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Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues

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Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues

Summary

Problems of usage of steroids and other performance enhancing drugs in professional and amateur athletics have been the focus of a series of investigative hearings before the House Government Reform Committee. The Committee began taking evidence on March 17, 2005, when several former and current players, medical experts, and major league baseball executives were summoned to testify in the first hearing. Committee Chairman Tom Davis has urged all sports leagues to “acknowledge that their testing programs need improvement” and has framed bipartisan legislation to establish a uniform testing policy for major professional sports leagues. Currently, there are four professional athletic drug testing bills before Congress: S. 1114 (Senator McCain); H.R. 2565 (Representative Davis); H.R. 1862 (Representative Stearns); and H.R. 2516 (Representative Sweeney). The McCain and Davis bills are virtually identical, and all four bills would establish minimum drug standards – including random testing – for some professional sports leagues.

Congressionally mandated drug-testing requirements for both public employees and workers in private industry subject to federal regulation have a fairly long and well established legal history. Nonetheless, the federal courts have recognized limits, largely anchored in constitutional privacy interests of affected workers, that circumscribe governmental authority to impose suspicionless random testing requirements in the public or private sectors. These decisions establish that “compelling” governmental interests may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or workplace scrutiny to which they are otherwise subject. They further suggest, however, that substantial constitutional difficulties probably confront any broad-based testing program that is not limited to specific occupational categories or to persons for whom the government is able to demonstrate some special need to test.

It could be argued that professional players have a diminished expectation of privacy as the consequence of league or association rules that already require routine physical examinations and testing for drugs in certain circumstances. Moreover, a separate argument could be made that safety and health concerns associated with steroid usage, and the importance of professional athletes as role models for the nation’s youth, justify unannounced testing for anabolic steroids or other controlled substances. Testing of randomly selected athletes may also be the least intrusive route to an effective steroid detection program. Past major league baseball procedures, it has been argued, do not deter steroid use. Moreover, arguably, the reasonable suspicion standard may be unworkable since most often there may be no outward symptoms to signal the use of steroids.

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Federally Mandated Random Drug Testing in Professional Athletics: Constitutional Issues

Problems of usage of steroids and other performance enhancing drugs in professional and amateur athletics have been the focus of a series of investigative hearings before the House Government Reform Committee. The Committee began taking evidence on March 17, 2005, when several former and current players, medical experts, and major league baseball executives were summoned to testify in the first hearing. National Football League Commissioner Paul Tagliabue next testified, on April 27th, concerning details of the NFL steroid testing procedures and how they were negotiated between the league and the NFL players' union. The Committee also requested summaries of all test results during the period that testing has been in place, although not the names of individual players. Similar requests have reportedly been made of National Basketball Association, National Hockey League, US Soccer Federation, Major League Soccer, Association of Tennis Professionals, USA Track and Field, and USA Cycling. Committee Chairman Tom Davis has urged all sports leagues to "acknowledge that their testing programs need improvement" and has framed bi-partisan legislation to establish a uniform testing policy for major professional sports leagues.¹ Currently, there are four professional athletic drug testing bills before Congress: S. 1114 (Senator McCain); H.R. 2565 (Representative Davis); H.R. 1862 (Representative Stearns); and H.R. 2516 (Representative Sweeney). The McCain and Davis bills are virtually identical, and all four bills would establish minimum drug standards – including random testing – for some professional sports leagues.

The McCain/Davis proposal, for example, would require "major professional sports leagues" – defined to include Major League Baseball, the National Football League, the National Basketball Association, and the National Hockey League, and any "successor leagues" – to implement independently administered drug testing programs mirroring the standard of the United States Anti-Doping Agency (USADA). At a minimum, each professional athlete would have to be tested without advance notice no less than five times each calendar year, including at least two off-season tests. Each test would have to cover all substances prohibited in USADA's anti-doping code and would have to be analyzed at a USADA-approved lab.

Athletes testing positive (or refusing to test) a first time must be suspended a minimum of two years and would be subject to permanent suspension from the professional sports association for any later infraction. The leagues would be required to disclose positive tests and resulting penalties to the public. Each covered league

¹ 4/28/05 Phila. Daily News 70, 2005 WLNR 6611442.

would have to develop an adjudication process to provide the athlete who tests positive a hearing (after notice), representation of counsel, and the right to appeal. While such proceedings are pending, the athlete in question would be suspended. For a detailed discussion of all measures currently before Congress on the subject, see CRS Report RS22156, *Drug Testing in Sports: Proposed Legislation*, by Nathan Brooks.

