Drug Testing: A Question of Constitutional Privacy?

By Amy Weiss

Since Reagan's War on Drugs in the 1980's, drug testing of students and employees has become increasingly widespread. The Fourth Amendment's protection against unreasonable searches and seizures, however, provides a significant barrier to these developments.

THE UNITED STATES SUPREME COURT RECENTLY accepted on writ of certiorari a drug testing case, Vernonia School District v. Acton, which will be argued during its October, 1995 term. The Court adjudicated on the issue of drug testing throughout the 1980s, but this case will be the first to address the issue of random drug testing. The Court's conservative majority bloc has consistently upheld drug testing programs based on evidence of an individual's current drug impairment or involvement in an accident on the job, while leaving the question of random testing to the state and lower federal courts.

Although hailed as the most effective deterrent to drug use, random drug testing programs pose the highest degree of intrusion on one's privacy. By approving drug testing programs lacking warrant and probable-cause requirements, the Supreme Court has undermined the Fourth Amendment's protection of individuals against unreasonable searches.

THE EMERGENCE OF DRUG TESTING

Drug testing first became a contested public policy issue when the "rising anti-drug sentiment" and "public outrage over drug abuse" reached a peak during the Reagan era and encouraged employers to implement drug testing programs (Duffy 16). The President provided the major thrust for the increase in drug testing programs across the country when he launched his controversial "get tough" program in September, 1986. He ordered "mandatory drug testing for half the federal work force - 1.1 million employees largely working in national-security, law-enforcement, and safety-related positions" (Barnes 6).

In compliance with Reagan's program, federal agencies began implementing regulations in accordance with the Administration's guidelines for drug testing programs. In May of 1986, the President's Commission on Organized Crime issued a report calling for drug testing programs in both government and private industry.

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THE FOURTH AMENDMENT DEBATE OVER DRUG TESTING

Certain congressional members, government employee unions, and influential interest groups, such as the ACLU, fervently resisted Reagan's plan and raised crucial questions about the constitutionality of particular drug testing programs. Critics argued that such programs, most of which comprise "compulsory urinalysis drug testing which is not based upon an objective, individualized suspicion of drug abuse," violate the Fourth Amendment's protection against unreasonable searches and seizures and completely abandon the due process presumption of innocence (Adler 3). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable-cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.

On one side of the debate are heads of federal agencies and corporations who believe **that** workplace efficiency and safety outweigh individual privacy concerns and the necessity of Fourth Amendment warrant and probable-cause requirements. Some maintain that suspicion of an individual's drug use on the job is sufficient for a reasonable search, whereas others support drug testing even **without** prior suspicion. Those school administrators who believe that the importance of maintaining school order and discipline outweighs students' privacy interests also fall into this category.

On the other side of the debate are those who argue that an individual's privacy must be safeguarded by a warrant and probable cause, or at least reasonable suspicion. Civil libertarians, for example, believe that without these safeguards, all searches would be unreasonable, especially intrusive blood or urine tests, which may involve direct observation of the act of urination. They feel that the high potential for false-positives, which could not only falsely stigmatize an employee but could also lead to his or her discharge from work, raises crucial privacy concerns.

Furthermore, the fact that most tests cannot detect current impairment presents controversial issues. For instance, urinalysis can detect drug use up to 60 days prior to the actual testing, thus raising questions about off-the-job privacy and Fifth Amendment protection against self-incrimination. In addition, drug test results reveal a number of private medical facts about an employee, such as whether he or she is infected with HIV, diabetic, epileptic, or pregnant, and this information alone may, in certain circumstances, lead to one's termination of employment because of an employer's concern about insurance costs.

As early as 1928, Justice Louis Brandeis passionately argued, in his famous dissent in Olmstead v. United States, that "the right to be let alone" is "the most comprehensive of rights and the right most valued by civilized men" (277 U.S. 438). Brandeis was way ahead of his time; his beliefs about searches were not adopted by a majority of the Court until Katz v. United States, thirty-nine years later.

