# Random Drug Testing of Students as a Reasonable Search and the Application of the Special Needs Doctrine in the Philippines

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## INTRODUCTION

One of Philippine society's bigger problems today is the proliferation of illegal drugs. Emerging in the mid-1960s during the Marcos incumbency, the problem has since then worsened and eventually escalated into a social menace. Everyday, the news is filled with reports concerning drug-related crimes: drug pushing, drug smuggling, and crimes ranging from petty acts as simple theft or robbery to the most appalling as rape and murder, all committed by perpetrators under the influence of drugs. Under the influence of drugs, men are thereby reduced to the most savage of beasts, capable of committing a whole range of criminality.

The traffic of illegal drugs has furthermore become a base for organized criminal networks throughout the world. Apart from the drug trade, these networks also engage in gunrunning, prostitution, bribery, corruption, tax evasion, racketeering, and even terrorism.

It is also widely documented that the primary victims of the drug problem in the Philippines are the youth, particularly students. This situation shows the pervasiveness of the Philippine drug problem in view of the inadequate and inutile efforts of the government to protect Filipinos from the pernicious effects of drugs. It has in fact been said that drug syndicates in the Philippines even have the power to compromise with the very people and the very system that are duty-bound to eradicate this drug problem.

The traditional approach to combat the spread of illegal drugs is characterized by police efforts to apprehend and punish drug dealers, manufacturers, and possessors. The Amended Republic Act No. 6425 or the Dangerous Drugs Act of 1972[1] spearheaded the fight against the Philippine drug problem. At its inception, this 30-year old law was visualized as a potent tool against the growing threat of drugs and was characteristic of the traditional approach in the war against drugs.

Recently, however, this three-decade old piece of legislation was repealed by Republic Act No. 9165 (R.A. 9165)[2] or the Comprehensive Dangerous Drugs Act of 2002. This new law gives enforcers more teeth in detecting, combating, and eliminating the now rampant scourge of drugs. It

1. The Dangerous Drugs Act of 1972, Republic Act No. 6425 (1972) (repealed in 2002 by R.A. No. 9165).

2. An Act Instituting the Comprehensive Dangerous Drugs Act of 2002, Repealing Republic Act No. 6425, Otherwise Known As the Dangerous Drugs Act of 1972, As Amended, Providing Funds Therefor, and For Other Purposes, Republic Act No. 9165 (2002) [hereinafter COMPREHENSIVE DRUGS ACT OF 2002].

contains elements of the traditional approach, such as the imposition of harsher penalties on drug pushers and manufacturers. It likewise embodies significant provisions representing a radical departure from the traditional approach, an example of which is the conduct of mandatory drug testing, now required for government employees, military and police personnel, applicants for drivers' and firearms' licenses, and randomly selected students.

The constitutionality of a State-sponsored drug-testing program has already been settled in the United States but not in this jurisdiction as the Philippine Government advocates for the first time the use of mandatory drug tests. American jurisprudence reveals that a drug test is a search thereby embracing various constitutional issues, foremost of which are the right against unreasonable searches and seizures and other aspects of the right to privacy. These are rights similarly enshrined in the 1987 Philippine Constitution therefore warranting recognition and protection from the potential intrusions that drug tests may bring.

This paper aims to examine the right to privacy under Philippine Constitution Law and the concomitant government interest in eliminating the drug problem, particularly among the youth. An examination of the nature of the drug test as a search will be made as well the applicability of the constitutional provisions against intrusions on the privacy of persons. A conclusion will then be made on the constitutionality of the drug-testing program for students. It is hereby proposed that there is a need to adopt a new doctrine in Philippine Constitutional Law through the creation of another exception to the general rule requiring a warrant and the existence of probable cause for a valid search. This new doctrine will then enable the courts to strike a balance between the right and duty of the government to do all that is possible to protect the youth against drugs and the constitutional right of the people, including the youth, to privacy.

## I. A Look Into The Philippine Drug Problem

In 1972, an estimate of 20,000 of Filipinos were drug users, most of whom were confined to Metro Manila only[3] and a majority of whom preferred marijuana or *cannabis sativa* as the main drug of choice. Set against this background, the Dangerous Drugs Act of 1972 was thus legislated. Despite its enactment, however, the drug menace still worsened throughout the years and has assumed serious proportions at present. It is estimated that since then, the drug menace has grown by an average of 300% a year up to its

3. Joel Locsin & Daniel Agoncillo, *Drugs Grow Nearly 300% Yearly*, Manila Standard, June 29, 2001, at 1 [hereinafter Locsin].



present level.[4] Since 1997, the Philippine Government has in fact recognized drugs as a leading threat to Philippine national security.[5]

Present official estimates, as claimed by the Philippine National Police (PNP), indicate that there are about 1.8 million drug users nationwide.[6] According to the United Nations (UN), however, there are actually four million drug users in the Philippines, more than double of the official figures.[7] It is estimated that of the official figures, 1.2 million of the drug users belong to the youth,[8] comprised of individuals between the ages of 15 and 29 years. This means that roughly one-third or 33% of drug users in the Philippines may be classified as youths.

Drug abuse has become such a grave threat to the Philippine youth that the National Drug Law Enforcement and Prevention Coordinating Center, an attached agency of the PNP, has identified and placed four universities in Metro Manila, namely De La Salle University, Far Eastern University, University of the East, and the Polytechnic University of the Philippines, on the police drug watch list. PNP reported that these schools had the highest incidence of use and sale of illegal drugs among their students.[9]

Among the young drug users, the most pitiful are the underprivileged and unemployed out-of-school youths who peddle drugs, most commonly *metamphetamine hydrochloride* or shabu, as a source of livelihood and/or as a means of escape from their miseries. More often than not, they are lured into this dangerous and illegal trade because of poverty and their inability to find any employment due to lack of education. Thus, they enter into a vicious cycle – pushing drugs to earn money then using that same money to buy the drugs for their own consumption.

The enormity of the drug problem in the Philippines can also be seen from the fact that many of the Drug Rehabilitation Centers (DRC) nationwide are jam-packed with an increasing number of patients,[10] indicative of the still growing number of drug users. In fact, the PNP Drug Rehabilitation Center in Bicutan, Taguig increased the capacity of the 17

4. *Id.*

5. Philippine News Agency, *Drugs Now No. 1 Security Threat*, Manila Chronicle, Aug. 22, 1997, at 1.

6. Cynthia D. Balana, *Harsher Drugs Bill Okd: 99g of Shabu Means Death*, Philippine Daily Inquirer, Feb. 28, 2002, at 1.

7. *Id.*

8. Locsin, *supra* note 1, at 1.

9. Desiree Sison & Jing Villamente, *DLSU, FEU, PUP, UE ON Drug Watch List*, Manila Standard, July 13, 1999, at 1.

10. History of Drugs *at* http://www.depcenter.gov.ph/KILLDROGA/history.html (last visited 28 June 2002) [hereinafter History].

relatively new dormitories built by the various local government units in Metro Manila to 5,000, making this DRC the biggest in Asia.[11] At the time of its expansion, this DRC housed 3,200 patients, which number still increased by 30-40 patients a day. It was projected that this expanded rehabilitation center would be filled up to capacity by April of 2001. The maintenance and operating expenses alone of these rehabilitation facilities cost the government and the taxpayers huge amounts of funds and manpower.[12]

Estimates reveal that 95% of drug users favor shabu.[13] This particular drug inflicts the most severe damage on one's sanity and physical well-being. Shabu "demonizes" its users and even causes some to commit acts of murder or rape during their drug-induced stupor. In 2000 alone, around 70% of brutal and heinous crimes perpetrated in the country were drug-related.[14] This is in addition to the more than 20,000 drug cases being filed every year, which gravely clog the dockets of the courts. However, only 1% or 402 of the 36,735 arrested drug criminals in the same year were charged with non-bailable offenses. Most of the remaining arrested drug criminals were probably released on bail; their cases still pending in the Philippine justice system. Those released have presumably returned to their old ways of either drug use or drug pushing. All these demonstrate the inherent weakness of Philippine anti-drug laws.

In 1998, the illicit drug trade was believed to be worth more than PhP 250 billion,[15] 95% of such trade being in shabu. This drug was then being sourced from China, Taiwan, and Hong Kong. This may no longer hold true today because the Philippines is now the world's top source of shabu.[16] Shabu is now manufactured, sold, and actually exported from the Philippines. The drug manufacturers formerly based in Hong Kong and mainland China have relocated some, if not all, of their manufacturing activities into the Philippines because domestic drug laws are not strictly enforced and government officials are easier to corrupt. Even with the emergence of new illegal drugs onto the scene, shabu still forms the backbone of Philippine illegal drug trade.

11. *Id.*

12. *Id.*

13. *Id.*

14. Locsin, *supra* note 3, at 1.

15. History, *supra* note 10.

16. Daniel Agoncillo, *RP World's Top Source of Shabu*, MANILA STANDARD, Feb. 28, 2002, at 4.



Clearly, the illegal drug trade in the Philippines involves huge amounts of money. Naturally, with that amount of money, the drug lords can and do exert a tremendous amount of influence, even on government officials.

On 14 October 2001, Mayor Ronnie Mitra, the incumbent mayor Panukulan, Quezon, was caught by the police transporting shabu in a government ambulance provided to him by the Philippine Charity Sweepstakes Office.[17] The mayor's convoy was composed of two vehicles, the ambulance and another van, both bearing special license plates for the mayor riding therein.[18] The drug-pushing mayor was caught red-handed with 503 kilos of shabu, estimated to have a street value of well over a billion pesos.[19] Mitra is now suspended and further faces the loss of his office and a lengthy prison term.

The story of Mayor Mitra illustrates the fact that due to the prevalence of illegal drugs in the Philippines, it is not far-fetched that the drug lords can, if they had not already done so, influence government officials, from the lowest to the highest offices. Politicians may turn to drug money, not necessarily to enrich themselves, but to finance their political campaigns and stay in power. By doing so, these politicians become indebted to the drug lords who in turn can now exert tremendous influence on the politicians. With politicians and criminals in such a "symbiotic" relationship, law enforcement is reduced to nothing more than a farce, with the public as the unknowing victim of the situation.

Recently, a new drug has emerged and gained prominence in the urban centers. Ecstasy or more commonly referred to as "E," is a known "designer" and "feel good" drug. It gained prominence in the middle to late 1990s as a party drug because of the common association and prevalence of its use in the urban party scene, particularly during rave parties. Ecstasy is ingested orally in pill form and is quite expensive costing between PhP 1,500-P2,000 per pill. Due to its relative expensiveness, ecstasy is popular among young users belonging to the middle-to-high income families. Due to its emergence as a party drug, its popularity and use is concentrated in urban centers. This can be gleaned from the huge drug cache found in the possession of scions of some of Manila's wealthy families. Last 12 October 2001, the PNP busted what they claimed was a big-time drug ring in Quezon City and arrested 13 people, including a British businessman and two Americans, for their alleged involvement in the distribution of ecstasy.[20] Police raided the house of suspected drug syndicate leader Marvin Ducat in

17. *Are we Turning Into a Narcostate?*, PHIL. STAR, Oct. 25, 2001, at 8.

18. *Id.*

19. *Id.*

20. Inquirer News Service, *available at* http://www.inq7.net/met/2001/oct/15/text/met_1-1-p. htm (last visited July 17, 2002).

the upscale La Vista Subdivision in Quezon City.[21] Police found 39 ecstasy pills in the possession of the arrested individuals.[22] The mere addresses of those arrested already show that they belong to the more affluent portion of Philippine society. However, a few days after their arrest, 12 of these 13 individuals, including the three foreign nationals, were released pending further investigation.[23] It was rumored that a cabinet, PNP, and National Bureau of Investigation (NBI) official allegedly interceded for their release.[24]

Premised on the foregoing, the drug menace is definitely a problem of the entire Filipino people. It is clearly a threat to the national security of the Philippines as a sovereign nation. Drugs threaten the Filipino youth who are supposed to be the future of the nation. If nothing is done about it, the Philippines may end up being a "Narco-State" like Colombia where the entire government and society are helpless against the drug cartels, which run the country *de facto*. Given these facts, it is indeed time that a closer examination is made of the currents laws against the menace of illegal drugs in order to determine if these laws are sufficient to address the present state of the drug problem.

## II. The Comprehensive Dangerous Drugs Act of 2002

On 7 June 2002, Pres. Gloria Macapagal Arroyo signed into law R.A. 9165.[25] Said law seeks to impose harsher penalties on users and pushers of illegal drugs. For example, anyone caught with at least 50 grams of shabu shall be punished with a penalty of life imprisonment to death through lethal injection. The same applies to those caught with at least 500 grams of marijuana or 10 grams of ecstasy, opium, cocaine, heroin, and morphine, among others.[26] These amounts represent a considerable reduction from the amounts originally required by the Dangerous Drugs Act of 1972 for the imposition of capital punishment for the illegal possession of these drugs.

R.A. 9165 took into consideration the recent rise to popularity of the so-called designer drugs or party drugs that have gained popularity among the youths in Metro Manila and other urban centers. The most popular of these drugs is ecstasy. R.A. 9165 seeks to curb the use of these designer drugs during such parties by mandating that:

> *Possession of Dangerous Drugs During Parties, Social Gatherings or Meetings.* – Any person found possessing any dangerous drug during a party, or at a social gathering or meeting, or in the proximate company of at least two (2) persons, shall suffer the maximum penalties provided for in Section 11 of this Act, regardless of the quantity and purity of such dangerous drugs.[27]

21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. Comprehensive Dangerous Drugs Act of 2002.
26. *Id.* § 11.



One of the criticisms against the government's method in handling the drug problem is its seeming failure to detect and flush out those who are using drugs. Indeed, it is plain to see that just like any other business, the illegal drug trade is governed by the law of supply and demand. To get rid of this scourge, the government must attack not only the supply, which is the proliferation of prohibited substances, but also the demand for them. Mr. Pino Arlacchi, the Executive Director of the United Nations Drug Control Program (UNDCP), says that after 54 years of international drug control experience, the UN believes that the problem of illegal drugs will be solved only through this two-pronged approach.[28] Arlacchi further explained that although the international war against drugs has steadily progressed through the years, all the efforts would be nothing more than mere palliatives unless people stop asking for a "fix."[29]

R.A. 9165 seeks to address the government's past inability to combat the demand for illegal drugs by allowing the detection of the presence of drugs in one's body system so as to determine if he or she is a drug user. This is to be done through the institution of drug testing programs in various areas of society, which the government directly or indirectly regulates. These programs aim to detect who the drug users are in order that they may get the necessary assistance so that they may be prevented from becoming full-fledged addicts or if they already are, so that they may be rehabilitated. In doing so, the State is hoping to eradicate the illegal drug trade by minimizing, if not eliminating, the consumer market for illegal drugs. In this respect, R.A. 9165 represents a significant departure by the Philippine Government from the traditional approach in the war against drugs. Under R.A. 9165, the government is waging not just against the supply side of the drug trade, but more importantly, also against the demand side. This is done primarily through mandatory testing.

## III. The Mandated Drug Tests

Under R.A. 9165, drug testing of applicants of firearms and driver's license would be compulsory, while random testing would also be conducted among students, government workers, and private sector employees.

27. *Id.* § 13.
28. Junep Ocampo, *War vs. Drugs: Attack the Demand, Not Just the Supply*, Phil. Star, Sept. 2, 1999, at 1.
29. *Id.*

The mechanics for mandatory drug tests instituted by R.A. 9165 are as follows:

Article III
Dangerous Drug Test and Record Requirements

Section 36. Authorized Drug Testing. – Authorized drug testing shall be done by any government forensic laboratories or by any of the drug testing laboratories accredited and monitored by the DOH (Department of Health) to safeguard the quality of the test results. The DOH shall take steps in setting the price of the drug test with DOH accredited drug testing centers to further reduce the cost of such drug test. *The drug testing shall employ, among others, two (2) testing methods, the screening test which will determine the positive result as well as the type of drug used and the confirmatory test which will confirm a positive screening test.* Drug test certificates issued by accredited drug testing centers shall be valid for a one-year period from the date of issue which may be used for other purposes. The following shall be subjected to undergo drug testing:

(a) Applicants for driver's license. – No driver's license shall be issued or renewed to any person unless he/she presents a certification that he/she has undergone a mandatory drug test and indicating thereon that he/she is free from the use of dangerous drugs;

(b) Applicants for firearm's license or permit to carry firearms outside of residence. – All applicants for firearm's license or permit to carry firearms outside of residence shall undergo a mandatory drug test to ensure that they are free from the use of dangerous drugs; Provided, That all persons who by nature of their profession carry firearms shall undergo drug testing;

(c) *Students of secondary and tertiary schools. – Students of secondary and tertiary schools shall, pursuant to the related rules and regulations as contained in the school's student handbook and with notice to the parents, undergo a random drug testing: Provided, that all drug testing expenses whether in public or private schools under this Section will be borne by the government;*

(d) Officers and employees of public and private offices. - Officers and employees of public and private offices whether domestic or overseas, shall be subjected to undergo a random drug test as contained in the company's work rules and regulations, which shall be borne by the employer, for purposes of reducing the risk in the workplace. Any officer or employee found positive for use of dangerous drugs shall be dealt with administratively which shall be a ground for suspension or termination, subject to the provisions of Article 282 of the Labor Code and pertinent provisions of the Civil Service Law;

(e) Officers and members of the military, police and other law enforcement agencies. - Officers and members of the military, police and other law enforcement agencies shall undergo an annual mandatory drug test;



(f) All persons charged before the prosecutor's office with a criminal offense having an impossible penalty of not less than six (6) years and one (1) day shall have to undergo a mandatory drug test.

