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"Right To Privacy" Challenges To NCAA Drug Testing

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■ INTRODUCTION

In 1986 the NCAA adopted a mandatory drug testing program for athletes at its member institutions. This program was designed to safeguard the health and safety of participants and to prevent student athletes from gaining an artificially induced advantage by using performance enhancing drugs such as steroids (Bollig, 1987).

NCAA drug testing has resulted in court challenges across the country. Invasion of individual privacy interests is a consistent theme throughout these challenges. The Fourth Amendment to the United States Constitution has been the most common legal basis with which the NCAA's program has been challenged. However, the landmark case of *Hill v. NCAA* (1990) successfully challenged the NCAA on the basis of California's constitutional guarantee of the right to privacy.

The purpose of this article is to address the NCAA's mandatory drug program as it relates to the Fourth Amendment of the United States Constitution and the California standard as decided in *Hill v. NCAA*. Recent case law will be used to illustrate the deliberations by various courts regarding the privacy interests involved in mandatory testing of the urine of NCAA athletes and the ultimate legality of the NCAA's drug testing mandate.

■ THE NCAA'S DRUG TESTING PROGRAM

Each year, prior to participating in competition, intercollegiate athletes must sign a consent form required by the NCAA to be tested for certain drugs. Failure to sign the consent form results in athletic ineligibility (Bollig, 1990).

The current program tests at all NCAA championship events and also randomly tests Division I football players in the off-season. The NCAA uses urinalysis to determine the presence of banned substances including steroids, stimulants, "street drugs" (e.g. marijuana and heroin), diuretics, and urine manipulators. Subjects are required to disrobe from the area of their armpits to their knees, exposing their genitals, and produce a urine specimen of at least 100 milliliters while under visual observation. If a subject is unable to "fill the beaker", he or she is given fluids and

required to remain under observation of the NCAA validator until successful in producing the required amount of urine (Bollig, 1990).

Communication of test results goes from the laboratory to the NCAA to the athlete's school. The NCAA reviews the laboratory report and determines whether a suspect result is a "positive-ineligible" for NCAA purposes. If so, the NCAA notifies the school; it falls to the institution to present additional exculpatory information, request a test of another vial, or appeal to the NCAA committee responsible for drug testing (Bollig, 1990).

Member institutions are committed to the application and enforcement of NCAA legislation. Failure to do so can result in disciplinary action, including suspension from participation in intercollegiate games and expulsion (Bollig, 1990).

■ THE FOURTH AMENDMENT

The Fourth Amendment to the United States Constitution 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 Warrant 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 (*United States Constitution, Amendment IV*).

The Fourth Amendment, made applicable to the states by virtue of the Fourteenth Amendment, guarantees that individuals are protected against arbitrary invasions by governmental officials (*O'Connor v. Ortega*, 1987). If the Fourth Amendment is involved, protected rights are considered fundamental, and state or governmental regulation is subject to close scrutiny of the purpose and means of regulation. Furthermore, the rights protected by the Fourth Amendment are implicated only if the conduct at issue infringes an expectation of privacy that society is prepared to consider reasonable (*O'Connor v. Ortega*, 1987).

Analysis of the NCAA's drug testing program as challenged by the Fourth Amendment must consider three basic issues. First, is the conduct a search? Second, is the search unreasonable? Third, does the conduct represent state (governmental) action?

Issue #1: NCAA Drug Testing: Is It A Search?

Under Fourth Amendment analysis, the initial question concerns whether there is a search. A search occurs when an expectation of privacy which society is prepare to consider is infringed (*Schaill v. Tippecanoe County School Corporation*, 1989). The courts are in general agreement that the act of urination possesses a reasonable expectation of privacy as to the act. The United States Supreme Court has held that the collection and testing of urine constitutes a search under the Fourth Amendment (*Skinner v. Railway Labor Executive Ass'n*, 1989). In *Skinner*, the Court stated:

> It is not disputed ... that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an employee, including whether 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 interest.