The Supreme Court in Katz extended the Fourth Amendment's protection against unreasonable searches to peo-

pie, as well as places, and ruled that if one has a reasonable expectation of privacy, then he or she is protected by the Fourth Amendment without regard to location. In subsequent cases, courts have applied the Katz ruling to decide whether one's reasonable expectation of privacy has been violated; following that determination, they have balanced an individual's privacy interest against the government's, administrator's, or employer's need to search that individual.

THE GRADUAL EROSION OF FOURTH AMENDMENT REQUIREMENTS

In all Fourth Amendment search and seizure cases concerning the issue of drug testing, the Court employs its traditional two-step process in order to determine if the drug testing program is constitutional. First, it decides whether the drug test constitutes a search under the Fourth Amendment by examining the degree of intrusion and the individual's expectation of privacy. Secondly, the Court decides whether the search is reasonable; if not, then it violates the Fourth Amendment and is struck down as unconstitutional.

Historically, a search was deemed reasonable only if the warrant and probable-cause requirements of the Fourth Amendment were satisfied; however, in several cases, the Supreme Court upheld the constitutionality of drug testing programs that require neither warrants nor a showing of reasonable suspicion.

The U.S. Supreme Court has defined both blood and urinalysis tests as searches under the Fourth Amendment. For example, in Schmerber v. California, the Court found that the blood test of a person suspected of drunk driving clearly implicated the search and seizure provisions of the Fourth Amendment. In its ruling, however, the majority upheld the blood test even though a warrant was not obtained. The Court reasoned that although without a warrant, the police officer had individual suspicion that the suspect had violated the law, and furthermore, the "exigent circumstances" in this case required an immediate search (Hodkin 132).

Two years after Schmerber, in Terry v. Ohio, the Supreme Court first ruled that that a physical intrusion, which penetrates beneath the skin for drug testing, constitutes a search under the Fourth Amendment. Secondly, the Court held, for the first time, that a valid search may be conducted when based on less than probable cause. It established the "reasonable test" by which two competing interests are balanced: the need to search and individual privacy. This test stipulates that if the need to search outweighs the privacy interest, then a warrantless search is reasonable, and the Fourth Amendment offers no protection.

In 1989, the Court granted even more discretion to those conducting drug tests by ruling in favor of a program requiring neither individual suspicion nor a warrant and probable cause. This program stipulated that supervisors immediately transport railway employees present at the scene of an accident or fatal incident to a laboratory for mandatory drug testing. Despite his ruling in favor of the drug testing program, Justice Anthony Kennedy wrote:

> It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. (Skinner v. Railway Labor Executives Assn., 489 U.S. 602,1989)

VERNONIA SCHOOL DISTRICT V. ACTON

Vernonia School District v. Acton involves a random drug testing program implemented by a small Oregon school district for student athletes. This program requires students to consent to random urinalysis in order to compete in high school and middle school athletics. Positive test results lead to suspension from the sports program for up to three years. The parents of a seventh grader, who was not allowed to play football after he and his parents refused to sign the consent form, filed suit in a federal district court in Oregon, challenging the school's drug testing policy. The district court upheld the program as constitutional, but the United States Court of Appeals for the Ninth Circuit reversed that decision.

The New York Times indicates that the outcome of the case hinges on "how broadly the Justices define the issue: as the general question of random drug testing or the more limited question of random drug testing in the schools" (Greenhouse A1). The latter seems more likely since Supreme Court Justices generally confine their opinions to the particular circumstances presented by each case rather than render advisory opinions.