*In addition to the above stated penalties in this Section, those found to be positive for dangerous drugs use shall be subject to the provisions of Section 15 of this Act.*[30]

One of the programs mandated by R.A. 9165 is aimed at the youth in schools, colleges, universities, and other institutions of learning in the Philippines. This is the random drug testing program of students, as provided in Section 36(c) of R.A. 9165, which aim to determine who among the students are drug users. The new law defines drug use as "[a]ny act of injecting, intravenously or intramuscularly, of consuming, either by chewing, smoking, sniffing, eating, swallowing, drinking or otherwise introducing into the physiological system of the body, any of the dangerous drugs."[31]

The provision on student drug testing contains no explicit guidelines on how the schools should select the students to be subjected to the drug tests. In the Senate deliberations on R.A. 9165, Sen. Robert Barbers stated that in his mind, the idea was that the faculty would recommend to the school authorities which students should be tested on the basis of the faculty members' observations that such students exhibited signs of potential drug use or addiction.[32] The school authorities would then send a mandatory notice to the parents of the selected student that he or she has been selected to undergo the drug test on a specific date. Thereafter, the student will be made to undergo the drug test.

Senators Vicente Sotto III and John Osmeña meanwhile raised a concern regarding the possibility that the teachers' prerogative to determine who among the students should undergo a drug test might be abused and might lead to discrimination against students unpopular with such teachers.[33] Senator Barbers answered that this was a matter of opinion and that the reason why he proposed to implement the drug tests on students in this manner was because almost all of the reports that the senators received indicated that majority of the drug users came from the student population. He further added that almost all of these received reports pointed to students as the main source of drug dependency cases.[34] Senator Osmeña then suggested that the procedure for the selection of students for the drug tests should be made "within the disciplinary rules of an educational institution that the teacher may recommend to the institution's disciplinary body with

30. COMPREHENSIVE DRUGS ACT OF 2002, art. III (emphasis supplied).

31. *Id.*, § 3, ¶ (kk).

32. This was delivered during the Senate deliberations on the law on Feb. 4, 2001.

33. *Id.*

34. *Id.*

notice to the parents that there may be a situation where testing is warranted."[35] Senator Barbers accepted this suggestion which eventually found its way into the law that drug tests shall be "pursuant to the related rules and regulations as contained in the school's student handbook and with notice to the parents."[36]

The law nevertheless still does not contain the specific manner by which the students would be selected. This issue was left unresolved and with the Bicameral Conference Committee deliberations failing to reach a consensus, the matter was left to the statute's implementing rules and regulations.[37] It is important to note here that it is not the teacher who will determine if a student should undergo a drug test. The teacher only recommends and it is the school authorities or the school head, as Senator Barbers stated, who would make the final determination. This lessens the possibility that the teachers would use the drug tests as an oppressive tool. Further, after the selection of a student, the school is mandated to send a notice to the parents of that student regarding his or her selection for the drug test. This allows the parents the opportunity to contest the selection of their child. The possibility of backlash from the parents should also serve as a deterrent against the use of the drug tests as a discriminatory tool by the teachers.

However, if the concerned government agencies formulating the implementing rules and regulations of R.A. 9165 decide to follow Senator Barbers' thinking, such manner of selecting the students for the random drug tests would be valid considering that the law contains the necessary standard with respect to the selection of the students for the drug tests. The implementing rules can thus fill in the details of the process and criteria for the determination of which students should be subjected to the tests based on this standard.

The law provides for the standard by defining what a drug dependent is. Drug dependence, according to R.A. 9165, means:

> [A] cluster of physiological, behavioral and cognitive phenomena of variable intensity, in which the use of psychoactive drug takes on a high priority thereby involving, among others, a strong desire or a sense of compulsion to take the substance and the difficulties in controlling substance-taking behavior in terms of its onset, termination, or levels of use.[38]

35. *Id.*

36. COMPREHENSIVE DRUGS ACT OF 2002, § 36 ¶ (c).

37. Re: Comprehensive Dangerous Drugs Act of 2002: Summary Report on the Fourth Bicameral Conference Committee Meeting on the Disagreeing provisions of Senate Bill 1858 and House Bill No. 4433 (2002) (on file with the author).

38. COMPREHENSIVE DRUGS ACT OF 2002, § 3, ¶ (n).



This definition is a sufficient standard since it contains the criteria upon which the various implementing agencies and the teachers must conform to in their selection of the students for the drug test. The implementing rules need only to state that a student who exhibits these physiological, behavioral, and cognitive phenomena may be made to undergo a drug test. If the teacher determines that a student is indeed exhibiting these signs, then the teacher can recommend that such student be made to undergo a drug test.

As with all drug tests mandated by R.A. 9165, the first test that will be administered to the students is the preliminary test or the so-called "screening test." A screening test is "[a] rapid test performed to establish potential/presumptive positive result."[39]

The manner through which these screening tests shall be conducted has been left by Congress to the discretion of the different agencies tasked to implement R.A. 9165. This should be contained in the Implementing Rules and Regulations with respect to the drug tests. However, with respect to the program for the random drug testing of students, the Implementing Rules and Regulations will be promulgated by the Philippine Drug Enforcement Agency (PDEA) in cooperation with the Department of Education (DepEd) and the Commission on Higher Education (CHED). At present, these agencies are still in the process of drafting the implementing guidelines concerning the same. Nevertheless, it is expected that the screening test will also be administered through urinalysis, which is currently being administered by the Land Transportation Office to all applicants for drivers' licenses.

Furthermore, R.A. 9165 mandates that the drug tests consist of two phases.[40] The first phase is the *screening test*, which determines whether a person is positive for the presence of drugs in his system, such presence indicative of the use of illegal drugs. The second phase involves a *confirmatory test* which seeks to confirm a positive screening test. A confirmatory test as defined by the statute is "[a]n analytical test using a device, tool or equipment with a different chemical or physical principle that is more specific which will validate and confirm the result of the screening test."[41] R.A. 9165 further defines the nature of this confirmatory test:

> *Laboratory Examination or Test on Apprehended/Arrested Offenders.* – Subject to Section 15 of this act, any person apprehended or arrested for violating the provisions of this Act shall be subjected to screening laboratory examination or tests within twenty-four (24) hours, if the apprehending or arresting officer has reasonable ground to believe that the person apprehended or arrested, on account of physical signs or symptoms or other visible or

39. *Id.* art. I, § 3, ¶ (hh).

40. *Id.* § 36.

41. *Id.* art. I, § 3, ¶ (ff).

> outward manifestation, is under the influence of dangerous drugs. *If found to be positive, the results of the screening laboratory examination or test shall be challenged within fifteen (15) days after receipt of the result through a confirmatory test conducted in any accredited analytical laboratory equipment with a gas chromatograph/mass spectrometry equipment or some such modern and accepted method, if confirmed the same shall be prima facie evidence that such person has used dangerous drugs, which is without prejudice for the prosecution for other violations of the provisions of this Act; Provided, That a positive screening laboratory test must be confirmed for it to be valid in a court of law.*[42]

Pursuant to this definition, the confirmatory test must be based on a different chemical or physical principle from the one employed in the screening test. It must also be more specific in that it must validate and confirm the result of the screening test. As aforementioned, the confirmatory test may be achieved through a test conducted by any accredited analytical laboratory equipment with gas chromatograph or mass spectrometry equipment. Said test, however, is not limited to these two methods only since the phrase "or some such modern and accepted method" immediately follows the two specified methods.

The last paragraph of Section 36 of R.A. 9165 states that aside from the penalties imposed in the same section, all persons found positive for the use of dangerous drugs are subject to additional penalties:

> Use of Dangerous Drugs. – A person apprehended or arrested, who is found to be positive for use of any dangerous drug after a confirmatory test, shall be imposed a penalty of a minimum of six (6) months rehabilitation in a government center for the first offense subject to the provisions of Article VIII of this Act. If apprehended using any dangerous drug for the second time, he she shall suffer the penalty of imprisonment ranging from six (6) years and one (1) day to twelve years and a fine ranging from Fifty Thousand Pesos (P50,000.00) to Two Hundred Thousand Pesos (P200,000.00) Provided, That this section shall not be applicable where the person tested is also found to have in his/her possession such quantity of any dangerous drugs provided for under Section 11 of this Act, in which case the provisions stated therein shall apply.[43]

It is clear that when a student tests positive for the presence of drugs in the screening or preliminary test, he shall then be made to undergo the confirmatory test. If the subsequent test confirms his use of illegal drugs, he can then be made to undergo rehabilitation subject to the applicable provisions of Article VIII of R.A. 9165.

Article VIII deals with the Program for Treatment and Rehabilitation of Drug Dependents. It outlines the manner through which a person found to

42. *Id.* § 38 (emphasis supplied).

43. *Id.* § 15 (emphasis supplied).



have violated Section 15 of R.A. 9165, may be brought under rehabilitation. The pertinent portions of the law state:

> Voluntary Submission of a Drug Dependent to Confinement, Treatment and Rehabilitation. – A drug dependent or any person who violates Section 15 of this Act may, by himself/herself or through his/her parent, spouse, guardian or relative within the fourth degree of consanguinity or affinity, apply to the Board or its duly recognized representative, for treatment and rehabilitation of the drug dependency. Upon such application, the Board shall bring forth the matter to the Court which shall order the applicant to be examined for drug dependency. If the examination by a DOH-accredited physician results in the issuance of a certification that the applicant is a drug dependent, he/she shall be ordered by the court to undergo treatment and rehabilitation in a Center designated by the Board for a period of not less than six months: Provided, That a drug dependent may be placed under the care of a DOH-accredited physician where there is no Center near or accessible to the residence of the drug-dependent or where said drug dependent is below eighteen (18) years of age and is a first time offender and non-confinement in a Center will not pose a serious danger to his/her family or the community.
>
> Confinement in a Center for treatment and rehabilitation shall not exceed one (1) year, after which the Court, as well as the Board, shall be apprised by the Head of the treatment and rehabilitation center of the status of said drug dependent and determine whether further confinement will be for the welfare of the drug dependent and his/her family or the community...[44]
>
> Compulsory Confinement of a Drug Dependent Who Refuses to Apply Under the Voluntary Submission Program. - Notwithstanding any law, rule and regulation to the contrary, any person determined and found to be dependent on dangerous drugs shall, upon petition by the Board or any of its authorized representative, be confined for treatment and rehabilitation in any Center duly designated or accredited for the purpose.
>
> A petition for the confinement of a person alleged to be dependent on dangerous drugs to a Center may be filed by any person authorized by the Board with the Regional Trial Court of the province or city where such person is found.
>
> After the petition is filed, the court, by an order, shall immediately fix a date for the hearing, and a copy of such order shall be served on the person alleged to be dependent on dangerous drugs, and to the one having charge of him.
>
> If after such hearing and the facts so warrant, the court shall order the drug dependent to be examined by two (2) physicians accredited by the Board. If both physicians conclude that the respondent is not a drug dependent, the court shall order his/her discharge. If either physician finds him to be a dependent, the court shall conduct a hearing and consider all relevant evidence which may be offered. If the court finds him a drug dependent, it

44. *Id.* § 54 (emphasis supplied).

> shall issue an order for his/her commitment to a treatment and rehabilitation center under the supervision of the DOH. In any event, the order of discharge or order of confinement or commitment shall be issued not later than fifteen (15) days from the filing of the appropriate petition.[45]

> From the foregoing, it is clear that a student who tests positive for drugs after both the screening and confirmatory tests may be subjected to rehabilitation only if he is found to be a drug dependent by a court in a proceeding filed by the Dangerous Drugs Board.[46]

The law is silent with respect to what will happen to a student who tests positive for drugs but is not determined to be a drug dependent. This matter was left to the agencies charged with the formulation of the implementing rules and regulations of R.A. 9165, which would contain provisions on counseling and other services for such drug users who are not dependents to ensure that they do not repeat their drug use.[47] These rules and regulations are still being drafted by the Dangerous Drugs Board in conjunction with the concerned agencies such as the DSWD, CHED, and the DepEd.

In a press conference held last 24 May 2002, the National Union of Students of the Philippines (NUSP) denounced the provision in R.A. 9165 requiring random drug testing in schools and universities.[48] NUSP Secretary General Cristina Palabay said that they intended to question the measure through protest rallies, petition signing, and lobbying in Congress when the bicameral body deliberates on the final version of the bill.[49] She added, "[t]he provision is subjective and biased against students. They should, instead go after the big fishes that supply drugs to pushers and users."[50]

Senator Barbers, however, countered by saying that the provision on drug testing was inserted in an effort to deter users from taking illegal drugs.[51] The NUSP was up in arms over the fact that the random drug tests mandated for students by R.A. 9165 may be used by the teachers as a *weapon against students, particularly those who may not be in their good graces.*[52] *The NUSP's sentiments echoed the concerns of Senators Sotto and*

45. *Id.* § 61.

46. *Id.* § 3, ¶ (n).

47. Telephone Interview with Mr. Xerxes Nitafan, Committee Secretary of the Senate Committee on Public Order and Illegal Drugs (July 17, 2002).

48. Inquirer News Service, Students Cry Foul on Random Drug Testing in Schools, *available at* http://www.inq7.net/brk/2002/may/24/text/brkpol_12-1-p.htm (last visited Sept. 2, 2003).

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*



Osmeña but these fears, as stated earlier, would probably be addressed in the implementing rules and regulations of R.A. 9165.

The point raised by the NUSP is valid. However, the drug tests mandated by R.A. 9165 should evoke a much deeper concern among Filipinos. There is no question that the intent of the law is good. Indeed, what can be nobler than the protection of the Filipino youth from the ill effects of drugs so that they can grow into productive citizens? However, no amount of good intentions can validate a law that transgresses fundamental rights. This is the issue that confronts Philippine society with the passage into law of R.A. 9165.

## IV. Is A Drug Test A Search?

Article III of the 1987 Constitution mandates that:

> The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized.[53]

Although commonly referred to as the search and seizure clause, this constitutional provision does not define a search. The simplest way to define a search is that it is to look for something or someone.

The traditional rule is that all searches must be made pursuant to a valid warrant in order to be reasonable. This rule is bolstered by the fact that the Bill of Rights says that the people have the right against unreasonable searches and seizures "of whatever nature and for any purpose." This would *point to the conclusion that this right is available against any search initiated by the government regardless of the purpose of such search.*

Fr. Joaquin Bernas, S.J., an eminent Constitutional Law expert, has however opined that the Supreme Court unduly limited the application of this provision in the case of *Material Distributors (Phil.) Inc. v. Judge Natividad.*[54] In this case, the constitutionality of a *subpoena duces tecum* issued pursuant to Rule 27 of the Rules of Court then in force was challenged on the ground that it amounted to an unreasonable search and seizure. The Supreme Court, in a scant discussion on the issue of the constitutionality of such a search, held that the rule of procedure is purely of civil character, not warranting the application of the Bill of Rights. Fr. Bernas opines that the plain text of the search and seizure clause requires that the Rules of Court

53. PHIL. CONST. art III, § 2.

54. 84 Phil. 127 (1949).

must conform to the Constitution. Therefore, the requirements of reasonable searches and seizure must be followed in all searches, even those issued pursuant to civil cases.[55] His conclusion is based on American jurisprudence, specifically the U.S. Supreme Court cases of *Oklahoma Press Publishing Co. v. Walling* [56] and *Camara v. Municipal Court.*[57]

In *Oklahoma,* the Court ruled that so long the State authorizes a search, such search must conform to the Fourth Amendment,[58] which 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 Court in *Camara* then ruled that a building inspector should not enter the dwelling of a person without complying with the Fourth Amendment requirements even if the purpose of his search was the conduct of an administrative inspection for the enforcement of the fire, building, and safety codes.

If the strict pronouncements of the Supreme Court are followed, drug testing conducted on students pursuant to R.A. 9165 may arguably not even be under the protection of the search and seizure clause. It may be that the Supreme Court rulings applying this clause are limited to searches and seizures conducted on the dwelling, papers, and persons of individuals pursuant to criminal investigations only. However, if the plain constitutional text along with Fr. Bernas' esteemed opinion and American jurisprudence is followed, an opposite conclusion will be reached. According to this view, drug testing must conform to the established principles governing reasonable searches and seizures as this interpretation manifests a better representation of the purpose and intent of the Constitution. Drug tests, as searches, must therefore conform to the requirements of the Bill of Rights.