Congressionally mandated drug testing requirements for both public employees and workers in private industry subject to federal regulation have a fairly long and well-established legal history. Nonetheless, as described more fully below, the federal courts have recognized limits, largely anchored in constitutional privacy interests of affected workers, that circumscribe governmental authority to impose suspicionless random testing requirements in the public or private sectors. This report examines relevant judicial precedents for their applicability to the issue of random testing for performance-enhancing substances in professional athletics.

Constitutional Background

Constitutional law on the subject of governmentally mandated drug-testing is primarily an outgrowth of the Fourth Amendment prohibition on unreasonable searches and seizures.² A judicial exception to traditional requirements of a warrant and individualized suspicion for “administrative” searches has been applied to random drug testing of government employees, and of private employees tested pursuant to government regulation. In the employment setting, such testing has been justified under a “special needs” analysis, which the courts have applied in relatively narrow circumstances directly implicating “compelling” public safety, law enforcement, or national security interests of the government. More generalized governmental concerns for the “integrity” or efficient operation of the public workplace have usually not been deemed sufficient to justify interference with the “reasonable expectation of privacy” of workers or other individuals to be tested

The Supreme Court in 1989 applied the “special needs” doctrine to dispense with the normal warrant and probable cause requirements of the Fourth Amendment when the government demonstrates compelling justification “beyond ordinary law enforcement” for an employee drug testing program. In *National Treasury*

² Drug testing programs have also been challenged under the First, Fifth, and Fourteenth Amendments, based on arguments that the testing procedures or some other aspect of the program violated rights to due process, equal protection, privacy, and freedom of religion. In general, such claims have proven unsuccessful where the testing program included legal safeguards, such as the use of non-discriminatory testing practices, chain of custody procedures, confidentiality, adequate notice, properly certified laboratories, confirmatory tests, and other procedures designed to ensure fairness and to minimize the intrusiveness of the drug testing program. See, e.g. *Shoemaker v. Handel*, 795 F.2d 1136, 1139-41, 1143 (referring to selective enforcement of urine testing of jockeys as denying them equal protection of the laws); *Rushton v. Nebraska Pub. Power District*, 844 F.2d 562, 564-66 (8th Cir. 1988)(discussing plaintiffs’ contention that the drug testing program violated their First Amendment rights).

Employees Union v. Von Raab,³ extraordinary safety and national security concerns justified urinalysis testing of Customs Service employees seeking transfer or promotion to positions directly linked to drug interdiction, handling classified information, or the carriage of firearms. Similarly, in *Skinner v. Railway Labor Executives' Ass'n*,⁴ neither a warrant nor particularized suspicion was required for a Federal Railway Administration (FRA) program of blood and urine tests for railroad employees involved in accidents or who violated certain safety standards. In both cases, the Court emphasized that special needs analysis applied only where testing was not used as a prosecutorial tool. In *Veronia School District v. Acton*,⁵ the Supreme Court first approved of random drug testing procedures – for high school student athletes rather than public employees – a holding that it later extended to permit random drug testing of students participating in non-athletic extracurricular activities as well. However, the Court distinguished earlier rulings when, in *Chandler v. Miller*,⁶ it voided a Georgia law requiring drug testing of candidates for state office because no "special need" substantial enough to warrant suspicionless searches was shown.

The Supreme Court in *Skinner* discarded the reasonable suspicion standard for testing within industries that are "pervasively regulated." The rationale is that the existence of extensive federal or state regulation in and of itself diminishes the reasonable expectation of privacy of those involved in the industry. The primary issue before the lower courts in *Shoemaker v. Handel*⁷ was whether state-mandated drug and alcohol tests, administered without individualized suspicion, to thoroughbred race horse jockeys by the New Jersey Racing Commission, violated the Fourth Amendment.

The district court upheld the program, finding that the jockeys voluntarily participated in horse racing and that the state had shown a compelling need for conducting the tests. First, the court recognized that horse racing was a unique class of industry subject to "heavy" state regulation. Second, jockeys were licensed by the state and had received notice of the implementation of the tests. Although notice and licensure did not serve as a waiver of Fourth Amendment rights, they were factors to be considered in balancing the jockey's expectations of privacy against the needs of the state. Third, the state had a vital interest in ensuring that the horse racing industry was run honestly and safely and that the public perceived it as such. Finally, the jockeys tested were selected by random drawing not subject to the bias or discretion of test administrators.