In spite of such language by the Supreme Court, some have argued that athletes have diminished expectations of privacy rendering a Fourth Amendment analysis an insufficient basis on which to declare a Constitutional violation. For example, "communal undress" inherent in athletic participation suggests a reduced expectation of privacy. Also, health examinations are fairly routine to participants in vigorous activities. In the context of such examinations, viewing and touching is tolerated among relative strangers that would be firmly rejected in other contexts (*O'Halloran v. University of Washington*, 1988).

These arguments have met with limited success. With few exceptions, most courts agree that one's urine is not subject to public scrutiny, and there remains a legitimate expectation of privacy for the college athlete. The courts continue to hold that the mandatory donation of urine is a search and seizure. For example, in *O'Halloran* (1988) the constitutionality of drug testing of athletes was upheld, and it was concluded that the NCAA's urine testing program is a search for Fourth Amendment analysis.

Issue #2: NCAA Drug Testing: Is It An Unreasonable Search?

Only unreasonable searches are prohibited by the Fourth Amendment. However, as the Supreme Court noted, the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. What is "reasonable" depends on the context within which a search takes place (*Skinner v. Railway Labor Executives Ass'n*, 1989: *National Treasury Employees Union v. Von Raab*, 1989).

Although reasonableness depends upon the context surrounding the search, no exact parameters of what is reasonable have been established. Instead, the courts apply a test to balance the intrusion on an individual's privacy against the promotion of compelling governmental interests (*O'Halloran v. University of Washington*, 1988). Examples of such compelling interests include: (1) providing fair and equitable competition, (2) guarding the health and safety of student-athletes, and (3) deterring drug use by testing.

A variety of analyses have been used to determine the reasonableness of NCAA mandatory drug testing programs on athletes. In *O'Halloran* (1988), for example, it was determined that the reasonableness of both the university's and the NCAA's drug testing program was determined by using a two-prong test. The first prong dealt with whether the search was justified at its inception. The second prong related to whether the search as conducted was reasonably related in scope to the circumstances that justified the interferences in the first place.

Essentially, the first prong required reasonable grounds for believing that urine testing of student-athletes will turn up evidence of drug use. Inappropriate drug use by athletes in general, widely publicized in the media, were adequate grounds for a search of individual athletes. In the second prong, the court found that public and NCAA interest in preserving the integrity of college athletics, coupled with institutional interest in protecting the students' health and safety, outweighed the slight intrusion produced by the search. In fact, the court specifically praised NCAA efforts by stating that it was laudable that the NCAA and its member institutions are attempting to educate, ferret out, and deter drug use among student-athletes (*O'Halloran v. University of Washington*, 1988).

A 1988 article in the *Pepperdine Law Review* analyzed the 2-prong test differently (Rose, 1988). The author asserted that a search is justified at its inception when the party conducting it had reasonable grounds, based upon objective facts, for suspecting that the search will reveal evidence of a violation. Mandatory drug testing of athletes is reasonable if the party conducting it specifically suspects drug use, and that suspicion is directed toward the specific student being tested. The author noted a problem with group testing in that "it casually sweeps up the innocent with the guilty" and forces the innocent party to submit to a highly intrusive urine test in order to vindicate his or her innocence (Rose, 1989). Since Rose's article, two courts have adopted the reasonable and individualized suspicion standard for drug testing. While not in the context of NCAA drug testing, these cases offer opportunity to observe similar facts with decidedly different analysis from *O'Halloran* (1988).

In 1989, reasonable suspicion was defined as "the existence of reasonable circumstances, reports, information, or reasonable direct observation" leading to the belief that illegal drugs have been used (*Horsemen's Benevolent & Protective Assn v. State Racing Commission*, 1989). This standard may be useful to the NCAA drug program. Reasonable suspicion exists when college or university officials have overt manifestations or recent drug use by student-athletes and a reason to believe there is a high probability that probative evidence will be disclosed by a urine drug test in the presence of a school official.

In 1991, the Colorado Court of Appeals referenced the need for a standard of reasonable suspicion with regard to NCAA drug testing (*Derdeyn v. University of Colorado*, 1991). The Colorado Court of Appeals affirmed the trial court's holding that the University of Colorado's mandatory drug testing of athletes was a violation of the Fourth Amendment. The trial court expressed the necessity for a standard of probable cause when testing intercollegiate athletes. However, the Court of Appeals opened the door for reconsideration of this holding by stating:

> [A]n appropriate testing program premised on an objective reasonable suspicion standard may well be Constitutionally permissible.