### *A. Drug Tests as Searches in American Jurisprudence*

In the landmark case of *Skinner v. Railway Labor Executives' Association,*[59] the U.S. Supreme Court held that state-compelled collection and testing of urine constituted a search subject to the demands of the Fourth Amendment. In *Skinner,* upon the basis of evidence indicating that alcohol and drug abuse

55. JOAQUIN BERNAS, S.J., THE CONSTITUTION OF THE REPUBLIC OF THE PHILIPPINES: A COMMENTARY (1996) [hereinafter BERNAS].

56. 327 U.S. 186 (1948).

57. 387 U.S. 523 (1967).

58. U.S. CONST. amend IV.

59. 489 U.S. 602, 617 (1989).



by railroad employees had caused or contributed to a number of significant train accidents, the Federal Railroad Administration (FRA) promulgated regulations under the statutory authority of petitioner, Secretary of Transportation, to adopt safety standards for the railroad industry. Subpart C of the regulations requires owners of railroad companies to see that blood and urine tests of covered employees are conducted following certain major train accidents or incidents. Subpart D of the regulations authorizes, but does not require, railroads to administer breath or urine tests, or both, to covered employees who violate certain safety rules. The Railway Labor Executives' Association then brought suit to enjoin the regulations.

The Federal District Court ruled that the regulations did not violate the Fourth Amendment. The District Court of Appeals reversed the ruling of the Federal District Court, ruling that a requirement of particularized suspicion is essential to a finding that the testing, pursuant to the disputed regulations of railroad employees, is reasonable under the Fourth Amendment. The appellate court reasoned that a requirement of particularized suspicion would ensure that the tests, which reveal the presence of drug metabolites that may remain in the body for weeks following ingestion, are confined to the detection of current drug use.

The U.S. Supreme Court reversed the Court of Appeals. At the onset, the U.S. Supreme Court ruled that the Fourth Amendment is applicable to drug and alcohol testing mandated or authorized by FRA regulations. The collection and subsequent analysis of the biological samples required or authorized by the regulations constitutes a search of the person subject to the Fourth Amendment. The Court stated that it has long recognized that a compelled intrusion into the body for blood to be tested for alcohol content and the ensuing chemical analysis constitutes a search. Similarly, subjecting a person to the breath test authorized by Subpart D must be deemed a search, since it requires the production of "deep lung" breath and thereby implicates concerns about bodily integrity. Further, the U.S. Supreme Court ruled that although the collection and testing of urine under the regulations does not entail any intrusion into the body, it nevertheless constitutes a search, since it intrudes upon expectations of privacy as to medical information. Urine analysis likewise falls within the said ambit. Thus in *Skinner,* the U.S. Supreme Court held that:

> We have long recognized that a 'compelled intrusion into the body for blood to be analyzed for alcohol content' must be deemed a Fourth Amendment search. In light of our society's concern for the security of one's person, it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. Much the same is true of the breath-testing procedures required under Subpart D of the regulations. Subjecting a person to a

> breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber*, should also be deemed a search.
>
> Unlike the blood-testing procedure at issue in *Schmerber*, the procedures prescribed by the FRA regulations for collecting and testing urine samples do not entail a surgical intrusion into the body. 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. As the Court of Appeals for the Fifth Circuit has stated:
>
> > There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[60]

This ruling was reiterated in *Treasury Employees Union v. Von Raab*,[61] wherein the U.S. Supreme Court again ruled that drug and alcohol tests are searches that must meet the reasonableness requirement of the Fourth Amendment. It is noteworthy that *Skinner* and *Von Raab* were both decided by the Court on the same day, 21 March 1989. In *Von Raab*, the U.S. Customs Service implemented a drug-screening program requiring urinalysis tests of Customs Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or requiring incumbents therein to carry firearms or to handle "classified" material. The primary enforcement mission of the U.S. Customs Service was the interdiction and seizure of illegal drugs smuggled into the country.

The testing program required that an applicant for such positions must be notified that his selection is contingent upon successful completion of drug screening. The disputed program also sets forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy. The disputed program further provided that test results may not be turned over to any other agency, including criminal prosecutors, without the employee's written consent. The Treasury Employees Union filed suit on behalf of Customs employees seeking the positions covered by the requirements of the testing program, alleging that the drug-testing program violated their rights under the Fourth Amendment. The District Court agreed to such position and enjoined the program. The

60. *Id.* at 617 (citations omitted).

61. 489 U.S. 656 (1989).



District Court of Appeals, meanwhile, reversed and vacated the injunction. It held that although the program effects a search within the meaning of the Fourth Amendment, such searches are reasonable in light of their limited scope and the Service's strong interest in detecting drug use among employees in covered positions.

The Court affirmed the ruling of the District Court of Appeals, holding that where the government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. The Court in *Von Raab* thus held:

> In *Skinner v. Railway Labor Executives' Assn.*, ante, at 616-618, decided today, we held that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer, and, in view of our holding in Railway Labor Executives that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment.[62]

There are two cases decided by the U.S. Supreme Court that directly dealt with the issue of drug tests to students and the implications of such tests on the rights of students under the Fourth Amendment. These cases are *Vernonia School District 47J v. Acton*,[63] and the recently decided *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.[64]

*Vernonia* involved the constitutionality of a school district drug program for student athletes. The parents of James Acton, a student, brought suit against Vernonia School District 47J (the District) in the U.S. District Court of Oregon. The District claimed that it had implemented a drug testing policy because of severe disciplinary problems, particularly with student athletes, and staff observations of student athletes using drugs or glamorizing drug and alcohol use. The District's drug testing policy required all students wishing to participate in school athletics to sign a form authorizing a drug test before the student could participate in the athletic program. In addition, the student had to consent to random weekly drug tests throughout the season. Should a student test positive for drugs, a second test would be given

62. *Id.* at 665 (citations omitted).

63. 515 U.S. 646 (1995).

64. Board of Education of Independent School District No. 92 v. Earls, No. 01-332 (filed March 19, 2003), *available at* http://laws.findlaw.com/us/000/01-332.html (last accessed Aug. 1, 2003).

to confirm the results. If the student tested positive again, the school would notify his or her parents and the student would have to choose between entering a six week assistance program with weekly drug testing or being suspended from school athletics for the rest of the current season and the following season.

James Acton and his parents refused to consent to the drug testing. Consequently, the school principal and the district superintendent refused to allow James to participate in school athletics until his parents signed the consent form. The Actons alleged the District's drug testing program violated their son's rights under the Fourth Amendment.

The District Court ruled in favor of the District, holding that the drug-testing program was constitutional because the District was justified in initiating the program to address alleged disciplinary problems in the school. The Actons appealed to the Ninth Circuit Court of Appeals, arguing that the District Court erred in holding that the District's drug testing policy did not violate the Fourth Amendment. The Court of Appeals reversed the District Court by determining that the District's drug problem did not justify testing students randomly for drugs. The District then petitioned the U.S. Supreme Court for the issuance of a writ of *certiorari*.

The U.S. Supreme Court granted *certiorari* to determine whether the District's random drug testing policy violated the Fourth Amendment. The Court vacated and remanded the decision of the Ninth Circuit Court of Appeals, determining the District's policy was reasonable and was thus not violative of the Fourth Amendment. At the onset of *Vernonia*, the Court, once again adopting *Skinner* and *Von Raab*, settled a preliminary issue by ruling that the drug testing of students was a search subject to the requirements of the Fourth Amendment:

> In *Skinner* v. *Railway Labor Executives' Assn.*, we held that state compelled collection and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a "search" subject to the demands of the Fourth Amendment.[65]

Meanwhile in the *Earls* case, decided on 27 June 2002, the Student Activities Drug Testing Policy (Policy) adopted by the School District of Tecumseh, Oklahoma, required all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity. In practice, this policy had been applied only to competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association, *i.e.*, the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, cheerleading, and athletics. Under the Policy, students were required to take a drug test before participating in an extracurricular activity, submit to random drug testing

65. *Vernonia*, 515 U.S. at 652 (citations omitted).



while participating in that activity, and agree to be tested at any time upon reasonable suspicion. The urinalysis tests were designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates and not medical conditions or the presence of authorized prescription medications.

At the time of their suit, respondents attended Tecumseh High School. Respondent Lindsay Earls was a member of the show choir, the marching band, the Academic Team, and the National Honor Society. Respondent Daniel James sought to participate in the Academic Team. These high school students and their parents brought an action for equitable relief, alleging that the Policy violated the Fourth Amendment.

Applying *Vernonia*, which the U.S. Supreme Court upheld the suspicionless drug testing of school athletes, the District Court ruled in favor of the School District. The Tenth Circuit Court of Appeals, however, reversed the decision of the District Court, holding that the testing policy violated the Fourth Amendment. The appellate court concluded that before imposing a suspicionless drug-testing program, a school must demonstrate some identifiable drug abuse problem among a sufficient number of those tested, such that testing that group actually redresses its drug problem. It further held that the School District had failed to demonstrate such a problem among the Tecumseh students participating in competitive extracurricular activities.

The U.S. Supreme Court reversed the Tenth Circuit Court of Appeals. Citing *Vernonia*, the Court again ruled that a drug test is a search within the meaning of the Fourth Amendment, stating that "[s]earches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests."[66]

Even if there is no case in Philippine jurisprudence expressly recognizing drug tests as searches, there is authority for the adoption of the above-quoted American rulings into Philippine Constitutional Law. The Philippine Supreme Court has recognized the intertwined history of Philippine Constitutional Law with that of the United States as a basis for the persuasiveness, if not controlling influence, that American constitutional doctrines have in the Philippines. In the case of *People vs. Marti*,[67] the Supreme Court held that:

> Our present constitutional provision on the guarantee against unreasonable search and seizure had its origin in the 1935 Charter which states:
>
> > The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall

66. *Id.*

67. 193 SCRA 57 (1991).

> not be violated, and no warrants shall issue but upon probable cause, to be determined by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched, and the persons or things to be seized. (Sec. 1 [3], Article III).
>
> [It was] derived almost verbatim from the Fourth Amendment to the United States Constitution. *As such, the Court may turn to the pronouncements of the United States Federal Supreme Court and State Appellate Courts which are considered doctrinal in this jurisdiction.*[68]

Based on the foregoing, it is apparently more plausible to adopt the pertinent rulings of the U.S. Supreme Court into the discussion.

*B. Extraction and Examination of Body Fluids in Philippine Jurisprudence*

As earlier stated, no Philippine case has categorically ruled that the taking of body fluids is an outright search within the meaning of the Constitution. Every instance of examination of body fluids or other forms of physical examination is related more to the right against self-incrimination rather than to the right against unreasonable searches and seizure. Three cases illustrate such.

The first case was *United States v. Tan Teng,*[69] penned by Justice Johnson and decided in 1912 when the Philippines was still under the authority of the United States. In this case, the accused was contesting the admissibility of the results of tests done on a fluid taken from his body. Upon his arrest for raping a seven year-old girl, the body of the accused bore signs of a disease and a fluid was being emitted from his private parts. The police officer took a sample of the fluid and the examination results later revealed that he was suffering from gonorrhea. This fact was material to the prosecution's evidence because apparently the child was now suffering from the same disease presumably brought about by the rape.

The Supreme Court ruled that the right against self-incrimination applies only to testimonial evidence. Impliedly, they declared that the body might be examined without being incriminatory to the individual. The Court's premise was that the purpose of the constitutional provision against self-incrimination was to prevent the application of any compulsion or duress to an individual to extract false testimonial evidence. There was no mention on any implication that the extraction of the body fluids might have had on the individual's right against unreasonable searches and seizures.

68. *Id.* at 63 (emphasis supplied).

69. 23 Phil. 145 (1912).



The second case is *Villaflor v. Summers,*[70] involving the physical examination of a woman accused of adultery to determine if she was pregnant. The accused was committed to prison for contempt of court because she refused to submit to the test despite the court order. She filed a petition for a writ of *habeas corpus* to restore her freedom on the ground that the order for physical examination violated her right against self-incrimination.

The Supreme Court, through Justice Malcolm, ruled that the examination of the body did not violate the right against self-incrimination. However, the Court added that the right to due process of law must be protected, such that the physical examination of the accused must be made either by her family doctor or a doctor of the same sex as the accused. The *ratio decidendi* of the case appears to be the non-repugnancy of a physical examination to the right against self-incrimination. Again, the case was decided when the Philippines was still under the authority of the United States and there was no discussion on whether the physical examination of the accused violated her right against unreasonable searches and seizures.

In the latter case of *Beltran v. Samson,*[71] the Supreme Court extended the application of the right against self-incrimination to include the compulsory production of handwriting specimens by an accused and not just the compulsion to provide testimonial evidence against himself or herself. However, this case does not in any way alter the earlier pronouncements in the two preceding cases. *Beltran* clarified the scope of the self-incrimination clause by saying that it prevents not only the giving of oral testimony as earlier ruled, but also all cases when the person is "divulging, in short, of any fact which an accused has a right to hold secret."[72]

There must be a positive act done to produce evidence not yet in existence. According to the Court, a physical examination requires no positive act and that the evidence is already in existence. Hence, physical examinations do not infringe on the right against self-incrimination.

These three cited cases show that traditionally, the Supreme Court held the view that the extraction of evidence from the body of an individual does not result in a violation of his constitutional rights. A drug test will naturally involve such an extraction of samples from the body of the test subjects. However, these three cases do not provide enough justification to exempt such drug test from the requirements of the constitution as these cases dealt with the right against self-incrimination and not the right against unreasonable searches. Furthermore, in these cases, all of the persons whose

70. 41 Phil. 62 (1920).

71. 53 Phil. 570, 577 (1929).

72. *Id.*

bodies were subjected to physical examinations were all under custody and indictment for the commission of various crimes. This would not be the case in the random drug tests of students since such tests would not be based on any indictment nor would they be conducted pursuant to a criminal case filed against said students. This being the case, the determination of whether the drug tests under R.A. 9165 are searches under the Constitution should be continued.

Since there is an absence of direct authority to indicate that a drug test is a search within the context of the Constitution, the nature of the constitutional right involved in drug tests must be examined along with how this right is viewed and has developed in the Philippine context and whether such right is applicable to the proposed drug tests under R.A. 9165.

### C. *The Nature of the Right Involved*

In the constitutional sense, a search occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.[73] The central element in determining whether a particular act or conduct constitutes a search is the existence or non-existence of any intrusion into the legitimate privacy of a person. Thus, there are two elements in a search: a legitimate expectation of privacy on the part of the individual, and an intrusion by the government into this privacy.

In a drug test, body fluids such as urine or blood are taken from a person and are subjected to chemical tests and analysis. This is in order to look for the presence of trace substances that indicate that the person, from which the sample was taken, has recently ingested or used banned or controlled substances.

Any State-mandated drug testing program primarily affects the right to privacy. A drug test involves a certain amount of examination of a person's body and the substances that may emanate from it, particularly urine. This examination is an intrusion, to a certain degree, into a person's personal life or private realm. In order to determine the validity of any State-mandated drug testing program, the effects that such a program may have on a person's right to privacy must be examined. Thus it is important in order to understand the history and the nature of the right to privacy and how this right has developed in both its origins in American jurisprudence, from which it came, and in Philippine jurisprudence.

The respective Bill of Rights of the 1935, 1973, and 1987 Philippine Constitutions were all patterned after the Bill of Rights of the American Constitution. In fact, some of the provisions of the Philippine Bill of Rights were lifted *verbatim* from the American Constitution while other provisions

73. *See* Maryland v. Mason, 472 U.S. 463 (1986).



of the two charters are very similar. Hence, a thorough study of the development of the privacy rights in the Philippines must necessarily include a study of the development of this right in the United States.

At the onset, the right to privacy was associated with and practically limited to the concept of property.[74] The right to privacy was limited to a prohibition against any State intrusion into an individual's property rights but not against his person.

In 1890, Samuel Warren and Louis D. Brandeis introduced a revolutionary new conception of the meaning and scope of the right to privacy. They published a ground breaking article entitled "The Right to Privacy,"[75] wherein they argued that the right to privacy is first and foremost a personal right of an individual, which should apply to his person as well as to his property. They further stated that this right should be conceptualized in such a manner as to enable it to be an effective protection or deterrent against the continually increasing possibilities of intrusion by the State and a technological society.[76]

This is clearly an important development considering that today's technology makes previously unimaginable intrusions on a person's privacy possible. This idea has allowed the right to privacy to develop throughout history as a check on the corollary technological development. This is true especially in the scientific and medical field, as for instance DNA examination, where even an individual's single cell is capable of revealing facts about said individual that even he has no idea about.

### D. *Source of the Right*

A perusal of the provisions of the 1987 Constitution will reveal that there is no express provision granting the right to privacy to an individual. This is true even though the Constitution was drafted at a time when the right to privacy had already been granted jurisprudential recognition in both the United States and the Philippines. However, the Constitution contains substantially the same provisions as that of the earlier constitutions upon which the right to privacy of an individual was based. Therefore, it is more probable that the omission was brought about by the understanding that there are enough provisions in the Constitution upon which to base and to protect the right to privacy. It is once again imperative to start with an

74. Linda Przybyszewski, *The Right to Privacy: A Historical Perspective*, in ABORTION, MEDICINE AND THE LAW 667, 684 (J. Douglas Butter, et al. 4d ed. 1992) [hereinafter Linda].

75. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

76. Linda, *supra* note 74, at 683.

examination of American Constitutional Law to determine the source and to fully understand the development of this right.

The very first instance when the right to privacy was given the highest express judicial recognition was in 1928 in Justice Brandeis's dissent in *Olmstead v. United States.*[77] In said case, Justice Brandeis declared that the right to privacy is the most comprehensive of rights and the right most valued by civilized men. This dissent was subsequently adopted in the 1952 case of *Public Utilities Commission vs. Pollack,*[78] wherein Justice Douglas declared that liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint. It should likewise include privacy as well, if it is to be a repository of freedom. Justice Douglas declared that the right to be let alone is indeed the beginning of all freedoms.

It was only in 1965, in the case of *Griswold v. State of Connecticut,*[79] that the U.S. Supreme Court gave the right to privacy its express recognition and preferred position in the vast realm of American Constitutional Law. In this case, Griswold was indicted for giving advice to a couple regarding the use of contraceptives for birth control. At that time, a Connecticut statute penalized the use or attempt to use of a contraceptive, including the giving of advice regarding the matter by medical practitioners. Upon reaching the U.S. Supreme Court, Griswold was acquitted and the statute was declared void and unconstitutional. In the decision, Justice Douglas noted:

> Various guarantees create zones of privacy. The right of association contained in the penumbra of the First Amendment is one as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-incrimination Clause enables the citizen to create a zone of privacy which government may not force him to surrender to hid detriment. The Ninth Amendment provides: 'The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people.'[80]

Justice Douglas further added, "[c]ases bear witness that the right of privacy which presses for recognition is a legitimate one."[81] It is evident from the above pronouncement that the right of privacy is not only a recognized right but also that it is not limited to a single provision but rather

77. 277 U.S. 478 (1928).

78. 343 U.S. 451 (1952).

79. 381 U.S. 479 (1965).

80. *Id.* at 484.

81. *Id.*



the right can be seen from the whole of the Bill of Rights and from its various specific provisions. Every right thus creates a zone of privacy where the state is prohibited from interfering. As aforementioned, this is probably the reason for the absence of an express provision in the Constitution on the right to privacy, considering that the right is already inherent in the various rights enumerated therein.

Some three years after *Griswold,* the Philippine Supreme Court gave express recognition to the right of privacy by engrafting the doctrine in *Griswold* into Philippine jurisprudence. This was done in the case of *Morfe v. Mutuc,*[82] where the Supreme Court quoting, among others, the dissent of Justice Brandeis in *Olmstead* and the majority opinion in *Griswold.* The Court declared:

> There is much to be said for this view of Justice Douglas: 'Liberty in the constitutional sense must mean more than freedom from unlawful governmental restraint; it must include privacy as well, if it is to be a repository of freedom. The right to be let alone is indeed the beginning of all freedom.' As a matter of fact, this right to be let alone is, to quote from Mr. Justice Brandeis 'the most comprehensive of rights and the right most valued by civilized men.'
>
> The concept of liberty would be emasculated if it does not likewise compel respect for his personality as a unique individual whose claim to privacy and interference demands respect. As Laski so very aptly stated: 'Man is one among many, obstinately refusing reduction to unity. His separateness, his isolation, are indefeasible; indeed, they are so fundamental that they are the basis on which his civic obligations are built. He cannot abandon the consequences of his isolation, which are, broadly speaking, that his experience is private, and the will built out of that experience personal to himself. If he surrenders his will to others, he surrenders his personality. If his will is set by the will of others, he ceases to be master of himself. I cannot believe that a man no longer master of himself is in any real sense free.'
>
> Nonetheless, in view of the fact that there is an express recognition of privacy, specifically that of communication and correspondence which 'shall be inviolable except upon lawful order of Court or when public safety and order' may otherwise require, and implicitly in the search and seizure clause, and the liberty of abode, the alleged repugnancy of such statutory requirement of further periodical submission of a sworn statement of assets and liabilities deserves to be further looked into.
>
> In that respect the question is one of first impression, no previous decision having been rendered by this Court. It is not so in the United States where, in the leading case of Griswold v. Connecticut, Justice Douglas, speaking for five members of the Court, stated: 'Various guarantees create zones of privacy. The right of association contained in the penumbra of the First

82. 22 SCRA 424 (1968).

> Amendment is one, as we have seen. The Third Amendment in its prohibition against the quartering of soldiers 'in any house' in time of peace without the consent of the owner is another facet of that privacy. The Fourth Amendment explicitly affirms the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' The Fifth Amendment in its Self-Incrimination clause enables the citizen to create a zone of privacy which government may not force him to surrender to his detriment. The Ninth Amendment provides: 'The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.' After referring to various American Supreme Court decisions, Justice Douglas continued: 'These cases bear witness that the right of privacy which presses for recognition is a legitimate one.'
>
> The Griswold case invalidated a Connecticut statute which made the use of contraceptives a criminal offense on the ground of its amounting to an unconstitutional invasion of the right of privacy of married persons; rightfully it stressed 'a relationship lying within the zone of privacy created by several fundamental constitutional guarantees.' It has wider implication though. The constitutional right to privacy has come into its own.
>
> So it is likewise in our jurisdiction. The right to privacy as such is accorded recognition independently of its identification with liberty; in itself, it is fully deserving of constitutional protection.[83]

In *Morfe*, the validity of a statute requiring compulsory periodic revelation of assets and liabilities of public officials, including the statement of amounts and sources of income as well as the amounts of personal and family expenses was being challenged. The Supreme Court upheld the questioned disclosure law by saying that it was not repugnant to the right to privacy of the public officials. In effect, the Court, recognized the fundamental right to privacy of individuals and the fact that this fundamental right can and must admit of certain exceptions in the proper instances. This point will be explained further later in the chapter dealing with the validity of a drug test as a search.

The above quoted case of *Morfe* is the landmark Philippine case on the right to privacy. Almost all of the subsequent cases dealing with the right to privacy quoted or drew authority from the *Morfe* pronouncements.

Another leading case on the right to privacy in the Philippine context is the case of *Ople v. Torres*.[84] This case involved the constitutionality of an administrative order issued by then Pres. Fidel V. Ramos, creating the National Identification Reference Card System. In an eight to six decision, a divided Court, with the majority speaking through Justice Puno, ruled against the validity of the National I.D. System citing among other grounds,

83. *Morfe*, 22 SCRA at 442-45.

84. 293 SCRA 141 (1998).



the lack of a standard of safety in the law regarding the use of the information to be recorded pursuant to the I.D. System. The Court said that this absence of standards on the use of such information presents a potential infringement on the right to privacy of the people, which the Court, as a guardian of liberty, could not ignore. The Supreme Court once again cited the doctrines of *Griswold* and *Morfe* expressly recognizing that the people have a right to privacy emanating from the various provisions of the Bill of Rights, ruling:

> Indeed, if we extend our judicial gaze we will find that the right of privacy is recognized and enshrined in several provisions of our Constitution. It is expressly recognized in Section 3(1) of the Bill of Rights:
>
> > Sec. 3. (1) The privacy of communication and correspondence shall be inviolable except upon lawful order of the court, or when public safety or order requires otherwise as prescribed by law.
>
> Other facets of the right to privacy are protected in various provisions of the Bill of Rights, *viz*:
>
> > Sec. 1. No person shall be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws.
> >
> > Sec. 2. The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures of whatever nature and for any purpose shall be inviolable, and no search warrant or warrant of arrest shall issue except upon probable cause to be determined personally by the judge after examination under oath or affirmation of the complainant and the witnesses he may produce, and particularly describing the place to be searched and the persons or things to be seized....
> >
> > Sec. 6. The liberty of abode and of changing the same within the limits prescribed by law shall not be impaired except upon lawful order of the court. Neither shall the right to travel be impaired except in the interest of national security, public safety, or public health, as may be provided by law....
> >
> > Sec. 8. The right of the people, including those employed in the public and private sectors, to form unions, associations, or societies for purposes not contrary to law shall not be abridged....
> >
> > Sec. 17. No person shall be compelled to be a witness against himself.[85]

Two broad meanings of the right to privacy have emerged: (1) the right of selective disclosure and (2) the right concerning the broader aspects of

85. *Id.* at 156-57.

freedom or autonomy of an individual.[86] The first right refers to the right of an individual to choose whether or not to disclose certain matters about his person and should he choose to do so, the matters which he chooses to disclose. This is the right of an individual to control for himself when, how, and to what extent information about his person is communicated to others.[87] This may also refer to the right of a person to choose the extent to which others may inquire about his person.[88] The second right is a broader concept because it refers to the acts which a person chooses to commit and the experiences, which he chooses to engage in.[89] More aptly stated, this refers to the freedom of choice of an individual.

Though these two concepts are distinct and separate from one another, in certain cases, they may be both present. In fact, an analysis of both concepts might give an impression that the first concept is merely a sub-type of the second concept of the right to privacy. This is because the act of disclosing information about one's self or the act of allowing or submitting one's self to a process wherein information will be revealed is an act of autonomy. The right to control the collection, maintenance, use, and dissemination of data about oneself is called informational privacy.[90] The right to make personal decisions or conduct personal activities without intrusion, observation, or interference is called autonomy privacy.[91] A drug test will necessarily reveal information about one's self. Therefore, a drug test will necessarily involve issues on the right to privacy.

### *E. Privacy Interests in a Drug Test*

Given that there is express recognition of the existence of the right to privacy of an individual in Philippine jurisprudence but there is no express recognition that a drug test is a search, the next issue that has to be addressed is the privacy interests that may be involved or violated in such drug tests. As stated earlier, it is most probable that the preliminary drug tests or the screening tests that will be employed for the students will most probably be based upon urinalysis. It is therefore important to determine the privacy interests that an individual has with respect to his urine.

86. Baker Tyler, *Roe and Paris: Does Privacy Have a Principle?*, 26 STANFORD L. REV. 1163 (1974) [hereinafter Tyler].

87. *Id.*

88. Daniel R. Ortiz, *Privacy, Autonomy and Consent*, 12 HARV. J. OF L. & PUB. POL. 92 (1989).

89. Tyler, *supra* note 86, at 1136.

90. G. Hancock, *California's Privacy Act: Controlling Government's Use of Information?* 32 STANFORD L. REV. n.5 (1980).

91. Hill v. NCAA, 865 P. 2d 633, 652-54 (Cal. 1994).



There are three distinct privacy interests that are involved with respect to the taking of urine samples and the subsequent analysis of that urine sample in drug testing.[92] The first is the expectation of privacy of an individual as to his or her own urine.[93] The second interest is the expectation of privacy in the information derived from the urine samples.[94] This issue will greatly deal with the procedure in the drug testing and the custody of the samples after the student discharged these samples. The third is the expectation of privacy in the manner of discharging the urine sample.[95]

The Filipino sense of privacy is arguably less than that in the Western Hemisphere. In his dissenting opinion in *Ople*, Justice Mendoza, quoting a footnote from the earlier case of *Morfe*[96] recognized this fact, stating:

> In Morfe v. Mutuc, this Court dealt the *coup de grace* to claims of latitudinarian scope for the right of privacy by quoting the pungent remark of an acute observer of the social scene, Carmen Guerrero-Nakpil:
>
> > (Privacy? What's that? There is no precise word for it in Filipino, and as far as I know any Filipino dialect and there is none because there is no need for it. The concept and practice of privacy are missing from conventional Filipino life. The Filipino believes that privacy is an unnecessary imposition, an eccentricity that is barely pardonable or, at best, an esoteric Western afterthought smacking of legal trickery.)
>
> Justice Romero herself says in her separate opinion that the word privacy is not even in the lexicon of Filipinos.[97]

This point is further bolstered by the prevalent practice among Filipino males of urinating along a wall or into an open sewer or against the wheel of a parked vehicle while in full view of the public, with nothing more than their backs to cover them while they relieve themselves in this most private of acts.

If the three-point guideline referred to above is however followed, it will be seen that Filipinos do have a valid expectation of privacy with respect to the act of urination and the urine dispelled. First, just like all other people, Filipinos have an expectation of privacy with respect to the urine itself because it is a by-product of one's own body. Urine is produced by one's body and so it should rightfully be under the control of the one who

92. Mark A. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHICAGO-KENT L. REV. 705 (1987).

93. *Id.*

94. *Id.*

95. *Id.*

96. 22 SCRA 424 (1968).

97. Ople v. Torres, 293 SCRA 141, 192 (1998) (Mendoza, J., dissenting).

produced it and he or she alone should have the power to decide what he or she wants to do with his or her own urine. Since the urine belongs to the person who produced it, he or she also has a valid expectation of privacy with respect to the information that can be derived from his or her own urine. Naturally, no information can be derived from one's urine unless a sample is obtained. Considering that the urine belongs to the person who produced it, being a by-product of one's own body, then he or she alone can rightfully decide if he or she wants to give a sample of urine in order for information to be derived from such sample. It is with respect to the expectation of privacy in the manner of discharging such urine that the argument presented by the Filipino habit of urinating in public may be directed.

In the *Ople* case, the Supreme Court enunciated the rule for determining whether an expectation of privacy exists and whether such is reasonable. The Supreme Court ruled:

> The reasonableness of a person's expectation of privacy depends on a two-part test: (1) whether by his conduct, the individual has exhibited an expectation of privacy; and (2) whether this expectation is one that society recognizes as reasonable. The factual circumstances of the case determines the reasonableness of the expectation. However, other factors, such as customs, physical surroundings and practices of a particular activity, may serve to create or diminish this expectation.[98]

It can be argued that with respect to urinating, because of the very prevalence of the habit of public urination, Philippine society no longer views any expectation of privacy rights regarding such as reasonable. However, this unsightly practice should not be a sufficient basis to conclude that Filipinos do not have a valid expectation of privacy with respect to the act of urination. This is because even though it is a prevalent practice, it is not a practice that Philippine society has accepted. In fact, it can be said that Philippine society frowns on the practice of urinating in public. This can be clearly seen from the fact that most if not all of the cities and municipalities in the Philippines have an ordinance that bans and punishes the act of urinating in public. It must be remembered that a valid expectation of privacy in the constitutional sense, is one that society is ready to accept as reasonable. It is clear from the foregoing that Philippine society is not only prepared to accept as reasonable an expectation of privacy with respect to the act of urination, but also through laws and ordinances, is actually fostering the growth of this expectation.

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation;

98. *Id.* at 164.



indeed, its performance in public is generally prohibited by law as well as social custom. Even if the drug tests under R.A. 9165 were administered in another manner, such as through blood tests or deep breath analysis, such would still constitute searches subject to the requirements of the Bill of Rights.

There can be no doubt that a drug test, either through urinalysis or blood analysis, is a search in the constitutional sense. Should a question on the constitutionality of a drug test as a search arise, the Supreme Court can easily determine that such test is indeed a search within the meaning of the 1987 Constitution. The Supreme Court can achieve this by either directly implanting the clear mandate of the American rulings in *Skinner, Von Raab, Vernonia,* and *Earls* or the Supreme Court may consider the drug test according to the criteria it itself enunciated in *Ople* and determine that the drug tests under R.A. 9165 infringe on a valid expectation of privacy among the Filipinos. It is most probable that the Supreme Court will use both ways in justifying that the drug tests are searches. Whichever way the Supreme Court chooses, there can be no doubt that the Supreme Court should rule that a government-mandated drug test is a search, which should comply with the criteria of the Bill of Rights of the 1987 Constitution. This issue being settled, the next issue that has to be addressed is the question of whether the drug tests mandated by R.A. 9165 comply with the requirements of the 1987 Constitution.

## V. Requirements for a Valid Search Under Philippine Constitutional Law and the Concept of "Special Needs"

As can be seen from Section 2 of the Bill of Rights, the most basic requirement in order for a search to be considered constitutionally valid is that it should be reasonable. In Philippine jurisprudence, the general rule is that a search and seizure must be validated by a previously secured judicial warrant, otherwise, such search and seizure is unconstitutional and subject to challenge.[99] In fact, Fr. Bernas noted that:

> As a general rule, however, whenever there is a search or seizure, the plain import of the language of the Constitution, which in one sentence prohibits unreasonable searches and seizures and at the same time prescribes the requisites for a valid warrant, is that searches and seizures are unreasonable unless authorized by a validly issued search warrant or warrant of arrest.[100]

However, this general rule admits of certain exceptions. Philippine jurisprudence itself shows that there are two kinds of reasonable searches under the 1987 Constitution. These are the searches pursuant to lawful

99. Manalili v. C.A., 280 SCRA 400 (1997).

100. Bernas, *supra* note 55 at 148.

warrants, as referred to in the general rule mentioned above, and the valid warrantless searches.