The Third Circuit Court of Appeals affirmed the district court decision. In particular, the appellate opinion emphasized the pervasiveness of New Jersey state regulation and the state's "strong" interest in preserving the "integrity" of the horse-

³ 489 U.S. 656 (1989).

⁴ 489 U.S. 602 (1989).

⁵ 515 U.S. 646 (1995).

⁶ 520 U.S. 305 (1997).

⁷ 619 F. Supp. 1089 (D.N.J. 1985), aff'd, 795 F.2d 1136 (3d Cir. 1986).

racing industry. In assessing the reasonableness of the testing scheme, the *Shoemaker* court found that the integrity of a sport, from which large sums of revenue were collected, outweighed the jockeys' individual privacy interests.

New Jersey has a strong interest in assuring the public of the integrity of persons engaged in the horse racing industry. Public confidence forms the foundation for the success of an industry based on wagering. Frequent alcohol and drug testing is an effective means of demonstrating that persons in the horse racing industry are not subject to certain outside influences. It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing.⁸

Summing up, the Third Circuit concluded that to justify governmentally imposed random testing, there must be a "strong state interest" in the search and "the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search."⁹ Other post-*Shoemaker* rulings are in agreement.¹⁰

In *Veronia School District v. Acton*,¹¹ the Supreme Court sustained a random drug-testing program for high school students engaged in interscholastic athletic competition. The Student Athlete Drug Policy required mandatory and random suspicionless urinalysis testing of all student athletes within the district. The purpose of the policy was to protect the health and safety of the athletes and to rehabilitate drug users by enrolling them in a drug assistance program. All students wanting to participate in a school-sponsored sports team had to provide a consent form, signed both by the student and his or her parents, acquiescing in the tests. Each athlete was tested at the beginning of the athletic season, and anytime during the season that such student's name was randomly selected. Ten percent of the athletes were randomly drawn each week from a pool for testing.

The Supreme Court found that the privacy interest of high school student athletes is diminished by "an element of 'communal undress' inherent in athletic competition." "School sports are not for the bashful," and by choosing to participate in athletics the students "voluntarily subject themselves to a degree of regulation

⁸ Id. at 1142.

⁹ Id.

¹⁰ See e.g. *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir 1991)(en banc) where the full appeals court upheld a similar rule of the Illinois Racing Board on behalf of jockeys and other horse racing participants required to submit to suspicionless drug testing. In striking a balance between the intrusiveness of the rule and the Board's reasons for it, the court cited the state's substantial interest in promoting the safety of participants as well as protecting financial revenue which it derive from the betting public's interest in a "clean" sport. The opinion also stressed that since jockeys and other participants were subject to frequent medical examinations, they had a diminished expectation of privacy, which was outweighed by the state's interests in this case.

¹¹ 515 U.S. 646 (1995).

even higher than that imposed on students generally.”¹² Moreover, an “immediate crisis,” caused by “a sharp increase in drug use” in the school district, triggered installation of the program. District Court findings established that student athletes were not only “among the drug users,” they were “leaders of the drug culture.”¹³ The opinion emphasized that “students within the school environment have a lesser expectation of privacy than members of the public generally.”¹⁴

Balanced against this diminished expectation, the Court determined that the state’s interest in protecting the physical and mental well-being of student athletes while in state custody was “important – indeed perhaps compelling.” In this regard, the program’s context was “central” to Justice Scalia’s majority opinion. Local government bears large “responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.”¹⁵ Because of this “custodial and tutelary” relationship between the government and its students, school officials regularly exercise “a degree of supervisory control that could not be exercised over free adults.”

In *Board of Education v. Earls*,¹⁶ the Court pressed the *Veronia School District* rationale one step further, finding that because of its unique relationship with students, the state’s interest in preventing drug use outweighs the privacy interest of students participating in any competitive extracurricular activities. In addition, *Earls* noted “this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing”¹⁷ and would not set a threshold level of drug abuse sufficient to support a drug testing program. Instead, the Court found that prevention of harm to school children tested sufficed to demonstrate the necessity for a drug testing policy.

