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The Fourth Amendment: The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects

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A TIME *for* CHOICES

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The Bill of Rights

Amendment
I Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment
II A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Amendment
III No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law.

Amendment
IV 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.

Amendment
V No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

Amendment
VI In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Amendment
VII In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

Amendment
VIII Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Amendment
IX The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

Amendment
X The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The Fourth Amendment:

The Right of the People to Be Secure in Their Persons, Homes, Papers, and Effects

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By YALE KAMISAR

THREE QUARTERS OF A CENTURY ago, the Supreme Court expressed some thoughts on constitutional interpretation that bear repeating today *(Weems v. United States):*

> Time works changes, brings into existence new conditions and purposes. Therefore, a principle to be vital must be capable of wider application than the mischief which gave it birth. This is particularly true of constitutions. . . . [In interpreting] a constitution, therefore, our contemplation cannot be only of what has been but what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power.

The Fourth Amendment protects "the right of the people to be secure in their persons, homes, papers, and effects, against unreasonable searches and seizures" and bans the issuance of warrants except upon "probable cause" and certain other conditions. The wording of the amendment is succinct and majestic. But it is also vague and general. Thus, whether, and how, to apply it to new conditions has generated great controversy—and none greater than the current agitation over mass drug testing.

Electronic Surveillance

Until recently, the best illustration of the struggle to adapt the search and seizure provision to new developments was the Court's confrontation with the troublesome problem of wiretapping and electronic eavesdropping. In *Olmstead v. United States* (1928), the first wiretapping case to reach the Supreme Court, a 5-4 majority, per Chief Justice Taft, concluded, over the famous dissents of Holmes and Brandeis, that so long as electronic surveillance did not involve a physical entry into one's home or office it fell outside the coverage of the Fourth Amendment. Conversations, reasoned Taft, were not "things" to be "seized" within the meaning of the amendment.

In the following years, as parabolic microphones and other forms of sophisticated electronic snooping made their presence felt, it became increasingly clear that the property-trespass theory of the Fourth Amendment could not survive. The Warren Court finally rejected it in the 1967 *Katz* case. The Fourth Amendment, the Court told us, "protects people, not places"; the amendment applies whenever the government violates a person's "justifiable" expectation of privacy or one that society is prepared to recognize as "reasonable."

But that was not the end of the matter. Once tapping and bugging were deemed "searches" or "seizures," were they so inherently intrusive and indiscriminate that they were necessarily *unreasonable* ones? The Court answered in the negative. If the Taft Court had read the Fourth Amendment too literally, to maintain that conversations were beyond the reach of any warrant or court order would be to display little more sophistication.

Privacy and Random Drug Testing

Today it is hard to believe that the Supreme Court struggled so long and so hard to bring electronic surveillance within the ambit and the terms of the Fourth Amendment. For the constitutional problems posed by such surveillance, although not inconsiderable, pale in comparison with those raised by mass or random drug testing. Indeed, some day, we may look back on such testing as either the most dramatic illustration of the application of the Fourth Amendment to new conditions and purposes or the most striking example of the failure to do so.

In 1986, President Reagan issued an executive order calling for a "drug-free federal workplace," an order requiring each executive agency to set up a program to test all job applicants and current employees in "sensitive positions." A growing number of state and local agencies have also instituted urinalysis screening. (So have many of the largest private employees, but they need not satisfy Fourth Amendment requirements because the Amendment only restricts government officials. However, government involvement in private conduct may make that conduct "state action.")

These developments have put enormous pressure on the Fourth Amendment. Very few people (and perhaps not too many judges) will worry about losses of privacy when the government claims that such losses are "necessary" in order to win "the war against drugs."

Questions have been raised about the need for, and the accuracy of, mass drug testing. But even if the courts are convinced that mandatory warrantless and suspicionless testing is an effective means of achieving an important public objective, effectiveness alone is not a sufficient justification for a legal search. As one federal judge recently noted: "There is no doubt about it—searches and seizures can yield a wealth of information useful to the searchers. (That is why King George III's men so frequently searched the Colonists.) That potential, however, does not make [a governmental search] a constitutionally reasonable one."