The valid warrantless searches are jurisprudentially created and recognized exceptions to the general rule. The first of the valid warrantless searches are the searches to which consent to the search has been given or where the right against unreasonable searches and seizures has been waived.[101] Such consent or waiver may be given or made expressly or impliedly. Second are those made incidental to a lawful arrest.[102] This form of warrantless search must, however, be limited to the body of the arrested individual and to that point within his or her immediate reach and control, in order to detect anything which may furnish him or her with the means of committing violence or of escaping,[103] or anything which may be used as proof of the commission of the offense.[104] The third of the valid warrantless searches are the searches of moving vehicles,[105] to which the Supreme Court has recently included boats engaged in illegal fishing.[106] The fourth among the valid warrantless searches are the customs searches including those conducted at international ports, for the purposes of enforcing customs laws.[107] The fifth are the administrative searches or searches incident to inspection, supervision, and regulation in the exercise of the police power such as health, fire, and safety inspections of homes and establishments.[108] The sixth are the so-called "stop and frisk" searches.[109] The seventh are the warrantless searches conducted during urgent and exigent circumstances.[110] The eighth among the valid warrantless searches is the "evidence in plain view" doctrine,[111] which actually involves no intrusive search at all since under this doctrine, evidence or contraband in plain view may be validly seized by a peace officer even without a warrant. The ninth are the limited visual inspections conducted during checkpoints.[112]

101. People v. Omaweng, 213 SCRA 462 (1992).

102. Papa v. Mago. 22 SCRA 857 (1968).

103. People v. Lua, 256 SCRA 539 (1996).

104. RULES OF COURT, Rule 126 § 13.

105. People v. Lo Ho Wing, 193 SCRA 122 (1991).

106. Hizon v. C.A., 265 SCRA 517 (1996).

107. 1 HECTOR S. DE LEON, PHILIPPINE CONSTITUTIONAL LAW PRINCIPLES AND CASES 397 (1999).

108. *Id.*

109. Manalili v. C.A., 280 SCRA 400 (1997).

110. People v. Garcia, 233 SCRA 716 (1994).

111. People v. Aruta, 288 SCRA 626 (1998).

112. Valmonte v. De Villa, 178 SCRA 211 (1989).



*A. Availability and Scope of the Right*

Before any further discussion on whether the drug test is a reasonable search or not, it would be best if it is first determined if the right against unreasonable searches and seizures is applicable to the situation presented by the random drug testing of students mandated by R. A. 9165. In doing this, it has to be first determined to whom this proscription is directed. Speaking about the purpose of this provision, the Supreme Court in *Alvero v. Dizon*[113] stated:

> The purpose of the constitutional provision against unlawful searches and seizures is to prevent violations of private security in person and property, and unlawful invasion of the sanctity of the home, *by officers of the law acting under legislative or judicial sanction*, and to give 'remedy against such usurpations when attempted.'[114]

From the foregoing ruling, it is clear that the proscription against an unreasonable search is directed against the government, including the legislature. Thus, the right is applicable to the drug test mandated by R.A. 9165, which is an act of the Philippine Congress.

Next, it has to be determined if the right is available to the students who are to be subjected to the drug tests. In the landmark case of *Malabanan v. Ramento*,[115] the Supreme Court ruled that even while students were inside the premises of the school and subject to the authority of the school administrators and their teachers, such students did not relinquish any of their constitutional rights. The Supreme Court ruled:

> Petitioners invoke their rights to peaceable assembly and free speech. They are entitled to do so. They enjoy like the rest of the citizens the freedom to express their views and communicate their thoughts to those disposed to listen in gatherings such as was held in this case. *They do not, to borrow from the opinion of Justice Fortas in Tinker v. Des Moines Community School District, 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'*[116]

Proceeding from this, it is but logical to conclude that students also do not relinquish their right against an unreasonable search and seizure within their schools. The freedom from unreasonable search and seizure is just as important as the freedom of speech in a constitutional democracy. The Bill of Rights gives both rights equal protection and favor. It is important to remember that the right against unreasonable searches and seizures is also

113. 76 Phil 637 (1946).

114. *Id.* at 646 (emphasis supplied).

115. 129 SCRA 359.

116. *Id.* at 367-68 (emphasis supplied).

available to a student who is a minor,[117] including in the context of searches by school officials.[118] The right against unreasonable searches and seizures is available also to a person regardless of whether he or she is guilty or innocent or whether he or she is accused of a crime.[119]

It now has to be determined to whom the right is directed. The right against unreasonable searches and seizures, like all the other provisions in the Bill of Rights, is a proscription against the State or the Government. In the landmark case of *People v. Marti*,[120] the Supreme Court held that:

> *In the absence of governmental interference, the liberties guaranteed by the Constitution cannot be invoked against the State.* As this Court held in Villanueva v. Querubin (48 SCRA 345 [1972]: ' This 'constitutional right (against unreasonable search and seizure) refers to the immunity of one's person, whether citizen or alien, from interference by government, included in which is his residence, his papers, and other possessions.... That the Bill of Rights embodied in the Constitution is not meant to be invoked against acts of private individuals finds support in the deliberations of the Constitutional Commission. *The constitutional proscription against unlawful searches and seizures therefore applies as a restraint directed only against the government and its agencies tasked with the enforcement of the law.* Thus, it could only be invoked against the State to whom the restraint against arbitrary and unreasonable exercise of power is imposed.[121]

Under R.A 9165, the schools would administer the drug test to the students pursuant to the mandate of the law. The schools and universities would then be acting, as agents of the government and this fact would make the right available to the students. This was the ruling of the U.S. Supreme Court in *Skinner* and *Vernonia*.

It is therefore clear that the random drug tests mandated by R.A. 9165 to be administered by the schools on their students is an indirect act of the State done through the schools as agents of the Government. Being an act of the State that potentially infringes on the rights of individuals, such an act must pass the standard of the Bill of Rights. That standard is reasonableness.

Given the fact that a random drug test is not one of the recognized exceptions to the general rule that a warrant is required in order for a search to be considered reasonable, would this lead to the conclusion that a drug test without a warrant is constitutionally infirm? This conclusion should not necessarily follow. Fr. Bernas noted:

117. *In re* William G., 40 Cal 3d. 550 (1985).

118. 2 MIRIAM DEFENSOR SANTIAGO, CONSTITUTIONAL LAW, TEXT AND CASES, BILL OF RIGHTS 928 (2002).

119. 79 C.J.S. *Searches and Seizures* §4 (1952).

120. 193 SCRA 57 (1991).

121. *Id.* at 64 (emphasis supplied).



> The rule that searches and seizures must be supported by a valid warrant is not an absolute rule. The search and seizure clause has two parts. The first prohibits 'unreasonable search and seizures' and the second lays down the requirements of a valid warrant. As the text stands, it does not yield the conclusion that a search or seizure not supported by a warrant is necessarily unreasonable.[122]

A valid search is necessarily a reasonable search. How does one determine whether a search is reasonable? In *Valmonte v. De Villa* [123] the Supreme Court held that, "[n]ot all searches and seizures are prohibited. Those which are reasonable are not forbidden. *A reasonable search is not to be determined by any fixed formula but is to be resolved according to the facts of each case.*"[124]

Therefore, in determining whether a drug test is a reasonable search within the meaning of the Constitution, it should be weighed on its own merits.

### *B. American Jurisprudence and the Emergence of the "Special Needs" Doctrine*

The U.S. Supreme Court has already authoritatively ruled in four landmark cases that a State-mandated drug test is a reasonable search that does not violate the Constitution. The first of these cases is *Skinner*, where the U.S. Supreme Court held that the state mandated drug tests on railway employees was reasonable. The Court reversed the decision of the Ninth Circuit Court of Appeals and ruled that the authorized drug testing was reasonable under the Fourth Amendment despite the lack of a warrant or reasonable suspicion of an employee's impairment. Writing for the majority, justice Kennedy applied the special needs exception to the warrant requirement because "*special needs* beyond normal law enforcement" existed.[125] According to the Court, when special needs exist, governmental interests should be balanced against privacy interests to establish the practicality of requiring a warrant or probable cause. In this case, a government interest existed in improving and providing safe railroad travel by prohibiting employees from using drugs or alcohol while on duty. The Court noted that this was a strong interest. Thus, obtaining a warrant would likely frustrate the purpose of the search.

Moreover, delay in obtaining a warrant could result in the destruction of valuable evidence because the body eliminates drug and alcohol traces at a constant rate. Thus, the Court explained that authorities should gather

122. BERNAS, *supra* note 55, at 169.

123. 178 SCRA 211 (1989).

124. *Id.* at 216.

125. *Skinner*, 489 U.S. at 602 (1989) (emphasis supplied).

evidence as soon as possible after an accident to avoid the loss of valuable evidence.

Furthermore, the Court also took note that the FRA did not use the samples to assist in prosecuting the employee, but rather used the drug testing to prevent casualties and accidents from drug or alcohol impairment of employees while operating railroads. The Court then concluded that requiring the railroad company to show a reasonable suspicion of an employee's impairment before giving a drug test to that employee would significantly hinder the government's interests.

Regarding the employees' privacy interests, the U.S. Supreme Court stated that the drug tests did not overly infringe on the employees' expectations of privacy. First, it noted that the procuring of the samples for drug testing was minimally intrusive because they were taken in the context of employment. Next, it acknowledged that all employees consent to a level of restriction on their privacy from their employer when it is necessary for employment. It stated that the time it would take for a railroad employee to provide the necessary samples for drug testing did not alone significantly infringe on the employees' privacy. When considered in conjunction with the important safety interests served, the Court held that FRA regulations did not violate the railroad employees' rights under the Fourth Amendment.

However, Justice Marshall, joined by Justice Brennan, offered a strong dissent. They argued that the majority ruling alarmingly relaxed the warrant and probable cause requirements of the Fourth Amendment. They observed that past rulings, though not requiring probable cause in all instances, still always required individualized suspicion as a minimum requirement.[126]

In *Von Raab*,[127] the U.S. Supreme Court again ruled that the drug tests on the customs employees were reasonable given the circumstances of the situation. The Court affirmed the decision of the Fifth Circuit Court of Appeals, upholding drug testing for positions directly involved in interdiction of drugs and positions requiring an employee to carry a firearm.

Justice Kennedy, again writing for the majority, first acknowledged the special needs exception to the warrant requirement. The Court held that no warrant is required when "special governmental needs, beyond the normal need for law enforcement,"[128] would make a warrant requirement impractical. The Court therefore rejected the requirement of a warrant for sensitive and routine employment decisions made by the Customs Service.

126. *Id.* at 635 (Marshall, J., dissenting).

127. Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

128. *Skinner*, 489 U.S. at 679.



Furthermore, it acknowledged that the Customs Service drug testing policy did not allow the Customs Service to use any discretion in determining which employees to search, and as such, there would be no facts for a judge to consider when getting a search warrant. The Court determined that the Customs Service's need to conduct searches, even without any suspicion, trumped the privacy interests of employees interested in positions directly engaged in drug interdiction or positions requiring the employee to carry a firearm.

In addition, the U.S. Supreme Court determined Customs Service employees in such positions should expect diminished privacy because of the types of employment positions they occupied. The Court stated that promoting drug users to positions that interdict drugs and positions requiring an employee to carry a firearm involved extraordinary national security and safety hazards. According to the Court, the national security and safety hazards made the Customs Service's drug testing policy reasonable. Regarding the positions requiring the employee to handle classified information, the Court recognized similar government interests and limited expectations of privacy; however, it remanded the issue to clarify which Customs Service employees the policy would be subjected to drug testing.

Justices Marshall and Brennan again dissented using the arguments they used in the *Skinner* case, which is based on their displeasure over the balancing of interest test being used in place of the warrant, probable cause, and individualized suspicion tests. Justice Scalia, in this instance, joined the dissent for a different reason. He opined that the justification of the Customs Service to require drug testing did not overcome the privacy interest of the employees. He cited the fact that the Customs Service failed to show that there was a pervasive drug problem in the Service. He also differentiated this from the *Skinner* case, where the FRA proved that there was a rising drug and alcohol problem in the train industry.[129] Other than this point, Justice Scalia was in favor of using the balancing of interests test.

In the *Vernonia* case,[130] the landmark case that first dealt with the issue of the Fourth Amendment rights of students who are being subjected to a random drug test, the U.S. Supreme Court determined that such random drug testing of student athletes did not violate the students' rights under the Fourth Amendment. Here, the U.S. Supreme Court vacated and remanded the decision of the Ninth Circuit Court of Appeals, determining that the District's policy was reasonable and thus not violative of the Fourth Amendment. Justice Scalia, writing for the majority, reasoned that the athletes had a decreased expectation of privacy, the search was relatively unobtrusive, and the search met serious needs of the school district. The

129. *Von Raab*, 489 U.S. at 679 (Marshall, J., dissenting).

130. Vernonia School District v. Acton, 515 U.S. 646 (1995).

Court recognized that when law enforcement undertakes a search to find evidence of criminal actions, officials must obtain a search warrant to meet the reasonableness requirement of the Fourth Amendment. However, the Court noted that special needs could make a search constitutional, even without probable cause, if the special needs were beyond the normal need for law enforcement. The U.S. Supreme Court stated that special needs exists in a public school circumstance, because requiring a warrant would unduly interfere with informal and swift disciplinary procedures needed in a school setting. The Court further stated that requiring the existence of probable cause before a search could be initiated would undercut the teachers' and administrators' need to maintain order in the school. The Court thus ruled:

> We have found such 'special needs to exist in the public school context. There, the warrant requirement 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and 'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.[131]

In determining the reasonableness of the District's policy, the Court considered three factors. First, it examined the privacy interests of student athletes upon which the search intruded. It stated that the student athletes had reason to expect such intrusions because they voluntarily participated in a regulated activity where privacy is commonly limited. Second, the Court considered the character of the intrusion when evaluating the reasonableness of the District's drug testing. It recognized that the drugs tested for did not vary based on the identity of the student. In addition, the Court recognized that the District disclosed the test results only to a limited number of school personnel, but not to law enforcement agencies nor were such test results used in disciplinary functions. As such, the Court determined the negligible intrusion of the drug testing on the student athletes' privacy. Finally, the Court considered the governmental concern and its immediacy. It determined that even in light of the search's intrusiveness, the government's concern of deterring drug use by student athletes was important enough to justify the search. In considering immediacy, the Court declined to question the district court's conclusions as to the gravity of the students' drug use and specifically stated that the conclusions were not clearly erroneous, ultimately declaring that the drug use by students was an "immediate crisis of greater proportions" than railroad employees or customs employees' drug use. Hence:

> Finally, we turn to consider the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as compelling.... *It is a mistake, however, to think that the phrase 'compelling state interest,' in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.*
>
> *That the nature of the concern is important--indeed, perhaps compelling--can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was the governmental concern in Von Raab, or deterring drug use by engineers and trainmen, which was the governmental concern in Skinner. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. 'Maturing nervous systems are more critically impaired' by intoxicants than mature ones are; childhood losses in learning are lifelong and profound, 'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'* And of course the effects of a drug infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes.[132]

Because of the diminished expectations of the students' privacy, the unobtrusive nature of the drug testing, and the District's serious needs, the Court concluded that in the context of the *Vernonia* case, the drug testing was reasonable under the Fourth Amendment.

The U.S. Supreme Court, however, specifically cautioned against assuming that drug testing without suspicion would be constitutional. The Court emphasized that it found significance in the fact that the school developed the policy to further its responsibility for the children in its care. In addition, it noted that no other parents objected to the drug-testing program, which showed that it was accepted and welcomed by most of the other parents of the students covered by the school district.

131. *Id.* at 652 (citing New Jersey v. T.L.O., 409 U.S. 325 (1985)).

132. *Id.* at 633 (emphasis supplied) (citations omitted).

Meanwhile, in the *Earls* case,[133] the U.S. Supreme Court reversed the Tenth Circuit of Appeals and ruled that the drug test on students who wanted to participate in extracurricular activities was a reasonable search under the Fourth Amendment. It held that in the public school context, a search may be reasonable when supported by special needs beyond the normal need for law enforcement. Because the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children, a finding of individualized suspicion may not be necessary. Against the argument that because students engaged in extracurricular activities are not subject to regular physicals and communal undress thus having a stronger privacy expectation than the athletes in the *Vernonia* case, the Court ruled that this distinction was not essential in *Vernonia*. It held that the decision in *Vernonia* depended primarily upon the school's custodial responsibility and authority. In any event, it also recognized that students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.

The conclusion is that the invasion of students' privacy is not significant, given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put. These test results were not to be turned over to any law enforcement authority. Nor would the test results lead to the imposition of disciplinary measures or have any academic consequences. Rather, the only consequence of a failed drug test was to limit the students' privilege to participate in extracurricular activities.

Finally, the U.S. Supreme Court took into consideration the nature and necessity of the government's concerns and the efficacy of the drug-testing policy in meeting them. It concluded that the same policy effectively serves the School District's interest in protecting its students' safety and health. The Court recognized that preventing drug use by schoolchildren is an important governmental concern. The health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children. The U.S. Supreme Court further took into consideration the fact that the School District had presented specific evidence of drug use at Tecumseh schools. However, it noted that a demonstrated drug abuse problem is not always necessary for the validity of a drug test program for students, even though some showing of a problem does support an assertion of a special need for a suspicionless general search program.

