certainly  
6 a significant difference.

7 QUESTION: What about a prison? Would you say  
8 you can't have metal detectors at a prison because the  
9 people going to prison aren't going there voluntarily?

10 MS. DE JULIO: Well, Your Honor, certainly the  
11 difference between a prison and a school is a critical  
12 factor in the analysis. This Court last term found that  
13 inmates have no expectation of privacy in their cells  
14 based upon the nature, goals, and operations of a penal  
15 institution.

16 I don't believe that any of the factors which  
17 were utilized in the Court's analysis of a prison have  
18 application in a school. First of all, we are not  
19 talking about confining people who have committed crimes  
20 and are shown that they are dangerous.

21 QUESTION: But it at least suggests that your  
22 voluntariness analysis is not good for all cases.

23 MS. DE JULIO: Well, I think it is a factor  
24 that has to be taken into consideration. Prison --

25 QUESTION: You are a respondent here. How

1 voluntarily have you come?

2 MS. DE JULIO: I personally have come  
3 voluntarily, although certainly someone would have had  
4 to appear on behalf of the respondent. That I think is  
5 a voluntary assumption on my part.

6 But I think that the prison analogy fails also  
7 because the lack of rights is part of the punitive  
8 feature of prison, whereas certainly in an educational  
9 context respecting the constitutional rights of students  
10 is considered part of the educational purpose of  
11 schools.

12 Thank you.

13 CHIEF JUSTICE BURGER: Very well.

14 ORAL ARGUMENT OF ALLAN J. NODES, ESQ.,  
15 ON BEHALF OF THE PETITIONER - REUBTAL

16 MR. NODES: Mr. Chief Justice, and may it  
17 please the Court, I believe that the analysis which was  
18 just given concerning the distinction between a student  
19 in a public school and a student in a private school has  
20 some importance in evaluating the differences between a  
21 juvenile and an adult.

22 Last term in Shaw v. Martin this Court noted  
23 that juveniles are continuously under some form of  
24 custody or another, and this does not mean custody with  
25 total liberty, and it doesn't mean custody except when a



1 student attends a public school.

2 What it really means is that they are under  
3 that form of custody and the amount of custody which  
4 will ensure their safety and their wellbeing, and that  
5 is why society insists on adult supervision of  
6 juveniles, and that is why society insists that the  
7 juveniles do be under continual custody.

8 QUESTION: Mr. Nodes, may I ask you a question  
9 on that? Supposing a juvenile, a young lady in this  
10 case, was riding in an elevator with a law enforcement  
11 officer, and she smoked in his presence. Would he be  
12 free to search her purse in the elevator?

13 MR. NODES: I don't know if a search of the  
14 purse would be at all -- I don't know if there is any  
15 kind of a violation that has occurred under your  
16 hypothetical.

17 QUESTION: There is a no smoking sign in the  
18 elevator. There is a city ordinance against smoking. I  
19 should have made that clear.

20 MR. NODES: I think the violation would be  
21 smoking a cigarette, and in that case there would be  
22 really no relevance at all to whether or not she had  
23 additional cigarettes.

24 QUESTION: What if she denied she smoked?  
25 Just like this girl did.

1           MR. NODES: It would be very difficult. If he  
2 was the same person who observed her, there is no  
3 question of his credibility. He doesn't have to do this  
4 to check his own credibility.

5           QUESTION: Then in this case the vice  
6 principal could search the purse but not the teacher who  
7 saw her in the restroom. Is that what you are saying?

8           MR. NODES: I think that the vice principal  
9 could search the purse. I think there would probably be  
10 less need for the teacher to search the purse, or if the  
11 vice principal had directly seen it, there would be less  
12 reason for him to do it. And I think that is something  
13 that --

14          QUESTION: What if the officer in my example  
15 took her to the station, and then the person at the  
16 station says, I would like to search your purse. Could  
17 he have done it?

18          MR. NODES: I believe the further you become  
19 removed from individual direct observation, the more  
20 need for proof of credibility there is, and the more  
21 need for credibility proof you have, the more necessary  
22 the search.

23          QUESTION: Is there anything in this record to  
24 show that the vice principal didn't trust the teacher's  
25 veracity?

1 MR. NODES: No, there isn't anything to show  
2 that he didn't trust the teacher's veracity. What there  
3 is is, there is evidence to show that he was willing to  
4 give the student the benefit of every doubt, and we feel  
5 that that is something which is appropriate, and which  
6 he should not be criticized for, at the very least.

7 But whether the Fourth Amendment is held  
8 inapplicable or whether a lower standard is applied, we  
9 feel that what is necessary is that teachers be given an  
10 immediate and effective means of conducting searches and  
11 performing other disciplinary factors, and we believe  
12 that either by ruling the Fourth Amendment inapplicable  
13 or by holding a much lower standard than probable cause  
14 to be appropriate, that this can be accomplished.

15 Thank you.

16 CHIEF JUSTICE BURGER: Thank you, counsel.

17 The case is submitted.

18 - (Whereupon, at 11:03 a.m., the case in the  
19 above-entitled matter was submitted.)  
20  
21  
22  
23  
24  
25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:  
#83-712 - NEW JERSEY, Petitioner v. T.L.O.

---

---

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY

Paul A. Richardson

(REPORTER)



RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'84 OCT -9 P3:13