In 1989, the constitutionality of drug testing finally reached the U.S. Supreme Court. That year, in companion cases, *National Treasury Employees Union v. Von Raab* (5-4) and *Skinner v. Railway Labor Executives Association* (7-2), the Court upheld the constitutionality of two drug-testing programs that predated the president's executive order.

The contention that state-mandated urinalysis is neither a "search" or "seizure" because it does not entail a physical invasion, or even a touching, of the body might have prevailed in the Taft Court era, but it was quickly dismissed, and rightly so, by the current Supreme Court: Urinalysis is covered by the Fourth Amendment because one has a reasonable and legitimate expectation of privacy in the personal information contained in one's bodily fluids. Moreover, a urine test will often be conducted under the close surveillance of a government representa-

tive, an embarrassing, if not a humiliating, experience.

Nevertheless, the Court rejected the challenges to each testing program. But the *Skinner* and *Von Raab* cases are hardly the last word on the subject. Because the drug-testing plans at issue in each case were heavily circumscribed, the fate of other programs less restricted in scope is unclear. The principles lurking in this area will have to await shaping and clarification in future cases.

At issue in the *Skinner* case were federal regulations requiring railroad employees involved in train accidents to submit to alcohol and drug tests and permitting railroads to administer breath or urine tests to employees who violated certain safety rules. *Von Raab*, the companion case, dealt with provisions of a customs service plan that required drug testing of employees who sought transfer or promotion to positions that directly involve the interdiction of illegal drugs or that require the carrying of firearms.

In upholding both programs, although neither required a warrant nor any individualized suspicion of wrongdoing, the Court, speaking through newly appointed Justice Anthony Kennedy, utilized a general "reasonableness" test or a general "balancing" approach. Because neither program was designed to serve ordinary law enforcement needs (or, to put it somewhat differently, each program presented special governmental needs beyond the normal needs of law enforcement), the Court deemed departure from the usual Fourth Amendment requirements justified and a general balancing of individual privacy expectations against the government's interests appropriate.

That the government's interests prevailed in both cases—the Court concluded that traditional Fourth Amendment safeguards were "impractical" in these settings—is hardly surprising. This is usually the result when the Court utilizes what the dissenters aptly called "a formless and unguided 'reasonableness' balancing inquiry."

Von Raab is the more significant, and more troublesome, case of the two. Although it can be read narrowly (if one strains a bit) it also can be read broadly as resting on nothing more than the government's abstract interest in the "integrity and judgment" of its employees. (Of 3,600 Customs Service employees tested, only five tested positive for drugs; the commissioner of customs himself had stated that the service was largely drug-free.) Moreover, unlike the program sustained in *Skinner,* the Customs Service testing plan did not require predicate circumstances that at least raise some suspicion about the government employees to be tested.

Justice Antonin Scalia joined the majority in *Skinner,* but dissented in *Von Raab.* There is much force in his argument that the only plausible explanation for the Customs Service drug-testing program was "symbolism"—to show that the service is "clean" and that the government is serious about its war on drugs. As Justice Scalia emphasized, however, "the impairment of individual liberties cannot be the means of making a point"; "symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search."

After reading the opinion of the Court in *Von Raab,* one cannot help but ask: What happened to the Fourth Amendment? In light of the text and history of the amendment, how can the Court sustain searches conducted without a war-

rant and in the absence of "probable cause"—indeed, in the absence of any level of individualized suspicion? If drug testing is a "search" (and the Court was quick to recognize that it is) and if individuals do not lose their Fourth Amendment rights merely because they work for the government (and the Court has assured us that they do not), how can any public employee be tested without any suspicion particular to him simply because he is a member of a group that includes some who do use drugs? After all, no court ever has, or would, approve a "dragnet" or "blanket" search of all people in a particular neighborhood, even one in a high crime neighborhood, on the rationale that such a police operation would turn up evidence of criminal conduct on the part of some people—as undoubtedly it would.