In the foregoing cases, the drug tests were to be administered on the respective subjects after a certain occurrence: a train accident in *Skinner*, a

133. Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls, No. 01-332(filed Mar. 19, 2002) *available at* http.//laws.findlaw.com/us/000/01-332.html (last accessed Aug. 1, 2003) (emphasis supplied).



prior condition to admission into another field or area of conduct, such as a higher or more sensitive employment position in *Von Raab*; and admission into school athletic teams or other competitive extracurricular activities in *Vernonia* and *Earls* respectively. It must be noted, however, that the drug tests in these four cases were not random in nature. The only instance where a random test was involved in any of these four cases was in *Vernonia* where the student athletes had to undergo a random test at anytime during their engagement in student athletics.

The fact, however, that none of these four cases directly deals with the issue of random drug testing should not be a bar to their applicability to the question presented by the random drug tests under R.A. 9165. At the core of any random drug test program is the fact that the drug tests will not be conducted pursuant to any individualized suspicion against the person subject to the test. Moreover, in these four cases, the U.S. Supreme Court has consistently ruled that the presence or absence lack of such individualized suspicion is not the determinative factor of the validity of a drug-testing program. In subsequent cases, various U.S. Circuit Court of Appeals have ruled that even random drug tests satisfy the requirements of the Fourth Amendment.

The first of these random drug testing cases is *Bluestein v. Skinner*.[134] Involved here is a Federal Aviation Administration regulation requiring random testing for flight crewmembers, maintenance personnel, air traffic controllers, and several other categories of employees in the private commercial aviation industry. Under the regulation, the testing must be conducted on a random basis to avoid any bias, and at least 50% of the listed employees must be tested annually. Following the lead of *Skinner* and *Von Raab* cases, the U.S. Circuit Court of Appeals first ruled that any drug test conducted with State compulsion is within the ambit of the Fourth Amendment protection. Second, the Court ruled that since there is an intrusion upon the individual's expectations of privacy then such search must be reasonable. Lastly, the Court held that the warrant, probable cause, and individualized suspicion requirements do not apply when there is a special State need that is involved. Guided by these principles, the U.S. Circuit Court of Appeals upheld the constitutionality of the drug-testing program for the federal aviation industry.

*Bluestein* significantly departs from the traditional principles of Fourth Amendment jurisprudence. For the first time, the random testing is upheld and declared as an important factor in adding to the constitutionality of a drug-testing program even if the randomness of the testing is in total opposition to the individualized suspicion test.

134. 908 F2d 451 (Cir. 1990).

*International Brotherhood of Teamsters v. Department of Transportation*[135] meanwhile involved a drug-testing program promulgated by the Department of Transportation on commercial truck drivers. This drug testing refers to three instances: (1) random-periodic testing, (2) pre-employment, and (3) post-accident. The drivers' union challenged the validity of the program on the ground of invasion of privacy rights based on the Fourth Amendment.

The U.S. Circuit Court of Appeals first disposed of the warrant requirement by stating that the warrant requirement does not apply to the drug tests therein for two reasons. First, the supervisors or superiors had no knowledge regarding warrants and second, the choice of employees to be tested will be on a random basis. The lesser expectation of privacy of truck drivers is noted due to the fact that they are already subject to physical examinations on a biennial basis. The Court again used the balancing of interest test to uphold the constitutionality of the program. As was said, the random nature of the test was now an important factor.

Moreover, the U.S. Circuit Court of Appeals also observed that the new element introduced by randomness was the surprise it may bring about on the test subjects. The surprise brought about by the randomness of the tests was not, however, repugnant to the Fourth Amendment because it was of a lesser degree because the drivers knew the precise time of the tests not like the surprise brought about by apprehensions or searches without probable cause or warrant. This was a somewhat strained argument on the part of the appellate court. The U.S. Circuit Court of Appeals nonetheless ruled that the randomness of the search was essential to the achievement of the goals of the drug tests.

The pre-employment drug tests were likewise justified by arguing that the lesser expectancy of privacy of truck drivers cannot outweigh the government interest. Moreover, the post-accident test was justified by using the same arguments in *Skinner* regarding government interest to deter further accidents by knowing the causes of accidents.

Most of these random drug testing cases involve public utilities or students in public schools, over which the State had a tutelary responsibility and the safety of the public in general, over which the State had concern. In general, however, the U.S. Supreme Court and the Circuit Court of Appeals upheld the drug testing of the rail workers, customs employees, students, aviation employees, and truckers as valid warrantless searches consistent with the Fourth Amendment. In all of these cases, the courts held that the government's primary goal in enacting the drug tests therein was the health and safety of the workers in the rail systems, aviation, and trucking industries, the general public who used or encountered these means of transportation, the customs workers, and the students in the public school systems. The

135. 932 F2d 1292 (9th Cir. 1991).



High Court has consistently ruled that these drug tests, within the context of the circumstances in which they were conducted, were reasonable searches within the meaning of the Fourth Amendment. In so concluding, the Court considered the primary criterion of a "special need" that the State sought to address through the drug test as a search.

### C. *The Determination of the Existence of a Special Need*

The special need justifying the warrantless drug testing in the context of each of the preceding cases is not just limited to the compelling government interests *per se* that the drug tests sought to serve. Rather, the existence of a compelling government interest is only one of the factors that was taken into account, which interest was eventually weighed against other factors, *inter alia*, the obtrusiveness of the nature and manner of conducting the tests, the privacy expectations of the test subjects, the practicability of procuring a warrant prior to such tests, and the scope of the use to which the test results were to be directed.

The U.S. Supreme Court has previously enunciated in *New Jersey vs. T.L.O.*[136] the test for determining the existence of the so-called special need. First, an examination should be made to determine whether the government had a special need beyond mere law enforcement. Second, there should be a determination whether this special need, beyond normal law enforcement, made obtaining a warrant impracticable. A search meeting both tests will then justify a balancing of the government's interests against the individual's privacy interests in place of the Fourth Amendment warrant and probable cause requirements. If it is found that the government's interests outweighed the individual's privacy interests, the government's warrantless search should be permitted. It should however be stressed that these interests should be balanced only when there is a showing of a special need making the requirement of obtaining of a warrant impracticable.[137]

Further, it has also been ruled that aside from establishing that the special need must make obtaining a warrant impracticable, such special need also cannot intricately involve law enforcement, nor can it have an immediate purpose of achieving law enforcement goals. In addition, the Court has discouraged the use of law enforcement to achieve a special need's purpose by coercion, either by actually arresting or threatening to arrest. It has applied this special needs exception to cases involving warrantless drug testing on individuals.

136. 469 U.S. 325 (1985).

137. Barbara J. Prince, *The Special Needs Exception to the Fourth Amendment and How It Applies to Government Drug Testing of Pregnant Women: The Supreme Court Clarifies Where the Lines Are Drawn in Ferguson v. City of Charleston*, 35 CRLR 857 (2002).

This further clarification on the scope and limits of the special needs doctrine was enunciated in the case of *Ferguson v. City of Charleston.*[138] Here, the U.S. Supreme Court determined the Fourth Amendment prohibition against suspicionless, warrantless searches applied to the Medical University of South Carolina's (MUSC) drug testing policy on pregnant women. Justice Stevens, writing for the majority, declared such program as unconstitutional by focusing on the policy's immediate objective: the collection of evidence for law enforcement use. Specifically, the Court determined that the case did not fit within the category of special needs because the drug testing policy's primary purpose was to force women into drug treatment by threatening them with arrest and prosecution. The Court also emphasized that the drug testing policy extensively involved law enforcement throughout every stage of its policy's execution. Further, it determined that it could not distinguish the purpose of the drug testing policy from a general interest in crime control. The Court also recognized that the drug testing policy did not discuss medical treatment for the mother or child, but rather, focused on involving police and prosecutors in developing and administering the policy. In addition, the Court distinguished *Ferguson* from other special needs cases involving drug testing without a warrant, stating that the prior cases entailed special needs separated from the State's general law enforcement interests. The Court stated that when State hospital employees obtain evidence specifically to incriminate a patient, the employee has a special obligation to fully inform the patient of his or her constitutional rights. Finally, the Court recognized that a benign motive of protecting the mother and child did not justify departing from Fourth Amendment requirements when law enforcement was pervasively involved in developing and applying the drug testing policy.

After ascertaining that there is a special need in accordance with the tests laid down in the above cases, including *Ferguson*, this special need on the part of the State must then be balanced against other factors in a given case. The considerations analyzed in this balancing test consist of the strength of an individual's privacy expectation in the affected location or act, the "invasiveness" of the search, the existence of an adversarial, cooperative, or supervisory relationship between the searcher and individual, the use to be made of collected information, the effectiveness of the search in furthering government interest, evidence that the evil giving rise to the special need has occurred in the past or is presently occurring, and the exigency of the situation or practicality of obtaining probable cause under the circumstances.[139]

138. 536 U.S. 67 (2001).

139. Lucinda Clements, Ferguson v. City of Charleston: *Gatekeeper of the Fourth Amendment's 'Special Needs' Exception*, 24 CAMPBELL L. REV. 263 (2002).



## VI. R.A. 9165 AS AN ANSWER TO A SPECIAL NEED IN THE PHILIPPINE CONTEXT

The random drug testing for students directed by R.A. 9165 is a species of a warrantless search. It must pass this test to determine whether there is a special need for its justification in the context of how this test was developed in American jurisprudence. In order to do this, it must first be determined whether the student drug test programs under R.A. 9165 meets the criteria mandated by the American cases.

### *A. The Existence of a Special Need Beyond Law Enforcement in the Philippine Context*

The first thing that should be determined is whether or not under R.A. 9165, the government has a special need that is more than mere law enforcement. The American cases point to the notion that mere law enforcement or ordinary law enforcement connotes the enforcement of criminal laws, the apprehension of criminals, the prevention of crime, and the maintenance of peace and order as regularly done by the police. The drug tests mandated for students under R.A. 9165 are not designed to ferret out the drug users among the students for the purpose of prosecuting them as criminals. Rather, this drug test is designed to determine the drug users so that they may be extended the necessary assistance and be rehabilitated, if necessary. The government interest where the drug tests are aimed at is clearly more than just mere law enforcement and the apprehension of drug users as criminals. The interest is the protection of the youth though the prevention of drug abuse amongst them as well as their rehabilitation and reintegration in cases of drug abuse.

Four elements in R.A. 9165 manifest that the government interest that led to the enactment of this law and the drug tests mandated therein were more than just ordinary law enforcement. First, this government interest can be seen in the statute's Declaration of Policy, which reads:

> Declaration of Policy. It is the policy of the State to safeguard the integrity of its territory and the well-being of its citizenry particularly the youth, from the harmful effects of dangerous drugs on their physical and mental well-being and to defend the same against acts or omissions detrimental to their development and preservation. In view of the foregoing, the State needs to enhance further the efficacy of the law against dangerous drugs, it being one of today's more serious social ills.
>
> Toward this end, the government shall pursue an intensive and unrelenting campaign against the trafficking and use of dangerous drugs and other similar substances through an integrated system of planning, implementation and enforcement of anti-drug abuse policies, programs, and projects. The government shall however aim to achieve a balance in the national drug control program so that people with legitimate medical needs

> are not prevented from being treated with adequate amounts of appropriate medications, which include the use of dangerous drugs.
>
> It is further declared the policy of the State to provide effective mechanisms or measures to re-integrate into society individuals who have fallen victims to drug abuse or dangerous drug dependence through sustainable programs of treatment and rehabilitation.[140]

From the foregoing, it is clear that the State's interest mandating drug tests is the protection of the youth from the evil effects of drugs and the extension of assistance to those who have fallen prey to these drug's temptations. Further, there is no doubt that this interest is compelling enough to call for the measures enacted under R.A. 9165 considering the reality of the drug problem in the Philippines, particularly among the youth as illustrated in the introductory portion of the paper. It is noteworthy to remember the pronouncements of the U.S. Supreme Court in *Von Raab,* later echoed in *Earls,* that in the determination of the existence of a special need, it is not necessary that the actual existence of a drug problem must be shown.[141] The State has in fact the right and duty to protect its citizens, particularly the youth, from the evils of drugs through preventive measures. Indeed, it would make little sense to require the State to wait for a substantial portion of its youth to begin using drugs before it is allowed to institute a drug-testing program designed to deter drug use.[142]

The second element in R.A. 9165 buttressing compelling government interest beyond mere law enforcement is contained in the Senate deliberations on the drug tests. It was affirmed on the Senate Floor by the framers of the law that a student who tests positive for drugs would not be penalized for his drug use and that if ever rehabilitated pursuant to his drug use, then such rehabilitation would not be in the nature of a penalty.[143] Thus under Section 15, rehabilitation is considered a penalty only if it is imposed upon a person who has been apprehended or arrested for violation of the provisions of the Act and has thereafter tested positive for drug use in a confirmatory test. Rehabilitation is not a penalty with respect to a drug user who was found out to be such through the drug tests in Section 36 and who was not apprehended or arrested, especially with respect to the students.

This point was made clear by the Senator Barbers, the main proponent of Senate Bill No. 1858, the precursor of R.A. 9165, when he clearly stated during the deliberations that a student would not be penalized even if he

140. R.A. 9165, § 2 (emphasis supplied).

141. Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls, No. 01-332 (filed Mar. 19, 2002) *available at* http.//laws.findlaw.com/us/000/01-332.html (last accessed Aug. 1, 2003).

142. *Id.*

143. This was delivered during the Senate deliberations on the law on Feb. 4, 2001.



tested positive for drug use, unless he was also caught with drugs in his possession.[144]

Further, in the same deliberations, Senate President Drilon clarified that rehabilitation is not a penalty. This was in response to Senator Pimentel's query regarding a possible conflict between the drug tests and the students' rights against self-incrimination. Senate President Drilon later clarified from Senator Barbers whether under the proposed measure, a person found positive for drug use would be penalized, to which Senator Barbers clearly answered in the negative stating that a user would only be punished if drugs were found in his possession. The senators then concluded that since no penalty could be imposed under such tests, then there could be no self-incrimination.[145]

It has already been settled in the United States that it was within the powers of States to enact laws calling for the compulsory treatment of those addicted to narcotics including programs for involuntary confinement, in the interests of discouraging violations of drug trafficking laws and protecting the general health and welfare of the people.[146] It has also been ruled that although such treatment is valid, outright imprisonment of drug addicts or dependents due to such condition is unconstitutional since such imprisonment is a cruel and unusual punishment, the theory being that drug addiction or dependence is an illness which must be treated and cured and not punished.[147] Such a reasoning is applicable in the Philippines since the Supreme Court in *Lorenzo v. Director of Health*[148] has already ruled that the apprehension, detention, isolation, or confinement of leprous persons in the Philippine Islands was a valid police power measure, the exercise extending to the preservation of public health. Since drug dependence is also a disease, then the State can rightfully decree that all such persons suffering from the scourge of drug addiction must undergo rehabilitation in the legitimate exercise of the State's police power.

A concern was also raised with respect to the possibility that pursuant to a positive drug test, a student may be thrown out or expelled from his school.[149] This issue was again left to the implementing guidelines of the law and these guidelines are still being enacted, with a provision that with respect to public schools and universities, a student shall not be expelled on the basis

144. *Id.*

145. *Id.*

146. 25 AM. JUR. 2D *Drugs, Narcotics, and Poisons* § 74 (1966).

147. *Id.*

148. 50 Phil. 595 (1927).

149. This was delivered during the Senate deliberations on the law on Feb. 4, 2001.

solely of the fact that he has tested positive for drug use.[150] With respect to the public schools, a policy of non-expulsion of student drug users would be consonant with the U.S. Supreme Court ruling in *Vernonia* and *Earls* that the results of a student drug test must not be used against him for the purpose of imposing disciplinary measures. With respect to private schools, however, the resolution of a controversy arising from the expulsion of a student due to a positive drug test result may involve issues of academic freedom and admissibility of evidence, which should properly be the subject of a separate work.

It is therefore clear that the rehabilitation of students who are determined to be drug users under the drug tests is clearly not a penalty. Such rehabilitation is designed to help them stop their drug use or addiction. This concern for the rehabilitation of student drug users shows that the government interest in protecting or rescuing the youth from drugs is more than mere law enforcement.

