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Random Drug Testing

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RANDOM DRUG TESTING

Random drug testing coexists uneasily with a general Fourth Amendment right to be free of suspicionless government searches. Typically, a governmental search is accompanied by a warrant supported by individualized suspicion, that is, probable cause. Random drug testing involves a search without any particularized suspicion that the subject of the search has used drugs. The Supreme Court has justified random drug testing, ruling that when the government has special needs to search apart from law enforcement, the warrant requirement does not apply and the only constitutional requirement is that the search be reasonable. Whether a search is reasonable depends on weighing the search's intrusion on the subject's privacy interest against the government's interests in the



Vials used to collect urine for drug and alcohol testing. Seattle, Washington, April 16, 2004. The constitutionality of random drug testing has challenged the Supreme Court to find a balance between protecting citizens from unreasonable searches with the need to guard the general public against accidents caused by workers under the influence of drugs. Citing the need for public safety, the court has generally accepted the necessity of random drug testing, despite the intrusion into an individual's right to privacy. RON WURZER/GETTY IMAGES

suspicionless search. The Court has tended to approve random drug testing programs instigated by the government by minimizing the privacy intrusion occasioned by the search and maximizing the government's apparent interest in the suspicionless search.

The Supreme Court has addressed random drug testing in various contexts, including with respect to sensitive government employment, private employment subject to government safety regulation, requirements to run for public office, and eligibility to participate in extracurricular activities in public schools. In the cases before the Court, random drug testing was used variously to detect drugs, to ensure the absence of drug use, or to deter drug use. Justifications for random drug testing have included claims that a harm may have occurred because of drug use, a harm could occur as a result of drug use, or that drug use is incompatible with an activity engaged in by the group subject to testing. The Court has not deemed random drug testing to be subject to a specific test. It has relied on the general umbrella of reasonableness to endorse or reject a random drug testing policy.

THE FOURTH AMENDMENT AND RANDOM DRUG TESTING

The Fourth Amendment states: "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 persons or things to be seized." The amendment applies directly to the federal government and indirectly to the states through the Fourteenth Amendment. In addition, it applies to searches conducted by those acting as agents of the government or instruments of government policy. For example, not only was a railroad company's testing of employees pursuant to statutory command deemed a search for Fourth Amendment purposes, so was a test pursuant to the "government's encouragement, endorsement, and participation" (*Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 [1989]). However, the amendment does not apply to private parties acting out of purely private concerns.

The Court has consistently concluded that random drug tests, be they tests of blood, urine or breath, are searches for Fourth Amendment purposes. The collection of the samples involves a search, as does the analysis of the samples. However, the Fourth Amendment only prohibits unreasonable searches. The Court has determined that the amendment's suggestion that warrants supported by suspicion of wrongdoing (e.g., probable cause) are the epitome of reasonableness is most relevant to criminal cases. When the government has special needs to search that are unrelated to normal law enforcement concerns, the Court dispenses with the warrant requirement. Whether such a

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suspicionless search is reasonable depends on the balancing of the legitimate interests of the government represented by the search with the individual's Fourth Amendment-based rights.

GOVERNMENT INTEREST IN RANDOM DRUG TESTING

The Court appears willing to find a significant government interest supporting random drug testing whenever the government has a sensible reason to test. The issue is not merely whether the government has a legitimate reason to be concerned about drug use in a variety of circumstances. The issue is whether that concern can be addressed by allowing random drug tests when the government has no reason to believe that a particular person, or possibly even any person at all, has taken drugs. Given that the government's interest in suspicionless testing must outweigh the intrusion on the privacy interests of the subjects, the more important the government's interest is deemed to be, the more likely the random drug testing will be allowed.

In 1989, the Court allowed random drug testing in two cases. *Skinner* involved federal regulations that required blood and urine tests of employees "involved in certain train accidents," and authorized breath and urine testing of "employees who violate certain safety rules." The regulations were promulgated pursuant to the Federal Railroad Safety Act of 1970, in the context of an industry-wide record of accidents and injuries stemming from on-the-job alcohol and drug use. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), concerned required urine tests for employees seeking transfer or promotion to positions involving drug interdiction or positions that require that the employee carry firearms, though it did not appear that there was a historical problem of drug use involving the employees the Customs Service sought to test. Both cases were based on significant public safety concerns.

In 1995 and 2002, the Court allowed random drug testing in two public school cases. The Court authorized testing in *Vernonia School District v. Acton*, 515 U.S. 646 (1995), where a policy authorized random drug tests of students participating in school athletics. There, the school district was fighting a drug problem among students that appeared to be fueled by student athletes. Part of the district's concern was that when drugs and athletics mixed, an increased incidence of injury could occur among all competitors, including those not taking drugs. The Court also allowed random drug testing in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002). There, the school board implemented a random drug testing policy for all students involved in extracurricular activities based on the general concern regarding drug use among the student body. The Court allowed the program based on

the general concern for student health, even though there appeared to be no reason to believe that the group that was to be tested was particularly likely to have taken drugs. The Court simply noted that, "we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring and detecting drug use." It appears that the policy was deemed reasonable in part because it helped deter all of the district's schoolchildren from taking drugs, whether they participated in extracurricular activity or not.