But the matter is more complicated than that. Although the Supreme Court has not specifically addressed these questions, the lower federal courts have consistently upheld what might be called "dragnet searches" of boarding passengers and their carry-on luggage at airport gates, and what might be characterized as "blanket" metal detector searches and inspections of briefcases and parcels at the doors of courthouses and other governmental buildings. Moreover, a year after the drug-testing cases, in *Michigan Department of State Police v. Sitz,* the Court upheld a sobriety checkpoint operation, whereby police stationed at a DWI roadblock stopped every approaching vehicle. How can these "mass, suspicionless investigations" be squared with the Fourth Amendment?

The answer is that in the last quarter-century the Court has viewed the Fourth Amendment as a flexible standard that permits fairly wide-open balancing of public and individual interests when government programs are directed at special problems unlike those confronted by the police in their day-to-day pursuit of criminals. In these instances (originally inspection of residential and commercial buildings for possible violations of health, safety and sanitation standards) the Court has carved out an exception to traditional Fourth Amendment constraints for what have been variously called "inspections," "regulatory searches" or "administrative searches." The essence of this exception is that searches not conducted as a part of a typical police investigation to secure evidence of crime but as part of a general regulatory scheme (one applying standardized procedures negating the potential for arbitrariness) need not be based on individualized suspicion or, sometimes, be authorized by warrants.

The Administrative Search Concept

It should not be forgotten, however, that the "administrative search" exception to traditional search and seizure safeguards was, at its inception, a narrow one. Most housing code violations occur within private premises and cannot be detected from the outside. Thus, if housing code violations required individualized suspicion, such inspections might not be possible at all. Moreover, unlike drug testing, housing code inspections, as the Court emphasized at the time, were not "personal in nature" because they focused on heating, plumbing and wiring rather than on evidence of the occupant's activities.

Airport and courthouse searches also can be justified as "administrative searches," but these precedents, too, can be read narrowly. Courthouse searches were a response to the bombing of government buildings; airport searches were a response to a dramatic escalation of skyjacking and air piracy—crimes which

exceed all others in terms of the potential for enormous and immediate harm.

Moreover, airport searches present the government with a "now-or-never opportunity"—the individual passing the checkpoint is in but momentary contact with the government and thus even a reasonable suspicion requirement would be unworkable. This, of course, is not so as to the ongoing supervision of government employees. Finally, a metal detector search constitutes a minimal intrusion, certainly a much more limited one than the forced discharge of bodily fluids.

This is why, as a general proposition, on-the-job random drug testing should not be imposed absent a clear showing that a process of close supervision of employees plus testing upon some particularized suspicion (a less demanding standard than "probable cause") produces unacceptable results.

The serviceability of the administrative search concept has gladdened government lawyers, but has alarmed others, including me. "Administrative search" is swarming around the Fourth Amendment like bees. And the drone may soon become deafening.

I agree with the University of Illinois' Wayne LaFave, author of the leading treatise on search and seizure, who recently told me: "Unless the administrative search is limited to truly extraordinary situations where rigorous application of typical Fourth Amendment standards would be *intolerable,* would lead to unacceptably poor results, the amendment—as we thought we knew it—will largely disappear. The need to detect drug users is important, but hardly more so than the need to search for narcotics dealers, kidnappers and murderers. Yet we have never demanded 100 percent enforcement of the criminal law, or anything approaching it. Instead, we are committed to a philosophy of tolerating a certain level of undetected crime as preferable to an oppressive state."

As indicated earlier, because the particular testing program upheld in *Von Raab* was heavily circumscribed, the case can be read narrowly. But I think such a reading would be an unrealistic one. *Von Raab* probably means at least this much: Concerns about public safety are sufficiently compelling to justify warrant*less,* suspicion*less* drug testing of various categories of law enforcement and corrections officers and also certain categories of other public employees whose impaired faculties would pose a clear and present danger to the public safety of co-workers or the general public.