The third element in R.A. 9165 from which the fact that the compelling government interest embodied therein is more than mere law enforcement can be seen in the provisions regarding the confidentiality of the records of those who have availed of or compulsorily undergone rehabilitation pursuant to their being determined as drug users after the drug tests. These provisions are contained in Sections 60, 64 and 72 of the law which respectively state:

> Confidentiality of Records Under the Voluntary Submission Program. - Judicial and medical records of drug dependents under the voluntary submission program *shall be confidential and shall not be used against him for any purpose, except to determine how many times, by himself/herself or through his/her parent, spouse, guardian or relative within the fourth degree of consanguinity or affinity, he/she voluntarily submitted himself/herself for confinement, treatment and rehabilitation or has been committed to a* Center under this program.[151]
>
> Confidentiality of Records Under the Compulsory Submission Program. - The records of a drug dependent who was rehabilitated and discharged from the Center under the compulsory submission program, or who was charged for violation of Section 15 of this Act, *shall be covered by Section 60 of this Act.* However, the records of a drug dependent who was not rehabilitated, or who escaped but did not surrender himself/herself within the prescribed period, shall be forwarded to the court and their use shall be determined by the court, taking into consideration public interest and the welfare of the drug dependent.[152]
>
> Liability of a Person Who Violates the Confidentiality of Records. - The penalty of imprisonment ranging from six (6) months and one (1) day to six (6) years and a fine ranging from One thousand pesos (P1,000.00) to Six thousand pesos (P6,000.00), shall be imposed upon any person who, having official custody of or access to the confidential records of any drug dependent under voluntary submission programs, or anyone who, having gained possession of said records, whether lawfully or not, reveals their content to any person other than those charged with the prosecution of the offenses under this Act and its implementation. The maximum penalty shall be imposed, in addition to absolute perpetual disqualification from any public office, when the offender is a government official or employee. Should the records be used for unlawful purposes, such as blackmail of the drug dependent or the members of his/her family, the penalty imposed for the crime of violation of confidentiality shall be in addition to whatever crime he/she may be convicted of.[153]

150. Telephone Interview with Mr. Xerxes Nitafan, Committee Secretary of the Senate Committee on Public Order and Illegal Drugs (July 17, 2002).

151. COMPREHENSIVE DRUGS ACT OF 2002, § 60 (emphasis supplied).

152. *Id.* § 64 (emphasis supplied).



These provisions clearly show that the information and evidence that may be obtained pursuant to the drug tests may not be used in any criminal proceeding against the student. They are only to be used with respect to the rehabilitation of said student drug users. They are not to be turned over to any law enforcement officials and they shall remain only with the courts. The fact that the legislature has gone through great lengths to ensure that the information obtained through the drug tests would not be used against the positively-tested drug users shows that the interests they sought to promote was beyond the ordinary means of criminal law enforcement for what is involved is the youth and their well-being.

Another point worth noting here is that the term "medical records" as used in Section 60 is comprehensive enough to cover under its cloak of confidentiality the urine sample itself. This is important considering that the second privacy interest that a person has in his urine lies in the information that may be derived from such urine. The drug tests that will be conducted under the new law should be limited to the detection of drug metabolites in a person's urine. Any other information that can be derived from the urine sample can only be revealed through a subsequent analysis of the urine. This danger has more to do with the custody of the urine sample the security of which is amply provided for by the provisions on the confidentiality of medical and judicial records.

The fourth element in R.A. 9165 which shows that the drug tests were enacted pursuant to a special need is Article IV, a whole article devoted to the participation of the family, students, teachers, and school authorities in the enforcement of R.A. 9165. This Article contains provisions on the involvement of the family; role of student councils and organizations; mandatory instruction on the dangers of drug use in the school curricula; increased roles and powers of the heads, supervisors, and teachers of schools; the publication and distribution of materials on dangerous drugs by the

153. *Id.* § 72.

Dangerous Drugs Board, in cooperation with the different concerned agencies of the Government, such as the DepEd, the CHED and the Technical Education and Skills Development Authority; and the establishment of Special Drug Education Centers for the education of the out-of-school youth and street children regarding the pernicious effects of drug abuse which program shall likewise be adopted in all public and private orphanage and existing special centers for street children.[154] This whole

154. COMPREHENSIVE DRUGS ACT OF 2002, art. IV. The law provides in full:

Article IV

Participation of the Family, Students, Teachers and School Authorities in the Enforcement of this Act

Sec. 41. *Involvement of the Family.* – The family being the basic unit of the Filipino society shall be primarily responsible for the education and awareness of the members of the family on the ill effects of dangerous drugs and close monitoring of family members who may be susceptible to drug abuse.

Sec. 42. *Student Councils and Campus Organizations.* – All elementary, secondary and tertiary schools' student councils and campus organizations shall include in their activities a program for the prevention of and deterrence in the use of dangerous drugs, and referral for treatment and rehabilitation of students for drug dependence.

Sec. 43. *School Curricula.* – Instruction on drug abuse prevention and control shall be integrated in the elementary, secondary and tertiary curricula of all public and private schools, whether general, technical, vocational or agro-industrial as well as in non-formal, informal and indigenous learning systems. Such instructions shall include:

(1) Adverse effects of the abuse and misuse of dangerous drugs on the person, the family, the school and the community;

(2) Preventive measures against drug abuse;

(3) Health, socio-cultural, psychological, legal and economic dimensions and implications of the drug problem;

(4) Steps to take when intervention on behalf of a drug dependent is needed, as well as the services available for the treatment and rehabilitation of drug dependents; and

(5) Misconceptions about the use of dangerous drugs such as, but not limited to, the importance and safety of dangerous drugs for medical and therapeutic use as well as the differentiation between medical patients and drug dependents in order to avoid confusion and accidental stigmatization in the consciousness of the students.

Sec. 44. *Heads, Supervisors, and Teachers of Schools.* – For the purpose of enforcing the provisions of Article II of this Act, all school heads, supervisors and teachers shall be deemed persons in authority and, as such, are hereby empowered to apprehend, arrest or cause the apprehension or arrest of any person who shall violate any of the said provisions, pursuant to Section 5, Rule 113 of the Rules of Court. They shall be deemed persons in authority if they are in the school or within its immediate vicinity, or even beyond such immediate vicinity if they are in attendance at any school or class function in their official capacity as school heads, supervisors, and teachers.

Any teacher or school employee, who discovers or finds that any person in the school or within its immediate vicinity is liable for violating any of said provisions, shall have the duty to report the same to the school head or immediate superior who shall, in turn, report the matter to the proper authorities.

Failure to do so in either case, within a reasonable period from the time of discovery of the violation shall, after due hearing, constitute sufficient cause for disciplinary action by the school authorities.

Sec. 45. *Publication and Distribution of Materials on Dangerous Drugs.* – With the assistance of the Board, the Secretary of the Department of Education (DepEd), the Chairman of the Commission on Higher Education (CHED) and the Director-General of the Technical Education and Skills Development Authority (TESDA) shall cause the development, publication and distribution of information and support educational materials on dangerous drugs to the students, the faculty, the parents, and the community.

Sec. 46. *Special Drug Education Center.* – With the assistance of the Board, the Department of the Interior and Local Government (DILG), the National Youth Commission (NYC), and the Department of Social Welfare and Development (DSWD) shall establish in each of its provincial office a special education drug center for out-of-school youth and street children. Such Center which shall be headed by the Provincial Social. Welfare Development Officer shall sponsor drug prevention programs and activities and information campaigns with the end in view of educating the out-of-school youth and street children regarding the pernicious effects of drug abuse. The programs initiated by the Center shall likewise be adopted in all public and private orphanage and existing special centers for street children.



article on the participation of the family and the teachers and school officials, who are everyday figures in the lives of the youth, again shows the thrust of the law towards the rescue and reformation of youthful drug users as opposed to their mere apprehension and criminal prosecution.

### *B. "Special Need" Renders Obtaining a Warrant for the Drug Tests Impracticable*

After determining that a special need beyond ordinary law enforcement does exist in the Philippine context, it should be determined whether such special need makes obtaining a warrant for the drug tests impracticable. It would indeed be best if the drug tests mandated for students would be

done pursuant to a lawfully issued warrant. Moreover, has been recognized that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."[155] This stems from three primary factors that militate against the effectiveness of the drug tests as search in meeting its purpose if warrants were to be required prior to such tests.

First, the procurement of warrants for the students selected to undergo the random drug tests would be very cumbersome and impractical. The warrant is a special judicial process. It is the essential feature of a warrant that between the person sought to be searched or apprehended and the power of the State is the impartial judgement of cold and neutral judge. If each and every time the State, through the school officials, wants to conduct a drug test on a student, they would have to apply for a search warrant, imagine the additional burden this would place on the already clogged dockets of Philippine courts.

Second, to require that warrants be first secured before any testing can be done on a student may possibly defeat the purpose of this particular provision. As can be seen from the numerous American cases quoted herein, this fact lies at the heart of the reason why warrantless drug tests have been considered as reasonable under the Fourth Amendment. The provision on drug testing of R.A. 9165 seeks to detect drug users. It seeks to do this against the clandestine nature of this illegal activity. The knowledge that a warrant is being sought against a student/drug user in order to subject him to a drug test is clearly sufficient to put him or her on guard so that he or she may thwart the warrant or the corresponding drug test and thus evade detection.

Furthermore, in order for a judge to legally issue a search warrant, he must first personally determine the existence of probable cause after an examination under oath or affirmation of the complainant and the witnesses he may produce.[156] Probable cause, with respect to search warrants, has been defined as "such facts and circumstances which would lead a reasonably prudent man to believe that an offense has been committed and that the fruits or effects of the crime are with the person or in the place sought to be searched."[157]

Probable cause entails a reasonable amount of suspicion, in this case, suspicion that a person is taking drugs. Due to the fact that drug possession

155 *See* Camara v. Municipal Court of San Francisco 387 U.S. 523, New Jersey v. T.L.O., 469 U.S., at 340; Donovan v. Dewey, 452 U.S. 594, 603 (1981).

156. PHIL. CONST. art III, § 2.

157. BERNAS, *supra* note 55, at 149.



and abuse are illegal activities, drug addicts and drug pushers by nature, hide the fact that they are engaged in these activities. If warrants were required for the drug tests, drug users would easily circumvent this by making sure that their actions and behavior evoke no suspicions of drug use whatsoever. If such possibilities for suspicion may easily be hidden, then how can it be reasonably expected that the more stringent requirement of probable cause required for a valid search warrant would be met? Indeed, even the U.S. Supreme Court has noted that a drug-impaired person will seldom display any outward signs detectable by the ordinary person or, in many cases, even by the physician.[158] The intent of the proposed law would thus be thwarted and its would lose much of their teeth.

Third, it has been clearly recognized in American jurisprudence that special needs do exist in the context of searches by school officials, which exempt such searches from the requirements of a warrant. In the public school context, the warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed, and strict adherence to the requirement that searches be based upon probable cause would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools."[159] This holds true for all schools including those here in the Philippines.

The envisioned technology that will be used to put into effect the drug test provisions of R.A. 9165 would enable the government to detect drug traces in a person's blood stream up to a period of six months after his or her drug use. Due to this, it has been held by some that such drug tests should be subject to the warrant requirement. This is because there is no urgency in conducting the drug tests at the soonest possible time since there is that six month retention period of the drug residues and traces in the body. Further, such retention period would give enough time to the government to get enough evidence to satisfy the probable cause requirement and thus, secure a warrant. These arguments are bolstered by the fact that in almost all of the American cases dealing with the constitutionality of a drug test, the U.S. Supreme Court has almost always used the fact that such drug tests should not be subject to the warrant requirement because of the massive rate at which the human body eliminates the traces of drug use. Thus, it has been said that the current technology of drug testing negates any urgency in the need to conduct such tests and affords the government enough time to satisfy the warrant requirement.

158. *Skinner*, 489 U.S. at 654 (1989).

159. T. L. O. v. New Jersey, 469 U.S. 340, 341(1985).

However, these criticisms should in no way militate against the validity of the random drug tests for students as it is currently envisioned in R.A. 9165. First, the special needs tests, as it has developed in American jurisprudence, requires practicability rather than urgency. Even if there is no urgency to conduct the drug tests given the current technology, that fact alone would not make obtaining a warrant for such tests practicable. As stated above, to obtain a warrant would still be very cumbersome and would defeat the purpose of R.A. 9165.

Second, in the *T.L.O.* case, the U.S. Supreme Court validated the warrantless search of students by their teachers not on the basis of whether there was time for the school authorities to secure a warrant but rather due to the fact that in the context of a school setting, the warrant requirement cannot be imposed on teachers, even acting as State agents, because this would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools. In this respect, the urgency had to do with the need to impose swift disciplinary measures on the students and not due to the possible elimination of evidence. Further, it was held in that case that the warrant requirement cannot be applied to such teachers because they are not trained nor adept at ensuring that their acts meet the strict requirements for warrants.[160]

Third, in the context in which R.A. 9165 envisions the random drug testing of students, the warrant requirement should not be applied because, strictly speaking, such drug tests are not criminal searches. This is because drug use or dependence is not a crime, as shown by the clear intention of the framers of the law. The probable cause requirement for warrant speaks of the commission of a crime. However, since drug use is not a crime, theoretically, the probable cause requirement can never be satisfied in that context and a warrant would never be issued for a drug test. This is absurd. Hence, it has been consistently held by the U.S. Supreme Court that in the context of a school search, the warrant and probable cause requirements should not apply. This should also hold true for the Philippines. For such searches, it is the general criterion of reasonableness that should be satisfied in order to uphold their validity. For the foregoing reasons, the random warrantless drug testing of students should be upheld even if the technology used in such tests allow for the detection of drug traces even up to six months from the actual drug use.

### C. *Balancing the State Interest With the Privacy Expectations of the Students*

A search meeting both the *special needs beyond ordinary law enforcement* and the *impracticability of a warrant* tests must then be justified by a balancing of the government's interests against the individual's privacy interests in place

160. *Id.*



of the Fourth Amendment warrant and probable cause requirements. If it is found that the government's interests outweighed the individual's privacy interests, the government's warrantless search should be permitted. However, it should be reiterated that these interests should be balanced only if there is a special need that makes the requirement of obtaining of a warrant impracticable. Clearly, there is a special need in the Philippine context that necessitates a balancing between the interest that the government seeks to protect through the drug tests and the intrusion that such drug tests will impose upon the legitimate privacy expectations of the students.

In the context in which the U.S. Supreme Court decided *Vernonia* and *Earls*, great consideration was given to the intrusiveness of the drug tests dependeding primarily upon how the discharge of the urine sample to be subjected to the tests was to be monitored. In *Vernonia*, the male students were monitored while they discharged their urine in a receptacle against the wall, while the monitors were behind them and monitored their discharge primarily through auditory surveillance to ensure that the samples were not tampered. In *Earls*, meanwhile, the male students were actually allowed to discharge their urine sample within cubicles with the monitors standing outside and monitoring again primarily through auditory surveillance to ensure that there was no tampering. In both *Earls* and *Vernonia*, the females were allowed to discharge their urine samples within cubicles with the monitors again standing outside and monitoring primarily through auditory surveillance to suppress tampering. In both these cases, the U.S. Supreme Court ruled that the conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample were, in the Court's view, negligible.

R.A. 9165 is silent with respect to the manner through which the random drug testing of students is to be accomplished. As discussed earlier, such drug tests would probably be implemented through urinalysis like the drug test now being administered to applicants for drivers' licenses. If the random drug tests for students would be administered through urinalysis and the discharge of the urine would be monitored in the manner described in the American decisions, then it would be reasonable to conclude that should any question on the constitutionality of such drug tests arise, then the Supreme Court could easily conclude that the obtrusiveness of such drug tests would be negligible, taking the cue from the American doctrines.

Given that the drug tests would not be overly intrusive and the fact that the government interests in the protection of the youth is of paramount and transcendental importance, clearly the balance should be

tilted in favor of the government. It is clear from the foregoing that the random drug tests for students mandated under R.A. 9165 meet all of the tests under U.S. jurisprudence, the validity of the random drug tests should therefore be upheld.

### *D. The* Ferguson *Requirements*

The random drug tests for students under R.A. 9165 would also pass the additional requirement imposed by the *Ferguson* case since it does not intricately involve law enforcement means or methods nor does it have an immediate purpose of achieving law enforcement goals and the ordinary law enforcement agents are not extensively involved at any stage of the implementation of the rehabilitation of drug users. As stated and argued earlier, the drug tests seek the prevention of drug use and the rehabilitation of users or drug dependents. Such rehabilitation is not a penal sanction imposed upon them for violating the law but rather, it is in order to rescue them and cure them from the ills of drug use. Such rehabilitation is not for retribution but rather for the reformation and reintegration of the drug users. Such rehabilitation is to be administered by the Dangerous Drugs Board, the Courts, the DOH, the DSWD, the DepEd and the CHED primarily, in cooperation with other agencies.

It is important to note here that under R.A. 9165, the Dangerous Drugs Board is no longer the law enforcement arm in the government's war against drugs.[161] The new law enforcement arm will now be the Philippine Drug Enforcement Agency.[162] The Dangerous Drugs Board will only be the policy formulating and coordinating agency in the war against drugs.

As stated earlier, R.A. 9165 also gives special importance to the role of the family and the school in combating the threat of drugs among the youth. Clearly, such drug testing and its concomitant rehabilitation do not intricately involve ordinary law enforcement agencies but rather only agencies that are concerned with the physical, mental, and psychological well-being of the students/drug users. As stated earlier, the records of those who test positive for drug use and undergo rehabilitation are strictly confidential and are placed in the possession and control of the courts and are not to be turned over to the police or any other law enforcement agencies.

Another aspect of the *Ferguson* criteria that needs to be addressed is that the drug testing policy's primary purpose must not be to force the test subjects into drug treatment by threatening them with arrest and

161. COMPREHENSIVE DRUGS ACT OF 2002, art. IX, § 77.

162. *Id.* at § 82.



prosecution. Under R.A. 9165, drug users or dependents are encouraged to voluntarily submit themselves to rehabilitation under Section 54. Even if they do not do so and they are compelled to undergo rehabilitation, such is not done under the threat of imprisonment or the imposition of any other penal sanction. In both cases, rehabilitation is never considered a penalty to be imposed against an individual who is determined to be a drug user or dependent provided he has not violated any of the other provisions of the law.

