Testing Government Employees for Drug Use: The United States Supreme Court Approves

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Testing Government Employees for Drug Use: The United States Supreme Court Approves

Introduction

Over the past decade, there has been a massive national movement against drug use. On September 15, 1986, President Reagan openly declared a war on the use of drugs in the workplace by signing Executive Order Number 12,564. The Order mandates drug testing of federal employees in "sensitive positions" and requires each agency of the Executive Branch to adopt a policy regarding drug use. This action was later followed by the implementation of the Drug-Free Workplace Act of 1988. Additionally, both the Department of Defense and Department of Transportation have promulgated anti-drug rules and regulations.

1. 3 C.F.R. §§ 100, 101 at 224 (1986).
2. The testing is for illegal "narcotic drugs" as that term is defined by the Controlled Substances Act, 21 U.S.C. § 802 (Supp. V. 1987). The term illegal "narcotic drugs" does not include the use of a controlled substance pursuant to a valid prescription. 5 U.S.C. § 7301 (Supp. V 1987). The mandatory guidelines for federal workplace drug testing programs was promulgated by the Secretary of Health and Human Services. 53 Fed. Reg. 11,970-89 (April 11, 1988).
3. "Sensitive" positions include those with access to classified information, presidential appointees, law enforcement officers, positions dealing with national security, and "other functions requiring a high degree of trust and confidence." 3 C.F.R. §§ 100, 101 at 229 (1986).
4. Id.
5. 41 U.S.C.A. §§ 701-706 (West Supp. 1989). The Act requires that in order for an employer to be awarded a federal contract or grant of $25,000 or more, he must certify that he will provide a drug-free workplace by: (1) establishing a statement notifying employees about the prohibition of controlled substances in the workplace, and the sanctions imposed for such a violation; (2) establishing a drug-free awareness program; (3) providing a copy of the statement to each employee; (4) notifying the employee that his employment is conditioned upon his abiding by the statement and that the employee must notify the employer within five days of a drug statute conviction for a violation occurring in the workplace; (5) notifying the contracting or granting agency within ten days after receiving notice of an employee drug statute conviction; (6) imposing a sanction on the convicted employee or require his participation in a drug abuse assistance or rehabilitation program; and (7) making a good-faith effort to maintain a drug-free workplace. See id. at § 701.
6. 53 Fed. Reg. 37,763 (1988) (to be codified at 48 C.F.R. § 223). Employers entering into a contract with the Department of Defense ("DOD") must certify their intention to maintain a drug-free workplace. The employer must agree to provide for: (1) an employee assistance program which includes drug education, counseling and rehabilitation; (2) training for supervisors to detect drug abuse; (3) a referral system, including both self and supervisory referrals, for substance abuse treatment; and (4) procedures for identifying illegal drug users. The DOD regulations also mandate drug-testing for employees in "sensitive positions." Generally, "sensitive positions" include those having access to classified material or those requiring a "high degree of trust and confidence" due to national security concerns. The DOD regulations do not specify when drug testing must be conducted — i.e., applicant screening, post-accident, etc. It is up to the employer to determine the extent and criteria for testing. The DOD rules generally do not apply to contracts for commercial goods or contracts performed outside the United States, nor do they apply if they conflict with state or local law or existing collective bargaining agreements. Id.
7. 53 Fed. Reg. 47,002 (1988) (to be codified at 49 C.F.R. § 40). Employees of private and public transportation companies and employees in safety-sensitive or security-related jobs must also be tested under the Department of Transportation ("DOT") rules.
Admittedly, drug use in this country is a real and dangerous problem. A study conducted by the National Institute on Drug Abuse concluded that between 10% and 23% of all workers abuse drugs on the job. Additionally, according to the Alcohol, Drug Abuse, and Mental Health Administration, in 1986 alcohol and drug abuse cost industries up to $100 billion in lost productivity, caused three times more absenteeism and five times more workers' compensation claims. The fact that drug use is a devastating problem is not disputed. The real issue is what means may constitutionally be used to detect such use. While mandatory drug testing seems to be an attractive solution, it may open a Pandora's box of legal and ethical considerations. Two recent Supreme Court decisions explored the constitutionality of drug testing programs in both the Federal Railroad Administration ("FRA") and the United States Customs Service ("Customs Service"). In both cases, the Court held that the government's testing of employees in law enforcement and safety-sensitive jobs did not violate the fourth amendment's prohibition against unreasonable searches and seizures. Neither of the programs conditioned their test requirements upon the production of a warrant or the presence of individualized suspicion.

