OPINION

EDITORIALS

Get arrested, give up your DNA

Supreme Court majority likens collection of genetic material to a fingerprint.

Soon, "Open your mouth so we can swab it for DNA," may well become a routine order by police across America after a U.S. Supreme Court decision Monday.

The high court's decision came in a case involving a Maryland man, Alonzo King, arrested for assault in 2009. By collecting Mr. King's DNA, authorities were able to link him to an unsolved rape from in 2003.

While it is fortunate the crime was solved, police previously would have had to obtain a court order showing "probable cause" for the DNA test, complying the with the Fourth Amendment guarantee affirming the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."

Writing for the 5-4 majority, Justice Anthony Kennedy declared, "[T]asking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment."

Dissenting, Justice Antonin Scalia wrote, "The Fourth Amendment forbids searching a person for evidence of a crime when there is no basis for believing the person is guilty of the crime or is in possession of incriminating evidence. That prohibition is categorical and without exception; it lies at the very heart of the Fourth Amendment."

Erwin Chemerinsky, founding dean of the UC Irvine School of Law, doesn't think taking a cheek swab of a person's DNA is like fingerprinting. "Of course, it's different from fingerprinting," he told us. "You can obtain vastly more information about a person. This wasn't taking the DNA to link him to the assault because he already was linked to it. It was used to link the person to another crime. But the person was not suspected of the other crime."

In the case decided Monday, Maryland law allowed DNA collection without probable cause for those suspected of violent felonies. In California, a 2004 ballot measure, Proposition 69, gives police even greater latitude, allowing DNA collection in arrests for all – including nonviolent – felonies.

The American Civil Liberties Union challenged Prop. 69 on behalf of a number of individuals forced to submit to DNA sampling when arrested. The case is before the 9th U.S. Circuit Court of Appeals, which has been awaiting the Supreme Court's decision in the Maryland case.

Among the California cases under review is that of Elizabeth "Lily" Haskell of Oakland, arrested in 2009 during a rally in San Francisco's Civic Center Plaza against the Iraq war. Police took her DNA, yet she never was charged with any offense and had no criminal record.

Given Monday's decision, we do not think the prospects especially promising that the 9th Circuit will throw out Prop. 69.

The best remaining hope for plaintiffs like Ms. Haskell is that civil libertarians put a measure before the voters that would amend Prop. 69 to authorize DNA collections not merely when an individual is arrested, but only when she or he actually is charged with a felony or, better still, convicted.

No way to grow a payroll

Large-firm Obamacare dodge target of bill.

Gov. Jerry Brown told county officials last week that the state cannot afford to pay the full cost of expanding the state's Medi-Cal program under the Affordable Care Act. So he plans to offload $300 million of the expense onto the counties.

California businesses are no less wary about the threat Obamacare poses to their bottom lines. That's why a survey last year by Mercer Consulting found that roughly a third of restaurant and retail employers are likely to reduce their full-time staff to avoid the expensive, new mandate to provide health insurance.

The California Labor Federation, United Food and Commercial Workers, the California Medical Association and assorted health care advocacy groups are determined not to allow businesses get around Obamacare. They back Assembly Bill 880, the so-called Employer Responsibility for Medi-Cal Cost of Employees Act, sponsored by Assemblyman Jimmy Gomez, D-Los Angeles.

The measure would hit "large" employers – those with 500 or more workers – with a penalty of up to $6,000 for each of their employees who work more than eight hours a week and who are enrolled in Medi-Cal.

It also makes it unlawful for a "large" employer to designate an employee as an independent contractor or temporary employee, reduce an employee's hours or terminate an employee if the purpose is to avoid the measure's mandates.

AB880 is intended to close what Mr. Gomez and fellow Assembly Democrats refer to as the "Walmart Loophole." They argue that the nation's largest retailer, which boasts some 250 stores here in the Golden State, pays its California employees as little as possible, anticipating that many will rely on Medi-Cal for their health insurance.

Walmart says the accusation is scurrilous. "More than 75,000 people made the choice to work for Walmart in California," Delai Garcia, a company spokeswoman, told the Los Angeles Times, "because most know that we offer the opportunity to build a career."