However, the Court voided the random drug testing policy in *Chandler v. Miller*, 520 U.S. 305 (1997). The program in that case required that candidates for certain state offices certify that they had taken a negative urinalysis test within thirty days prior to qualifying for nomination or election. The Court concluded that the structure of the testing indicated that it did not address a special need, but merely a symbolic one. That interest was not enough to outweigh the admittedly small privacy interest that was invaded.

RANDOM DRUG TESTING AND PRIVACY INTERESTS

In approving a number of random drug testing programs, the Court has suggested that the privacy interests implicated by random drug testing are significant. However, it has found those privacy interests less significant than the opposing governmental interests. The Court focuses on the reasonable expectation of privacy of the person who is being tested. However, in the process of evaluating the privacy interests, the Court arguably diminishes them. Given that privacy interests are balanced against government interests as a part of a balancing test, minimizing the privacy rights implicated will tend to lead to the approval of whatever random drug test is at issue.

The Court has tended to find a general diminished expectation of privacy for those who are subject to random drug tests, noting that those who are tested may have a diminished expectation of privacy based on the very activity that triggers the drug test. For example, in the context of evaluating the random drug testing of railroad workers after accidents, in *Skinner*, the Court indicated that by taking a job in a highly regulated industry, workers had a diminished expectation of privacy. The Court made a similar finding in *Von Raab*, because U.S. Customs Service workers might be involved in drug interdiction and could carry weapons. In addition, the Court in *Acton* and *Earls* indicated that student athletes and students involved in extracurricular activities necessarily yielded some of their privacy by participating in school activities that would expose them to situations of communal undress. Nonetheless, even a lessened expectation of privacy may still be invaded by random drug testing.

Random drug tests implicate a wide range of privacy interests related to the collection of samples, the analysis of the samples, and the dissemination of the results of the testing. The collection of samples for testing can physically and emotionally intrude on privacy rights. The Court has considered the physical intrusion of breath and blood tests, and found them minimal. However, the Court has suggested that the privacy interests implicated by the process of collecting urine samples can be significant, particularly given the reasonable expectation of privacy in excretory bodily functions. However, the Court suggests that if the procedures used to monitor the act of giving the urine sample are respectful of privacy and are limited to guaranteeing that no tampering has occurred, legitimate privacy interests will not be overwhelmingly invaded. Indeed, the Court has suggested that being monitored while producing a urine sample is similar to urinating while in close proximity to others—a common occurrence in a public bathroom—and that privacy interests are not significantly implicated as long as the subject is fully clothed and monitored at a respectful distance. The Court ignored or failed to recognize a difference in privacy interests between urinating while in close proximity to others and being monitored while producing a urine sample for a drug test.

In addition, the chemical analysis of the samples qualifies as an additional search that intrudes on privacy interests. Blood and urine can be tested for many different substances that can reveal significant medical information. Factors relevant to the reasonableness of the search include whether the testing program tests only for those substances that are relevant to the concerns of those who require the tests, whether private medical information must be revealed in the course of the testing, and how broadly test results will be disseminated. The Court appears to conceive of the privacy right as the right not to have one's private medical conditions revealed, rather than the general right to not have one's body fluids searched.

Given that the Court now deems a government-ordered blood test for drugs to be a negligible invasion of privacy rights, it is fairly clear that the Court has sought to minimize the right to be free of searches. It is this minimized right that is then weighed against the governments interest in suspicionless testing.

It is unclear whether the Supreme Court's treatment of random drug testing suggests a shift in how the Fourth Amendment applies to searches outside of the criminal context or indicates that the Court is willing to provide as many tools as possible for the government's fight against drugs. The Court has made clear that a reasonable search is a constitutional search and that it will determine what is reasonable. In judging reasonableness, the Court has created a balancing test that weighs the random search's intrusion of privacy interests against the government's

interest in the policy. However, it appears to have minimized the apparent intrusion on privacy rights and maximized the apparent weight of government's interest in testing, with the result that random drug testing program may be fairly easy to construct in a constitutional manner.

SEE ALSO *Fourth Amendment; Privacy; Search and Seizure*

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RANKING THE JUSTICES

Between 1928 and 2004, there were twelve major studies that proposed rankings of U.S. Supreme Court justices, including those compiled by justices Charles Evans Hughes (1928) and Felix Frankfurter (1957) and those by Roscoe Pound (1938), John P. Frank (1958), George Currie (1964), Stuart Nagel (1970), Sidney Asch (1971), Albert Blaustein and Roy Mersky (1972, updated by William Ross [1996]), Bernard Schwartz (1979), James Hambleton (1983), Robert Bradley (2003), and Michael Comiskey (2004). In his 1996 article "The Ratings Game," William Ross remarks that far from merely being a parlor game, these rankings have elucidated the qualities of Supreme Court justices that are valued by Americans (p. 402). In addition to producing a list of the greatest justices, Bernard Schwartz also compiled a list of the ten worst justices, whom he calls "Supreme Court failures," in his 1997 *Book of Legal Lists*.

METHODOLOGIES

Most of the rankings were made on the basis of each compiler's individual evaluation (Hughes 1928; Pound