Performance Enhancing Drugs in Professional Sports

These decisions establish that “compelling” governmental interests may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or workplace scrutiny to which they are otherwise subject. They further suggest, however, that substantial constitutional difficulties probably confront any broad-based testing program that is not limited to specific occupational categories or to persons for whom the government is able to demonstrate some special need to test.

A special need has generally been found where there is a history of drug abuse in an industry, when the employment involves work in safety-sensitive or high risk positions, or where there is evidence that drug use has led to accidents or other dangers to the public welfare. But, as Justice Scalia suggests in *Veronia School*

¹² Id. at 650.

¹³ Id at 649.

¹⁴ Id. at 657.

¹⁵ Id. at 665.

¹⁶ 536 U.S. 822 (2002)

¹⁷ Id. at 835.

District, the concept may be sufficiently elastic to encompass any “interest that appears *important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy.”¹⁸ As such, the legality of any mandatory testing regime may depend upon the range of governmental interests that the Court ultimately declares to be “compelling” for Fourth Amendment purposes, and how close the required “nexus” to such interests must be to justify random testing of specific individuals or groups.

The application of the *Shoemaker* precedent would seem to require judicial recognition that professional sports, like horse racing involved there, is a “closely regulated industry.” While professional baseball, football, and hockey may be subject to union collective bargaining agreements and other largely self-imposed owners’ association and league rules, the hand of government in day-to-day team governance and control appears to be far less. Instead, owners individually and in association remain largely free to set their own standards for player conduct and team management, and even enjoy some limited exemptions from federal regulation – antitrust, for example – that apply to other business sectors. Nor, unlike the jockeys in *Shoemaker*, are professional baseball or football players licensed by state or federal authorities, a potentially relevant distinction. In short, the position of the professional athlete may be readily distinguishable from the jockeys in *Shoemaker* and railroad workers in *Skinner*. For similar reasons, the “custodial and tutelary” relationship of the state to student athletes would appear to deprive *Veronia School District* and its progeny of direct precedential (though perhaps not persuasive) value.

Even apart from governmental regulation, however, it could be countered that professional players have a diminished expectation of privacy as the consequence of league or association rules that already require routine physical examinations and testing for drugs in certain circumstances. Moreover, a separate argument could be made that safety and health concerns associated with steroid usage, and the importance of professional athletes as role models for the nation’s youth, justify unannounced testing for anabolic steroids or other controlled substances. Medical evidence could be mustered in the course of ongoing congressional hearings of the adverse health effects, not only to the steroid users, but to the safety of other players. Second, it could be argued, protecting the integrity of the game may be particularly important given the demonstrable influence of professional athletes on young players at all levels. The NFL, for example, cites three reasons, including the health of players, for its concern about the use of prohibited substances.

[They] threaten the fairness and integrity of the athletic competition on the playing field . . . [T]he League is concerned with the adverse health effects of steroid use. Although research is continuing, steroid use has been linked to a number of physiological, psychological, orthopedic, reproductive, and other serious health problems . . . [T]he use of Prohibited Substances by NFL players sends the wrong message to young people who may be tempted to use them.¹⁹

¹⁸ *Id.* at 661 (emphasis in original).

¹⁹ National Football League, National Football League Policy on Anabolic Steroids and Related Substances, 2003 (as amended May 15, 2003), p. 1. Similarly, one of the purposes (continued...)

Thus, both the NFL and World Anti-Doping Agency have acknowledged that steroid use can undermine the health of athletes and the fairness of athletic competition.

Finally, testing of randomly selected athletes may be the least intrusive route to an effective steroid detection program. “It seems to us self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.”²⁰ Past major league baseball procedures, it appears, do not deter steroid use. Moreover, arguably, the reasonable suspicion standard may be unworkable since most often there may be no outward symptoms to signal the use of steroids. Thus, the suspicionless, administrative search exception might be the only means of effectively deterring athletes from using steroids. In addition, it may avoid possible problems of subjectivity and prejudice that arguably attend the application of “reasonable cause” or other suspicion-based standards.

¹⁹ (...continued)

of the World Anti-Doping Program and the World Anti-Doping Code is “[t]o protect the Athletes’ fundamental right to participate in doping-free sport and thus promote health, fairness, and equality for Athletes worldwide. . .” World Anti-Doping Agency, World Anti-Doping Code, 2003, available online at [http://www.wada-ama.org/rtecontent/document/code_v3.pdf], p. 1.

²⁰ Veronia, 515 U.S. at 636.