In fact, the labor unions, the CMA, and the health advocacy groups actually are doing a disservice to Walmart workers, as well as those who currently work for the third of retailers and restaurants planning to pare their full-time staff, according to the Mercer study.

If it appears that AB880 will muster the two-thirds majority it needs for passage, not only in the Assembly, but also the state Senate, affected employers may actually pare their payrolls before the Gomez bill takes effect.

Correction

Cal State Fullerton professors are not being asked to accept a $10,000 pay cut. Because of erroneous information provided by a source, mention of such a demand was incorrect in an editorial in the May 31 edition of the Register.

REGULATION

Getting Americans more valuable medicines, devices

U.S. should study reciprocal approvals with other advanced nations.

CONOR FRIEDERSDORF
REGISTER COLUMNIST

The year before last, James Joyner, a political scientist, discovered that he had a cataract causing his vision to deteriorate in his left eye. "My surgeon suggested that, if I were willing to wait a couple of months and were willing to pay a couple thousand dollars out of pocket, a revolutionary new lens that had been in use in Europe for years would be approved by the FDA," he explained in a recent post at his popular blog, Outside the Beltway.

Unfortunately, the expected approval still hasn't come, and his vision is getting worse. He's scheduled to have an inferior lens installed this month.

MCT ILLUSTRATION

"The absurdity of a lens that's in widespread use in Sweden and Germany not being available in the United States because the FDA hasn't gotten around to it is mind-boggling," he complained in his post. "We're not talking about a back alley in Tijuana or Marrakesh; these are at least comparably advanced countries. And, of course, the difference between a pretty decent cataract replacement lens and a very good one is nothing compared to, say, a vastly better heart valve or cancer drug."

"The absurdity of a lens that's in widespread use in Sweden and Germany not being available in the United States because the FDA hasn't gotten around to it is mind-boggling."

JAMES JOYNER
CATARACT PATIENT

The Food and Drug Administration reviews drugs and medical devices before they can be sold in the United States so that consumers aren't hurt by unsafe products. FDA is partly responsible for the relative safety of American medicine. But that benefit comes at a significant cost. Drugs and medical devices can't start helping people until they're approved, and delaying their appearance on the market can hurt health outcomes.

When it comes to untested drugs and devices, that tradeoff probably makes sense. If I could abolish the FDA and all its testing requirements with a wave of my hand, I wouldn't do it. But preventing Americans from buying drugs available in other developed countries? That's an undue restriction on our freedom, and a practice to remedy.

Daniel Klein and Alex Tabarrok explained how, in a recent paper.

If the U.S. and Great Britain had drug-approval reciprocity, "drugs approved in Britain would gain immediate approval in the United States, and drugs approved in the United States would gain immediate approval in Great Britain," they wrote.

"Some countries, such as Australia and New Zealand, already take into account U.S. approvals when making their own approval decisions. The U.S. government should establish reciprocity with countries that have a proven record of approving safe drugs – including most west European countries, Canada, Japan, and Australia. Such an arrangement would reduce delay and eliminate duplication and wasted resources. By relieving itself of having to review drugs already approved in partner countries, the FDA could review and investigate ... more quickly and thoroughly."

That reform would also help address an understandable bias the FDA brings to its work. Failing to approve a safe drug or device can cost lives, but those deaths aren't blamed on the government; whereas approving a faulty drug or device would likely mean scandal and sorrow at the FDA. With those incentives, you'd expect the FDA to approve fewer drugs and devices than is ideal, if the goal is to minimize deaths.