SCHOOL SEARCHES

During the 1980s, the Supreme Court decided a trio of cases which upheld the constitutionality of warrantless civil searches, one of which took place at a school. In New Jersey v. T.L.O., the Court upheld the warrantless search of a student's purse because the administrator who conducted the search had reasonable, "individualized" suspicion that the purse contained marijuana. The T.L.O Court abandoned the warrant and probable-cause requirements and created what is known as the "special needs" exception. Justice Blackmun, in his concurring opinion, articulated this concept:

> Only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing interests for that of the Frnmers. (New Jersey v. T.L.O., 469 U.S. 325,1985)

Under this approach, if the Court concludes from its balancing test that the need to search encompasses "special needs," such as a principal's need to prevent student drug use, then the individual's privacy interest receives no Fourth Amendment protection, and the search is constitutional. In T.L.O., the Court also found that students, compared to adults, have a diminished expectation of privacy against searches intended to maintain school order. This 1985 case could have important implications for Vernonia School District v. Acton; however, it did not involve random testing, and it left unresolved the question of whether a search, or drug testing, of a student requires reasonable suspicion of evidence that the student has violated the law or a school rule.

COURT TRENDS AND THEIR IMPACT ON THE WORKPLACE

Since the end of the Warren Court in 1968, the Supreme Court has become increasingly conservative in its decision making. The four Reagan appointees who now sit on the Court, Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, and William

Rehnquist (whom Reagan promoted to Chief Justice) voted in favor of warrantless civil searches during the 1980s. Rehnquist, the most ardent supporter of judicial restraint, tends to defer to the judgment of administrators, executive agencies, and other technocrats as evident in his voting pattern on Fourth Amendment cases. He has conspicuously avoided the using the word "privacy" since he does not recognize it as a constitutional right.

Judicial activists, on the other hand, have been passionately committed to questioning law enforcement and administrative procedures when individual privacy is at stake. During their tenure on the Court, Justices Thurgood Marshall and William Brennan, Jr. consistently exercised judicial activism on behalf of individuals at the mercy of administrators, employers, police officers, and other officials. As noted in The Brethren, Brennan was "the most energetic advocate" who "rarely failed to put together a majority;" however, when governmental needs were weighed against individual privacy rights, the conservative bloc of the Rehnquist Court won out and repeatedly tipped the scale toward the government (Woodward 47).

Marshall feared that searches lacking suspicion would lead to discretionary abuses by drug testing officials and complete disregard for individual liberty. In his dissent against the "special needs" exception established in T.L.O., he portended "a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens" (New Jersey v. T.L.O., 469 U.S. 325, 1985). His prediction has indeed become true, as evidenced by recent state and lower federal court decisions and trends toward the approval of broad, random drug testing programs.

OUTLOOK AND FINAL THOUGHTS

These court decisions at both the federal and state levels have granted more discretion to those who carry out administrative and regulatory, as opposed to criminal, searches. While law enforcement officials are generally bound by traditional Fourth Amendment warrant and probable-cause requirements, employers are capitalizing on the courts' confirmation of the "administrative exception."

Employers' new drug testing policies, however, have not escaped challenges and lawsuits by labor unions, civil rights groups, and employees. Employers have thus instituted safeguards, such as advanced notice or consent procedures, to protect employee privacy rights. They have also taken steps to ensure testing accuracy and integrity since privacy pertains not only to the actual collection of test samples, but also to the confidentiality of test results.

The Skinner ruling, among others, has assured employers that the mere fact that most tests cannot measure current impairment and are rarely 100 percent accurate is no basis for automatically voiding them. Most employers nevertheless recognize that the more privacy guarantees a drug testing program has, the more likely it will be upheld. Today, millions of Americans and a majority of public sector employees now face the prospect of some type of drug testing at their workplaces.

The use of drug testing as an increasingly popular method of keeping workplaces and schools free of drugs raises arguments for and against a broader right to privacy: the right not only to be "let alone," but also to be free to choose whether to undergo certain experiences. While some view drug testing as merely a small inconvenience, others point out that the information gathered from such tests could either be false or reveal private medical conditions.

Although the word "privacy" is not written in the Constitution, the constitutional provisions which protect one's liberty interests occasionally serve to protect privacy as well. For instance, courts have interpreted the due process clauses of the Fifth and Fourteenth Amendments as barriers to invasions of privacy and autonomy. Like abortion and euthanasia, the issue of drug testing has only recently been dealt with by the courts, and like all other highly controversial issues, the more widespread drug testing becomes, the greater the likelihood that it will be challenged. D

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