Although drug testing has been prevalent in the government sector for nearly a decade, some level of individualized suspicion has
generally been required. This note will focus on historical fourth amendment analysis, the significance of the Skinner and Von Raab decisions regarding other drug testing programs, and will attempt to reconcile such programs with the fourth amendment.

I. BACKGROUND

A. Fourth Amendment Analysis

The essential purpose of the fourth amendment is to safeguard the privacy and security of individuals against arbitrary and unreasonable intrusions by the government. This right has been recognized as one which is "basic to a free society." Specifically, the fourth amendment protects against two types of intrusions — "searches" and "seizures." A search is an infringement on an expectation of privacy that society is prepared to consider reasonable. A seizure of property occurs when there is a "meaningful interference with an individual's possessory interest in that property." Although courts have historically applied fourth amendment protections only to intrusions of property, this right has been extended to protect a person's physical integrity as well.

The fourth amendment does not prohibit all searches and seizures, only those which are "unreasonable." Except for a few well-defined exceptions, a constitutional search requires the procurement of a warrant based upon a showing of probable cause.

A central question in fourth amendment cases, therefore, is to determine whether the search was "reasonable." If the search was conducted pursuant to a warrant, it is presumed to be reasonable because a neutral magistrate has objectively evaluated its reasonableness in advance to protect individual privacy interests. A more difficult question arises when a warrantless search has been conducted.

The Supreme Court has attempted to define what is "reasonable:

14. See McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), cert. denied, 429 U.S. 1029; Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).
18. The "expectation of privacy" doctrine was developed in Katz v. United States, 389 U.S. 347 (1967) (Harlan, J., concurring); see also infra notes 27-30 and accompanying text.
20. Id.
The test of reasonableness under the fourth amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating, and the place in which it is conducted.25

The determination of "reasonableness" therefore involves balancing the government's interests against the intrusiveness of the search on the individual's fourth amendment rights.26

The intrusiveness of the search must be viewed in the context of the individual's expectation of privacy.27 First, a person must have an actual, subjective expectation of privacy. Second, the expectation must be one that society finds reasonable. A further determination of reasonableness is then made by looking at whether the search was justified at its inception and whether it was reasonably related in scope to the circumstances which justified the intrusion in the first place.28 Whether the search was justified at its inception requires a balancing of the individual's expectation of privacy with the governmental interest which allegedly justified the intrusion. To justify the search, the government must be able to point to specific and articulable facts, together with rational inferences judged against an objective standard — i.e., would a reasonable person have thought the action appropriate?29 Anything less would be a "hunch" and constitute an unreasonable intrusion on fourth amendment rights.30

Although the government is generally required to obtain a warrant based upon probable cause before it may conduct a search,31 probable cause is not an "irreducible requirement" of a valid search.32 In certain circumstances, warrantless searches are valid even though suspicion did not rise to the level of probable cause.33 These exceptions are based on the "special needs" of the government (the "Special Needs Exception"). Both warrant and probable cause requirements are dispensed with when "special needs, beyond the need for law enforcement, . . .[make them] impracticable."34 These cases are generally rationalized by exigent circumstances,35 such as the risk that evidence will be destroyed while a

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26. Although the fourth amendment technically applies only to the federal government, its application has been extended to the states through the due process clause of the fourteenth amendment. See Mapp v. Ohio, 367 U.S. 643 (1961).
29. Id. at 21.
30. Id. at 22; see also Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).
31. See supra note 23.
34. T.L.O., 469 U.S. at 351 (Blackman, J., concurring).
35. Such exceptions include the "automobile exception," hot pursuit, stop and frisk, plain view, border searches, administrative searches of closely regulated industries, inven-
warrant is being obtained. Additionally, the warrant requirement may be dispensed with if "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search."37

Warrantless searches have also been held valid in closely regulated industries (the "Administrative Exception").38 The premise of allowing these searches is that the pervasive regulation of the industry diminishes the employees' expectation of privacy.39 Warrantless searches may also be constitutional when they are necessary to further a regulatory scheme which is sufficiently comprehensive and defined so that the individual is aware that he may be subject to such a search.40