Just like in *Skinner*, *Von Raab*, *Vernonia*, and *Earls*, the primary goal of the drug tests under R.A. 9165 is the promotion of the health, safety, and proper development of the subjects of the drug tests and the people around them, particularly the students, the youth, their peers, their families, the teachers, and the other school officials and personnel.

Since it is clear that the situation presented by the random drug tests for students contemplated by R.A. 9165 would past the tests as a special need, as it has developed in American Constitutional Law, the next issue that has to be addressed is the issue of the applicability of this doctrine in the Philippines.

## VII. BASIS FOR THE ADOPTION OF THE SPECIAL NEEDS DOCTRINE IN PHILIPPINE CONSTITUTIONAL LAW

The *special needs* doctrine first appeared in the case of *New Jersey v. T.L.O.* in the concurring opinion of Justice Harry A. Blackmun.[163] There, Justice Blackmun stated that certain exceptional circumstances exist where special needs, beyond the normal need for law enforcement, make a warrant requirement impracticable. He identified a stop and frisk circumstance as a special need. This was because in a stop and frisk circumstance, a police officer has a special need beyond normal law enforcement in assuring his safety. The police officer's safety interest is different from crime control because he must be allowed to assure himself that the individual he stopped does not have a weapon that could be used to injure the officer.

Justice Blackmun recognized that it would be impracticable to require the police officer to obtain a warrant or have probable cause before assuring his safety. He also identified policing the border as a special need, stating a warrant or probable cause requirement would be impracticable because a border patrol has no other reasonable alternative for guarding the border other than stopping a car to question the occupants briefly. Further, he identified school officials as having a special need to conduct searches without a warrant or probable cause to immediately respond to students' misbehavior. In all of these circumstances, he emphasized how the searcher

163. *T.L.O.*, 469 U.S. at 351-53.

could not practicably obtain a warrant or have probable cause and still achieve the objective of the search. It was in this opinion that the special needs doctrine first gained express judicial recognition.

Although Philippine jurisprudence does not expressly recognize the special needs doctrine as an exception to the warrant and probable cause requirements of the search and seizure clause, in a number of cases, the Supreme Court has impliedly recognized this doctrine through the exception of certain searches from the general requirement of a warrant and probable cause, owing to the circumstances under which such searches were made. The first of these cases is *Villaflor v. Summers,*[164] referred to earlier. The Supreme Court held that "[c]onceded and yet, as well suggested by the same court, even superior to the complete immunity of a person to be let alone is the interest which the public has in the orderly administration of justice."[165] By this statement, the Supreme Court may have, albeit unintentionally, touched upon the right to privacy and applied the special need doctrine as well, where the right to be let alone is weighed against the State interest for the administration of justice. This, however, was a mere *obiter dicta.*

The second of these recognized valid warrantless instances pertains to the searches of a car or moving vehicle. These searches have long been recognized as valid because it is not practicable to secure a search warrant in cases of smuggling with the use of a moving vehicle to transport contraband because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought thus placing the contraband beyond the reach of the officers and to secure a prior warrant thereby impedes law enforcement.[166] This doctrine has been expanded to include boats and fishing vessels in recognition of the fact that such vessels were usually equipped with high power motors, which enabled them to move fast and elude arresting ships of the Philippine Navy and Coast Guard and other government authorities enforcing fisheries laws.[167]

The third of these valid warrantless searches due to a special need is illustrated in the case of *Valmonte v. De Villa.*[168] Here, the Supreme Court ruled that under exceptional circumstances, as where the survival of organized government is on the balance, or where the lives and safety of the people are in grave peril, checkpoints may be allowed and installed by the government. In this case, the Supreme Court balanced these governmental interests against the admitted intrusion during the routine

164. 41 Phil. 62 (1920).

165. *Id.* at 69.

166. People v. Lo Ho Wing, 193 SCRA 122 (1991).

167. Hizon v. C.A., 265 SCRA 517, 528 (1996).

168. 185 SCRA 665 (1990).



checkpoint stop on the motorist's right to "free passage without interruption." However, the Supreme Court ruled that it could not be denied that, as a rule, the check point involves only a brief detention of such motorists during which the vehicle's occupants are required to answer a brief question or two. For as long as the vehicle is neither searched nor its occupants subjected to a body search, and the inspection of the vehicle is limited to a visual search, said routine checks cannot be regarded as violative of an individual's right against unreasonable search. Once again, the Supreme Court weighed the government interests against the relative unobtrusiveness of the search and tipped the scales in favor of the government.

Stop and frisk cases like in *Terry v. Ohio*[169] and *Posadas v. Court of Appeals* [170] constitute the fourth exception to the search warrant requirement because of the presence of a special need. As stated by Justice Blackmun in *Terry*, a stop and frisk is born out of the special need of the law enforcer to ensure his personal safety. The Supreme Court has actually expanded this doctrine by limiting such a stop and frisk search to the outer clothing of the suspect.[171] Again, this is a clear indication of the attitude of the Supreme Court in balancing the obtrusiveness of the search and the government interests in ensuring law and order and the safety of the peace officer and those around him.

The fifth of these cases or situations applying the special need doctrine is illustrated in the case of *People v. De Gracia,*[172] where the Supreme Court recognized the validity of a search done under "exigent and emergency circumstances" as another exception to the search and seizure clause. Here, the Supreme Court ruled that due to the general chaos and disorder at that time due to the *coup d'etat* in progress and because of simultaneous and intense firing within the vicinity of the office of the Eurocar sales and in the nearby Camp Aguinaldo, the warrantless search was valid. The military operatives were fired upon near the office and taking into account the facts obtaining in this case, there was reasonable ground to believe that a crime was being committed. There was consequently more than sufficient probable cause to warrant their action. Furthermore under that situation then prevailing, the raiding team had no opportunity to apply for and secure a search warrant from the courts, which were then closed. Under such urgency and exigency of the moment, a search warrant could thus be lawfully dispensed with. The Supreme Court particularly took into account the impracticability of securing a warrant and the compelling governmental

169. 392 U.S. 1 (1968).

170. 188 SCRA 288 (1990).

171. Malacat v. C.A., 283 SCRA 176 (1997).

172. 233 SCRA 716 (1994).

interest in thwarting the *coup* as valid reasons to hold the warrantless search valid. This case again illustrates an adoption into Philippine jurisprudence of elements of the special need doctrine.

The foregoing cases illustrate that Philippine jurisprudence has the necessary foundations for the adoption of the special needs doctrine that had been developed in the context of cases involving drug tests in American Constitutional Law. The special needs doctrine had been adopted in past cases after the Supreme Court weighed the exigencies presented by a situation against the intrusion that a governmental act imposes on the privacy of an individual thereafter. And in these instances, the Court tilted the balance in favor of the pubic interest. The situation presented by the drug tests under R.A. 9165, as a weapon against the drug problem, is another clear occasion for the Supreme Court to once again tilt the scales in favor of the public good.

## VIII. Other Arguments for the Validity of the Random Drug Tests for Students

Another argument for the validity of the drug tests as reasonable searches and seizures is presented by the long-standing rules on the interpretation of the provisions of the Bill of Rights, including the search and seizure clause. The drug tests under R.A. 9165 were mandated pursuant to the police power of the state under which it can prescribe and perform all means reasonably necessary to promote and protect the general welfare of the people. The Bill of Rights is of course a limitation on this police power. Given the immense power and resources of the State and the vulnerability of the individual citizen, it has been long recognized that the provisions of the Bill of Rights, including the search and seizure clause, are to be construed strictly against the State and liberally in favor of the individual.[173] Pursuant to this general rule of construction, it has been held that the exceptions to search and seizure clause should be limited to their specific circumstances and should not be stretched any further. However, despite these very strict pronouncements, it has also long been held that the Bill of Rights should not be construed in a way that will impede or hinder the reasonable needs of law enforcement.[174] From the earlier discussions dealing with the application of the special needs doctrine to the drug tests under R.A. 9165, it can be clearly seen that these drug tests were mandated to pursue ends above and beyond the reasonable needs of ordinary law enforcement. Given that these tests clearly seek to serve needs beyond ordinary law enforcement, the traditional rule of strict interpretation should not apply in determining the validity of these tests. Hence, the drug

173. 79 C.J.S. *Searches and Seizures* § 4 (1952).

174. *Id.*



tests under R.A. 9165 should be upheld as valid warrantless search even against the traditionally strict interpretation of the search and seizure clause.

Another argument for the validity of these drug tests is presented by the ruling in the case of *Dela Cruz v. Court of Appeals*.[175] In this case, the Supreme Court ruled that a provision in the Bill of Rights as important as the freedom of speech and assembly does not prevail over another right as equally important as the right of the youth to education. This pronouncement of the Supreme Court would be applicable in a case questioning the validity of the drug tests under R.A. 9165 as a warrantless search because in such a situation, two constitutional rights of equal importance would again be at odds. These are the rights of the people against unreasonable searches and seizures and the right of the youth to grow in a healthy and proper manner, in all aspects. This right of the youth has actually been made an express duty of the State under Article II, Section 13 of the 1987 Constitution which states:

> The State recognizes the vital role of the youth in nation-building and *shall promote and protect their physical, moral, spiritual, intellectual, and social well-being.* It shall inculcate in the youth patriotism and nationalism, and encourage their involvement in public and civic affairs.[176]

Though this provision is in Article II or The Declaration of State Principles and Policies, it does not mean that it is inferior to the provisions of the Bill of Rights. In the landmark case of *Oposa v. Factoran*,[177] the Supreme Court has held that while the right to a balanced and healthful ecology is to be found under the Declaration of Principles and State Policies and not under the Bill of Rights, it does not follow that it is less important than any of the civil and political rights enumerated in the latter. Thus the Court ruled here that the provisions in the Declaration of Principles and State Policies are sources of enforceable rights. Hence, the rights of the individual students under the search and seizure clause cannot be used as a justification to brush aside the validity of the drug tests under R.A. 9165. This is because these tests were enacted precisely to promote the students' own right to grow in a safe, healthy, and proper or conducive environment pursuant to Section 13 of Declaration of Principles and State Policies of the 1987 Constitution. Furthermore, these tests are mandated to fulfill the duty of the State to promote and protect the physical, moral, spiritual, intellectual, and social well being of the youth and to ensure the existence of a conducive environment for their growth.

175. 305 SCRA 303 (1999).

176. PHIL. CONST. art II, § 13 (emphasis supplied).

177. 224 SCRA 792 (1993).

## IX. CONCLUSION

The grave extent of the drug problem in the Philippines today calls for extraordinary measures on the part of the State. This is true especially to the ever-growing drug problem among the youth, the nation's future. These measures, however, no matter how noble or valid their objectives are, must not contravene the basic human rights of the people as enshrined in the Bill of Rights.

As answer to this growing drug problem, Republic Act No.9165 was recently signed into law. One of the extraordinary measures mandated by this new Comprehensive Dangerous Drugs Act of 2002 is the institution of drug-testing programs in various areas of society, including the educational sector. This program is extraordinary because it is the first time that the Government has instituted a mandatory drug testing program that embodies a radical shift in the focus on the war against drugs. The traditional approach in the war on drugs is focused on the eradication of those who supply the drugs to the users. The drug-testing program is focused on the reverse. It is aimed at eradicating the market demand for drugs by detecting the drug users and getting them off of their deadly addiction.

R.A. 9165 did not specify the manner by which the students would be randomly selected for drug testing. The manner that Senator Barbers has envisioned was described in the earlier parts of this work. It was also stated therein that should the implementing rules adopt the plan of Senator Barbers, such would still be valid. However, it is well to note here the observations of the U.S. Supreme Court in the *Earls* case:

> Moreover, *we question whether testing based on individualized suspicion in fact would be less intrusive.* Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. *A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.*[178]

In this case as well as in the earlier cases of *Vernonia*, *Skinner* and *Von Raab*, the U.S. Supreme Court has held the fact that the identity of the potential drug test subjects has no bearing to their selection to undergo the drug tests lessens the intrusiveness of the searches. The agencies tasked with the drafting of the guidelines for the actual implementation of these drug tests in the Philippines would do well to remember this particular

178. Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls, No. 01-332 (filed Mar. 19, 2002) *available at* http.//laws.findlaw.com/us/000/01-332.html (last accessed Aug. 1, 2003) (emphasis supplied).



statement and insure that the teachers do not take into account the identity of a student in determining if he or she is to undergo a drug test or not. Even if the random drug tests envisioned by the senators in R.A. 9165 be upheld as valid, still it is recommended that the selection of the students for the random drug tests should be totally random and not based on any observations or recommendations from the school officials.

The students should be selected regardless of their identities or to the perceptions of their teachers. Such selection should be totally random as, for example, selection through the drawing of lots or through as random computer program. Such a totally random selection would serve two purposes. First, a totally random selection of students would be a more effective deterrent to drug use since the students would have no way to avert or impede their selection. As stated above, the manner of selection envisioned by Senator Barbers, though valid, may be easily defeated by the students by simply ensuring that their conduct in school evoke no suspicion of drug use. If the students are selected totally at random, they are selected based on pure chance without any chance or opportunity for them to possibly avert or evade from being selected or to prepare for the drug tests should they be selected. Total random selection would put the element of surprise on the side of the State and considerably increases the possibility that the government will catch the clandestine student drug-users. Further, the totally random selection of the students totally negates any possibility that the teachers might use the selection process for discrimination against certain unpopular students since such total random selection removes any discretionary involvement of the teachers or school authorities in the selection process.

The drug-testing program may involve either a blood test or a urine test. However, the latter is the more probable choice. Whichever manner the implementing agencies choose to administer the drug tests, there can be no doubt that such drug tests are searches. American jurisprudence has conclusively ruled that a drug test, whether through a urinalysis, blood test, or deep breath analysis constitutes a search within the meaning of the Fourth Amendment of the American Constitution. There is no such authoritative ruling here in Philippine jurisprudence. However, the Supreme Court has recognized the existence of the right to privacy of the Filipino people. The drug-testing program infringes on this right to privacy because students have a privacy interest in the way they discharge their urine or in the taking of blood from their bodies and in the information that may be derived from an examination of such urine or blood. Therefore, whichever way the drug tests are implemented, the Supreme Court should rule that such drug tests are searches.

It is recommended that the implementing rules and regulations should adopt urinalysis as the manner of administering the drug test. This is

because urinalysis involves the least intrusion into the private sanctity of a person since no surgical incision is needed to perform the test. Further, in a drug test through urinalysis, there is a minimal intrusion into privacy since the greatest intrusion therein would only be the monitoring of the discharge of the urine by the test subjects primarily through auditory surveillance. This minimal characteristic of an intrusion through the monitoring of urine discharge was one of the factors that the U.S. Supreme Court used in determining that the tests on the students in *Vernonia* and *Earls* was reasonable. Further, in *Earls*, the discharge of the urine sample was allowed to be in a cubicle for both the males and females. The implementing rules should adopt this method of monitoring the urine discharge by the students. Students selected for the drug tests should be allowed to discharge the urine samples inside cubicles with the monitors standing just immediately outside listening to the discharge to make sure that there is no tampering or substitution of samples.

The Supreme Court can do this by adopting the rulings of the U.S. Supreme Court or by making independent finding that these tests infringe upon a recognized expectation of privacy among Filipinos. Either way, it is clear that the drug tests present inescapable issues on the right to privacy, particularly the rights against unreasonable searches and seizure that have to be addressed.

Since a drug test is a search, it must conform to the requirements of the constitution. The primary requirement is reasonableness. The U.S. Supreme Court has held that a drug test for rail workers, customs employees, truck drivers, and students are reasonable searches within the Fourth Amendment. The U.S. Supreme Court reached these conclusions by weighing the government interests against the expectations of privacy of the individuals involved in each of the cases. The U.S. Supreme Court has consistently held in that these cases which involved a compelling government interest that is sought to be achieved through a reasonable intrusion into the privacy of a person presents a special need that dispenses with the warrant or probable cause requirements of the Fourth Amendment.

Again, in the Philippines, there has been no authoritative ruling on the constitutionality of a drug test. Despite this however, the drug tests for students mandated by R.A. 9165 should be upheld as constitutional. This is because these tests and the situation now wherein they are to be implemented complies with all of the requirements for the recognition of the special need doctrine as it has emerged in American jurisprudence. Furthermore, there are enough foundations in Philippine jurisprudence for the formal adoption of the special needs doctrine as another valid exception to the warrant and probable cause requirements of the Bill of Rights. There have been many cases where the Supreme Court weighed



the intrusions of government on the privacy of individuals by taking into account the circumstances surrounding the particular situation that influenced the State conduct. In the context of the drug problem in the Philippines today, there can be no doubt that a special need exists that exempts the drug tests from the traditional requirements of a warrant or probable cause. The Supreme Court should recognize this special need and uphold the validity of the drug tests as reasonable searches.