Such an approach carries a considerable distance, but at least it has a stopping point. I do not believe the same can be said for the argument—one made by the government in *Von Raab* and in a goodly number of other cases—that the need to maintain the "integrity" and the "public image" of various government agencies and their employees also justifies suspicion*less* drug testing.

If such an argument prevails—if mass, random drug testing may rest simply on the premise that government employees serve as "role models"—the liberty and privacy of millions of federal, state and city workers, regardless of the nature of their jobs, will be significantly diminished. Nor is that all. What about lawyers, doctors and accountants? Aren't *we all* role models?

Judge (later Supreme Court Justice) Benjamin Cardozo once observed that "the great tides and currents which engulf the rest of men do not turn judges by." The drug-testing cases illustrate his point. The danger today is that judges will be unduly influenced by contemporary tides and currents—so much so that these

forces may engulf the Fourth Amendment itself.

The "individualized suspicion" concept is the heart of the Fourth Amendment. However great the threat posed by illicit drug use, that concept must be preserved. It must remain the rule, not the exception.

The *Von Raab* majority spoke of "a national crisis in law enforcement" caused by the drug problem. But we should greet claims of "crisis" or "emergency" or "necessity" with considerable skepticism. For such slogans can be—and have been—a free people's most effective tranquilizers. As we mark the 200th anniversary of the ratification of the Bill of Rights, we would do well to remember that.❦

Discussion:

In general the Fourth Amendment requires that the government obtain a warrant before it conducts searches, and warrants are usually issued only if there is some specific reason to suspect wrongdoing. Yale Kamisar shows how the Supreme Court has adapted these protections to modern life by defining "searches" to include wiretapping and other invasions of privacy. The courts, however, have also allowed searches without any "individualized suspicion" in certain non-criminal settings, such as housing inspections. Recently, this "administrative search" exception has been extended to permit suspicionless drug testing of railroad employees and federal drug agents. Professor Kamisar sees this development as having fundamental importance; indeed, he fears that unless this trend is reversed, the Fourth Amendment as we know it "will largely disappear."

Why are the drug-testing cases so ominous? Professor Kamisar emphasizes several considerations. The Court has increasingly employed a general balancing test, which is vague and provides little support for restricting the government's power to search when (as is nearly always the case) important information might be discovered. Moreover, the Court may have accepted the idea that the government's interest in the symbolism of having a drug-free workforce is sufficiently important to justify random testing. Since we are all potentially "role models," this justification would permit random testing of virtually all government employees, indeed all members of the legal and medical professions. Finally, a crisis-mentality about narcotic use further diminishes the incentives for preserving the older, more protective understanding of the Fourth Amendment.

As you read this essay, ask yourself whether you should be frightened by the legal developments that are described. It does not seem all that threatening for the government to require that its drug agents and those who are responsible for railroad safety be drug-free. However, it is true that in a sense we are all role models, so that the principle in those cases could readily be extended. But if drug testing is as intrusive and humiliating as Professor Kamisar suggests, how likely is it that such testing would be imposed on virtually everyone? The public has acquiesced to some kinds of random searches that are very widely imposed—for example, sobriety checkpoints and airport metal detection. Do these suggest that Professor Kamisar's fears of universal drug testing might be realistic? If so, do they suggest that the result would be deeply destructive to Fourth Amendment values?

In at least one respect, random drug testing of government employees is less hostile to Fourth Amendment values than are sobriety roadblocks and airport screening. Drug testing as a condition of employment is done to find qualified employees, not to enforce the criminal laws. In this respect, drug testing is simply one of many invasions of privacy—like aptitude testing, physical examinations, and the taking of personal histories—that can accompany employment decisions. Is urine testing more or less a "search" than these kinds of inquiries? Should individualized suspicion be required before some or all of these intrusions are permitted?