Issue #3: NCAA Drug Testing: Is It State Action?

Prior to 1984, courts found that the adoption, implementation, and enforcement of the NCAA's rules can constitute state action (*Hennessey v. NCAA*, 1977; *Parish v. NCAA*, 1975). In *Parish*, the fifth circuit took an interesting approach by finding NCAA actions to represent a government function because the court believed the government would step in to organize college athletes if the NCAA ceased to exist.

In a recent review of the NCAA drug testing program, Evans argued that a majority of the courts should find it necessary to find the NCAA a state actor for the following reasons: (1) Colleges have delegated control over every aspect of the drug program; (2) What is prohibited by the NCAA is outlined by the NCAA bylaws; (3) The NCAA does the testing; (4) It is the NCAA urinalysis laboratories that provide the data for decision-making; (5) It is the NCAA that makes the final decision on eligibility of the students; and (6) The NCAA drug program is not operated by a private party, but by a party that is a state actor. Therefore, Evans concluded that the NCAA's role is significant for Fourth and Fourteenth Amendment purposes (Evans, 1990).

The majority and modern view is that the NCAA is a voluntary, private association whose conduct does not reflect state action. Since 1984, courts have effectively overruled cases attributing the NCAA's actions to the state. In *Arlosoroff v. NCAA* (1984), the court described the NCAA's basic character as that of a voluntary association of public and private institutions. Moreover, the NCAA's regulatory functions were specifically found to represent private and not state action. In 1988, the Supreme Court affirmed *Arlosoroff*, in holding that the NCAA was not a state actor (*NCAA v. Tarkanian*, 1988). This holding makes untenable any challenge to the NCAA drug testing programs based on the Fourth Amendment.

■ SUMMARY OF THE FOURTH AMENDMENT CHALLENGE

The NCAA's drug testing program is difficult to challenge under the Fourth Amendment because the current judicial trend finds the NCAA a private rather than state entity. Therefore, the NCAA need not conform to the constitutional limitations imposed upon state activities by the Fourteenth Amendment. However, the NCAA drug testing program may be challenged under a state constitution that does not require state action. In *Hill v. NCAA* (1990), the plaintiffs challenged the NCAA on a state constitutional issue of privacy.

■ CALIFORNIA'S "RIGHT TO PRIVACY" CHALLENGE TO THE NCAA

The right to privacy has special significance in California as it is specifically guaranteed in the California Constitution.

> All people are by nature free and independent and have inalienable rights. Among these are ... privacy (*California Constitution, Article 1*).

In *Hill* (1990), the trial and appellate courts decided that the merits of the case would rest on the California constitutional guarantee of a right to privacy. The heart of the issue was whether California's protection of privacy would protect a student-athlete from NCAA drug testing where case law resting on federal guarantees had failed.

The Appellate Court affirmed the trial court's holding that NCAA drug testing constituted an invasion of privacy. The burden then shifted to the NCAA who was required to demonstrate a compelling interest justifying the invasion of a fundamental privacy right. To uphold the constitutionality of the testing program, the NCAA had to satisfy the following three-prong test:

1. The testing program related to the purposes of the NCAA regulations which conferred the benefit (participation in intercollegiate competition),
2. The utility/benefit of imposing the program manifestly outweighed any resulting impairment/detriment to the constitutional right, and
3. There was no less offensive alternatives.

First Prong - The NCAA Purposes

Two of the stated purposes of the NCAA are to: (1) initiate, stimulate and improve intercollegiate athletics programs, and (2) promote and develop educational leadership, physical fitness, sports participation as a recreational pursuit, and

athletic excellence. The NCAA asserted that the use of drugs to enhance performance creates intense pressures on other athletes to use potentially harmful substances in order to avoid competitive disadvantage. Furthermore, drug abuse can seriously damage the health of the athlete and create a significant risk of injury to other participants as a result of diminished perception/coordination or increased aggressiveness. Finally, the NCAA claimed that the use of illegal street drugs poses a threat to the integrity of NCAA sports.