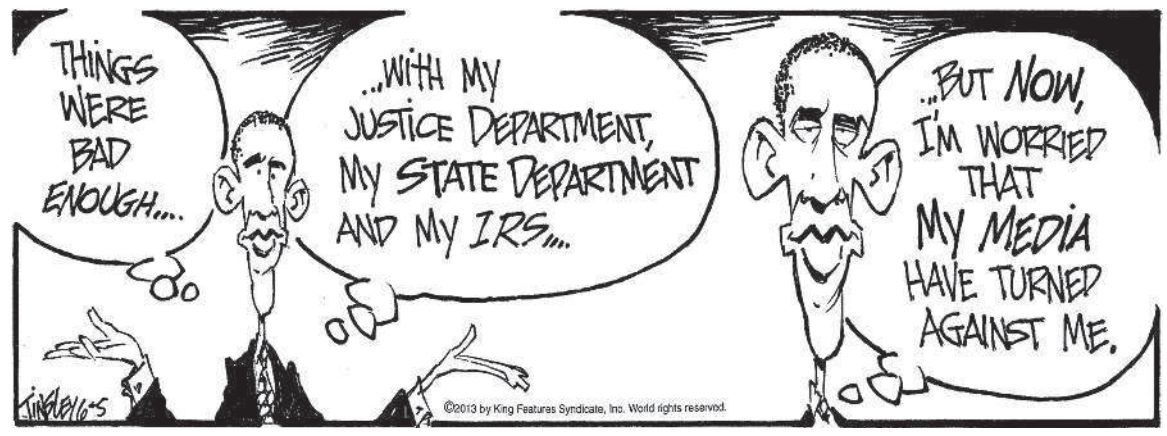
The risk of reciprocity is granting it to countries that don't deserve it. Would there be political pressure to do so? Initially, the U.S. would likely err on the side of caution. But, say that regulators in Germany and France remain top notch, while the Great Britain of 10 years from now has an FDA equivalent that is rife with corruption. Perhaps our special relationship with Britain would nevertheless make it a diplomatic headache to withdraw only its reciprocity.

I suspect the flaws in the current system make the reform of reciprocity worth the risk. Perhaps a tentative step forward would be to better quantify its costs. Among drugs approved in Europe or Japan, what percentage was eventually approved in the U.S.? Did the delay cost any lives? And how many European or Japanese lives have been lost due to unsafe drugs that weren't approved for use in the U.S.?

I suspect not very many.

Register opinion columnist Conor Friedersdorf also is a staff writer for the Atlantic.

MALLARD FILLMORE



QUOTE OF THE DAY

"Our peculiar security is in the possession of a written Constitution. Let us not make it a blank paper by construction."

THOMAS JEFFERSON

ORANGE COUNTY REGISTER

Published since 1905 ▪ a FREEDOM COMMUNICATIONS newspaper

Aaron Kushner, *Publisher and Freedom CEO*
Eric Spitz, *Freedom president*
Kenneth F. Brusic, *Editor and senior vice president*

Christopher D. Dahl, *vice president, finance, and chief financial officer*
Michael H. Burns, *senior vice president, advertising and marketing*
Richard Sant, *vice president, operations*
Bruce Blair, *vice president, circulation*
Brian Calle, *Opinion page editor*
Michael C. Tipping, *deputy editor, Commentary*

FORMER PUBLISHERS:
R.C. Hoiles, *co-publisher, 1935-1970*
C.H. Hoiles, *co-publisher, 1935-1979*
Harry Hoiles, *co-publisher, 1975-1979*
R. David Threshie, *publisher, 1979-1999*
N. Christian Anderson III, *publisher, 1999-2007*
Terry Horne, *publisher, 2007-2011*

REGISTER HEADQUARTERS: 625 N. Grand Ave., Santa Ana, CA 92701. Telephone: 1-714-796-7000.
Subscription services: Call 1-877-627-7009 toll-free (1-877-OCR-7009), www.ocregister.com/subscribe

The Opinion pages of the Register are dedicated to furnishing information to our readers so that they can better promote and preserve their own freedom and encourage others to do the same. The Register's guiding philosophy rests on three tenets: The Declaration of Independence, the Ten Commandments and the Golden Rule.

ABOUT THESE PAGES

Editorials represent views of the Register's Editorial Board, comprised of the Publisher, Commentary editors and editorial writers. Their views are guided by libertarian/conservative principles and dedicated to promoting individual liberty. **The Orange Grove** is a locally written column of 650 words. **Syndicated columns** are often selected to advance the editorial view or for "pro/con" formats. **Letters** reflect all points of view and are selected for clarity, substance and brevity (150 words). Sentiments on an issue are published in proportion to what is received, which changes daily. Letters must include the writer's name, address and telephone number for verification. Letters may be edited and used in print or digital form. All letters become property of the Register.
E-mail: **letters@ocregister.com**. Mail: Letters, The Register, P.O. Box 11626, Santa Ana, Calif. 92711-1626. Fax: 714-796-3657.