Furthermore, in Administrative Exception cases, there is generally a cogent federal interest in promoting public health and safety.41 Requiring a warrant would, in many cases, frustrate that purpose.42 The regularity and certainty of a comprehensive regulatory inspection scheme is a constitutionally valid substitute for a warrant because it safeguards individual privacy interests.43 It is under the Special Needs and Administrative Exceptions that the government justified its warrantless searches in Skinner and Van Raab.44

B. The Historical Drug Testing Cases

The taking of blood samples,45 and urine samples46 constitutes a search and seizure under the fourth amendment. Additionally, breath tests have also been held to be a search and seizure.47 The drug testing cases, therefore, require a fourth amendment balancing of individual privacy interests against the asserted governmental interests.48

Cases involving the intrusiveness of warrantless drug testing have gone both ways.49 One of the first cases to deal with this issue was detoritory searches, searches of children's possessions at school, and consent. See Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 583 n.11 (9th Cir. 1988) (citing cases).

40. Id. at 600.
41. See supra note 38.
42. Donovan, 452 U.S. at 603.
43. Id.
47. Skinner, 109 S. Ct. at 1412.
48. See supra notes 25-50 and accompanying text.
49. See infra notes 50-69 and accompanying text. But see supra note 14 (requiring some level of individualized suspicion).
cided in 1976. In Division 241 Amalgamated Transit Union v. Suscy, the United States Court of Appeals for the Seventh Circuit upheld the constitutionality of the Chicago Transit Authority's ('CTA') rules requiring bus drivers to submit to blood and urine tests after serious accidents or upon a suspicion of intoxication or being under the influence of drugs. The court applied the balancing test and found that the state had advanced its compelling public safety interest by insuring the drivers fitness for duty. Furthermore, the court concluded that bus drivers have no reasonable expectation of privacy.

Likewise, in Allen v. City of Marietta, the court found that requiring government employees engaged in extremely hazardous work to submit to urine tests was reasonable. There was evidence that the tested employees had used drugs while on duty thereby creating a threat to the public. Because there was actual evidence of the employees' drug use, the test was clearly based on reasonable suspicion.

It was not until July 1986 that a court first upheld a random drug testing program of civilian employees. In Shoemaker v. Handel, regulations promulgated by the New Jersey Racing Commission required jockeys to undergo breath and urine testing to detect alcohol or drug use. A warrant was not required because the search fell within the Administrative Exception. The governmental interest advanced was assuring the public of the integrity of persons involved in the horse-racing industry. The jockeys, on the other hand, asserted that random drug testing without suspicion violated their fourth amendment rights. The court, however, found that the jockeys had a diminished expectation of privacy since horse-racing was one of the most highly regulated industries in the state. Additionally, safeguards were provided against invasions of the jockeys' privacy interests in that the State Racing Steward had no discretion in conducting the test.

Warrantless drug testing cases subsequent to Shoemaker generally required some level of individualized suspicion before an employee could be subjected to a drug test. However, in 1987, the United States
Court of Appeals for the Eighth Circuit followed the Third Circuit's lead by upholding the validity of a random drug testing program. In *McDonnell v. Hunter*, Department of Corrections employees having day-to-day contact with prisoners were required to submit to a urinalysis either by random selection or on the basis of reasonable suspicion. When based upon suspicion, the court determined that reasonable suspicion rather than probable cause was the appropriate standard. The warrantless searches also fell under the Administrative Exception. The court found that the state had a significant interest in safeguarding its correctional institutions while the employees had a reduced justifiable expectation of privacy. Additionally, the court felt that urinalysis was the least intrusive method of detecting drug use.