After reviewing the arguments, the Appellate Court agreed with the NCAA and found that the drug testing program was compatible with the stated purposes of the NCAA. Therefore, the first prong of the test was satisfied.

Second Prong - The Utility Of The Program

The second prong of the test required a determination of (1) whether the testing program invaded a constitutionally protected privacy interest, and (2) whether the utility of the program manifestly outweighed any resulting impairment of the constitutional right, shown by demonstrating a compelling need.

The Privacy Interest. The NCAA contended that the California constitutional guarantee of privacy applied only to state or governmental activities and not to private entities like the NCAA. The Appellate Court agreed with the NCAA's self-characterization that it is a private entity whose regulatory function is not a state or governmental action. Nonetheless, it held the California's right to privacy constitutional guarantee was intended to address both governmental and private conduct.

Alternatively, the NCAA asserted that if the privacy guarantee did in fact apply, the NCAA had a compelling interest in detecting and deterring drug abuse in intercollegiate athletics. This compelling interest superseded the privacy interest.

To consider these arguments, the court entertained and reached the following conclusions regarding the specific allegations of the Stanford University athletes who complained of the following four serious intrusions into their privacy interests:

1. **Monitored urine collection is embarrassing and degrading.** The NCAA argued that there is a reduced expectation of privacy since athletes are commonly subjected to extensive regulations regarding their physical fitness. The Appellate Court ruled, however, that the collection and testing of urine are included in the privacy interests that the California Constitution protects. Visual or aural monitoring of the act of urination implicates privacy interests. Furthermore, the passing of urine in public is generally prohibited by law as well as social custom. Therefore, the act represents a reasonable expectation of privacy long recognized by society.

2. **The NCAA's test program interferes with the individual's right to medical confidentiality**. Here, the court reasoned that the right to keep one's medical history private is protected by the constitutional guarantee of privacy. Chemical analysis of urine can reveal a host of private medical facts about a person, e.g. whether he or she is epileptic, pregnant, or diabetic. Furthermore, since the right to procreative choice is a fundamental right, the requirement that women athletes declare their use of birth control pills invades this right.

3. **The program interferes with medical treatment.** The court of appeals held that the individual's right to control her own medical treatment is also protected by the right to privacy. Adult persons have the fundamental right to control the

decision relating to the rendering of their own medical care. This includes the ability to choose among legal medications.

4. **The NCAA attempts to control personal and private off-the-field conduct by a form of technological surveillance.** Finally, the right to privacy protects an enormously broad and diverse field of personal action and belief. The right of privacy is the right to be left alone. This most fundamental interest protects our thoughts, expressions, personalities, freedom of communication, and freedom of association. The right of privacy is essential to American heritage and should be abridged only when there is a most compelling public need.

Compelling Need. Since the Court concluded that the NCAA program invaded a protected constitutional interest, the NCAA was challenged to show that the utility of imposing the program manifestly outweighed any resulting impairment of the constitutional right.

The NCAA offered two compelling needs in an effort to satisfy the required test: (1) protection of the health and safety of student-athletes, and (2) preservation of fair and equitable competition.

Health and Safety of Athletes. The Court of Appeals affirmed the 1987 trial court's findings of the facts that:

1. There was no evidence that drug use in athletic competition was endangering the health and safety of athletes.

2. The was no evidence that any college athlete had even been injured in competition as a result of drug use. Although there was agreement that the NCAA's banned drugs could be harmful, it was asserted that even aspirin and water can be dangerous if misused.

3. It was undisputed that the drug use of athletes was not greater than drug use of other students, and therefore there was not compelling need for drug testing of athletes based on their health.

4. There was not evidence that any student-athletes had ever injured anyone else as a result of drug use. The Appellate concurred with the trial court that the NCAA's drug testing program did not do much to protect the athlete's health and safety. It should be noted that the most relevant evidence presented at trial was the NCAA's own empirical data showing "remarkably little drug use by student-athletes involved in NCAA competition", e.g., less than 1% of the students tested in the 1986-87 program were declared ineligible and no woman had ever been declared ineligible. Also, the accuracy of test reports and procedures was found to be suspect. Finally, the Court expressed its concern that by far the most serious substance abuse problems among college athletes and college students generally are alcohol and cigarettes, which are neither banned nor tested by the NCAA.

