Written by **Bob Adelmann** on February 13, 2014

Judge Rules Against the DEA in Prescription Drug Privacy Lawsuit

The favorable ruling sought by the ACLU against the DEA (Drug Enforcement Administration) in Oregon to impede the DEA's use of "administrative subpoenas" that override Oregon's privacy guarantees was satisfying, but is likely to be challenged.

Said ACLU attorney Nathan Freed Wessler:

> This is a victory for privacy and for the constitutional rights of anyone who ever gets drug prescriptions. The ruling recognizes that confidential medical records are entitled to the full protection of the Fourth Amendment.
>
> The court rightly rejected the federal government's extreme argument that patients give up their privacy rights by receiving medical treatment from doctors and pharmacists.

The suit, originally brought by Oregon's prescription database program manager and four individuals, including a medical doctor, was later joined by the ACLU, which helped present, and win, the case against the DEA. In a tidy, succinct and well-reasoned decision, U.S. District Court Judge Ancer Haggerty saw the implications for violation of the plaintiff's rights to privacy under the Fourth Amendment and ruled accordingly.

In September 2012, the DEA issued two "administrative subpoenas" demanding that Oregon's database program — Oregon's Prescription Drug Monitoring Program (PDMP) — release information on an individual patient using prescription drugs and on two physicians who were prescribing them. PDMP turned the DEA away, claiming that Oregon's laws on privacy preempted the DEA's demand. PDMP then filed suit, joined later by the ALCU.

The judge was careful to note numerous similar (but not identical) cases and their rulings to inform his decision, including *Katz v. United States*, wherein the Supreme Court ruled that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se [implicitly] unreasonable under the Fourth Amendment." He also cited *United States v. Ziegler*, where the Supreme Court ruled that the Fourth Amendment "guards against searches and seizures of items or places in which a person has a reasonable expectation of privacy."

The DEA countered with a "third party" argument, asserting that once an individual consents to give information to a third party, he gives up his Fourth Amendment rights to the security and privacy of that information. The judge tossed that argument:

> It is clear from the record that each of the [plaintiffs] has a subjective expectation of privacy in his prescription information, as would nearly any person who has used prescription drugs.
>
> Each has a medical condition treated by a Schedule II-IV drug and each considers that information

> private. Doctor James Roe also has a subjective expectation of privacy in his prescribing information….
>
> By reviewing doctors' prescribing information, the DEA inserts itself into a decision that should ordinarily be left to the doctor and his or her patient.

Then the judge did something extraordinary. In defending the Fourth Amendment, Judge Haggerty invoked the Founders, including both the signers of the Declaration of Independence and the delegates to the Constitutional Convention, noting that many of them were physicians trained at the University of Edinburgh, "which required its graduates to sign an oath swearing to preserve patient confidentiality." If they meant it then, they certainly mean it now.

Based on his review of arguments presented on both sides, Haggerty concluded:

> [Plaintiffs'] subjective expectation of privacy in their prescription information is objectively reasonable. Although there is not an absolute right to privacy in prescription information, as patients must expect that physicians, pharmacists, and other medical personnel can and must access their records, it is more than reasonable for patients to believe that law enforcement agencies will not have unfettered access to their records.

Especially private are records of two of the plaintiffs taking prescription drugs in relation to their "gender identity disorders":

> By obtaining the prescription records for [these individuals, the DEA] would know that they have used testosterone in particular and by extension, that they have gender identity disorder and are treating it through hormone therapy.
>
> It is difficult to conceive of information that is more private or more deserving of Fourth Amendment protection….
>
> [Therefore] the prescription records here are protected by a heightened privacy interest rendering the use of administrative subpoenas unreasonable….
>
> It is so ordered.

It is unlikely that Haggerty's decision will go unchallenged, raising the concerns of the impact a reversal might have on the medical profession and on those seeking medical advice. If privacy expectations are diminished, how readily will doctors and patients offer and accept prescription drugs when they know that Big Brother is watching and can obtain, on an "administrative subpoena" whim, all that personal and private data? In noting how such a reversal might impact that relationship, Christopher Moraff, writing for PennLive, said:

> The most dangerous side effect [of such unlimited access by the DEA] is the chilling effect [it would] have on doctors and pharmacists.
>
> Research shows that [invasions of medical privacy] have a ripple effect that leads doctors to withhold medication from people who need it out of fear of prosecution or censure….
>
> Sick Americans, particularly the roughly 115 million who suffer from chronic pain, already face enough burdens to treatment without having their medical information used as leverage in the war on drugs.

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