Fair Competition. The second stated goal of the NCAA's testing program is to preserve fair and equitable competition. The NCAA's expressed concern was that if athletes believed in a performance enhancing effect, a concomitant pressure to use drugs would exist.

However, the court found the evidence did not establish a performance enhancing effect of the drugs placed on the banned list by the NCAA. The most persuasive evidence of such an effect was anabolic steroids, but conflict in the scientific literature prevented any conclusion of a performance enhancing impact.

Furthermore, the court concluded that NCAA drug tests cannot tell when an athlete took a banned substance, how much was taken, or even whether it affected performance. Also, it was concluded that there is no scientific evidence that drug testing is an effective deterrent to drug use. The court noted that drug testing alone, without counseling and rehabilitation, is not an effective treatment.

Therefore, the court concluded that the NCAA's random, announced, unindicated drug testing is not a scientifically valid method of detecting or deterring drug use. It ruled that the NCAA's drug testing program is not effective in reaching its stated goal of clean and equitable competition. It also does not protect the health and safety of student athletes. The second prong of the test was not satisfied.

Third Prong - Availability of Less Intrusive Methods

The third prong of the test required a showing that the NCAA had no less intrusive means available to further its goals of assuring fair competition and protecting the athletes health. Both the trial and appellate court found the NCAA did not carry its burden of proof for the following reasons:

1. The NCAA has not adequately tried drug education, which experts believe can be effective. NCAA witnesses at trial testified that even if drugs do not enhance performance, some athletes believe they do. According to the court, this problem is best addressed by an educational program rather than by punitive testing.

2. The NCAA has not adequately considered and used testing based on reasonable suspicion as an alternative to random testing or testing based on playing time. For example, anabolic steroids produce specific characteristics when taken, e.g., weight increases over a short period of time, aggressive behavior, changing hair patterns, etc. This means trainers and coaches can, by closely observing their athletes, form a reasonable suspicion of steroid use.

3. Finally, the NCAA appeal process is inadequate. Ineligible athletes are subject to an abbreviated appeal ("hearing") process which deprives them of an opportunity to adequately secure information regarding their test results (including chain of custody of the sample) or prepare a defense.

Summary of the Three-Prong Test. The Appellate Court concluded that the three prong test was not satisfied. The evidence did not support the NCAA's claim that there is significant drug use among student-athletes. The NCAA failed to show that testing would protect athletes' health and safety or the integrity of competition. The evidence showed the test program was too broad with doubtful accuracy. The appeal procedure was inadequate. Finally, the NCAA failed to consider alternatives less offensive to the right of privacy. For these reasons, the court held that the NCAA may not require student-athletes to "waive" their constitutional rights in order to receive the benefit of participation in intercollegiate athletics.

■ CONCLUSION

We are a nation whose national priority has become elimination of drugs from our society. Recent case law has extended this priority into the athletic arena. However, the legal issues in mandatory drug testing of athletes have yet to be resolved.

As we look forward to resolution of this issue, we must remember that drug testing of athletes involves both legal and educational issues. The position can be taken that colleges and universities should be leery of broad delegations to the NCAA. It is the colleges and universities that must be held accountable for their student-athletes. Thus, it is the institutions that must take charge of athletics and not leave governance up to external organizations such as the NCAA.

Our continued legal determination of fundamental educational questions will ultimately dictate the policies which shape the future of intercollegiate athletics in this country. More important, our decisions regarding constitutional protections might have repercussions on our most basic rights. As the trial court in *Derdeyn v. University of Colorado* (1989) emphasized:

> We must remember that, after all, it is only athletic games we are concerned with here .... The integrity of athletic contests cannot be purchased at the costs of privacy interests protected by the Fourth Amendment .... A government that invades the privacy of its citizens without compelling reason no longer abides by the constitutional provisions essential to a free society (*Derdeyn v. University of Colorado*, 1989).

Do we sacrifice fundamental rights in order to deter drug use among athletes? Perhaps we should be mindful of the Supreme Court's admonition that students do not shed their constitutional rights at the schoolhouse gate. The question we must now resolve is whether they shed them at the playing field.

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