II. RAILWAY LABOR EXECUTIVES ASS'N V. SKINNER

A. Facts

The Railway Labor Executives' Association ("RLEA") and its various member labor organizations brought suit to enjoin two Federal Railroad Administration ("FRA") regulations that provide for warrantless drug testing of certain employees without individualized suspicion. One regulation ("Subpart C") mandates blood and urine tests for employees involved in a major accident, an "impact" accident or a fatal accident. The other regulation ("Subpart D") authorizes, but does not require, breath or urine tests of certain employees if: (1) a supervi-

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64. McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987).
65. Id. at 1308.
66. Probable cause, in the administrative search context, is not established by a "quantum of evidence;" it merely refers to a "requirement of reasonableness." Griffin v. Wisconsin, 483 U.S. 868, 877 n.4 (1987). In other contexts, probable cause is used to refer to "a quantum of evidence for the belief justifying the search, to be distinguished from a lesser quantum such as 'reasonable suspicion.'" Id.
67. *McDonell*, 809 F.2d at 1308. Reasonable suspicion requires that suspicion be based on specific objective facts and rational inferences based on experience. *See also* Hunter v. Auger, 672 F.2d 668 (8th Cir. 1982).
68. *See supra* notes 38-44 and accompanying text.
69. McDonell, 809 F.2d at 1308.
71. A "major" train accident is one involving one or more of the following: (1) a fatality; (2) a release of hazardous materials accompanied by an evacuation or a reportable injury (e.g., from fire, explosion, inhalation, or skin contact with the material); or (3) damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1) (1988).
72. An "impact" accident is one resulting in: (1) a reportable injury; or (2) damage to railroad property of $50,000 or more. 49 C.F.R. § 219.201(a)(2) (1988).
73. A "fatal" train accident is one that involves a fatality to any on-duty railroad employee. 49 C.F.R. § 219.201(a)(3) (1988). However, no test is required in the case of a collision between railroad stock and a motor vehicle or other highway conveyance at a rail/highway grade crossing. 49 C.F.R. § 219.201(b) (1988).
75. 49 C.F.R. § 219.301(a) (1988).
visory employee has a reasonable suspicion that the employee is cur-
rently under the influence of, or impaired by, alcohol or a controlled
substance;\textsuperscript{76} (2) the employee has been involved in a reportable accident or incident and the supervisory employee has a reasonable suspicion that the employee's acts or omissions contributed to the occurrence or severity of the accident or incident;\textsuperscript{77} or (3) the employee violated a safety regulation.\textsuperscript{78}

The district court granted summary judgment for the government and upheld the validity of the testing procedure. Although railroad employees have an interest in the "integrity of their bodies" which deserves protection under the fourth amendment,\textsuperscript{79} the court found this interest was outweighed by the government's substantial interest in promoting railroad safety.\textsuperscript{80} The United States Court of Appeals for the Ninth Circuit reversed,\textsuperscript{81} holding that a "particularized suspicion is essential" to finding toxicological testing of employees reasonable.\textsuperscript{82} The Supreme Court granted \textit{certiorari}.

B. \textit{Supreme Court Decision}

1. \textit{Majority Opinion}

First, the Court determined that the blood and urine tests were at-

\textsuperscript{76} For a breath test, the supervising employee must reasonably suspect that the employee is currently under the influence of, or impaired by, alcohol or alcohol in combination with a controlled substance. Reasonable suspicion must be based upon specific, personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee. 49 C.F.R. § 219.301(b)(1) (1988). For a urine test, the supervisory employee must have a reasonable suspicion that the employee is currently under the influence of or impaired by alcohol or a controlled substance, based on specific personal observations that the supervisory employee can articulate concerning the appearance, behavior, speech, or body odors of the employee. However, an employee may be subjected to a urine test only if the determination is made by at least two supervisors, at least one of whom must have received at least three hours of training in the signs of drug intoxication. 49 C.F.R. § 219.301(c)(2) (1988).

\textsuperscript{77} 49 C.F.R. § 219.301(b)(3) (1987). The employee must have been involved in one of the following operating rule violations or errors: (1) noncompliance with a train order, track warrant, timetable, signal indication, special instruction or other direction with respect to movement of a train that involves: (A) occupancy of a block or other segment of track to which entry was not authorized; (B) failure to clear a track to permit opposing or following movement to pass; (C) moving across a railroad crossing at grade without authorization; or (D) passing an absolute restrictive signal or passing a restrictive signal without stopping (if required); (2) failure to protect a train as required by a rule consistent with § 218.37 of this title; (3) operation of a train at a speed that exceeds the maximum authorized speed by at least ten (10) miles per hour or by fifty percent (50%) of such maximum authorized speed, whichever is less; (4) alignment of a switch in violation of a railroad rule or operation of a switch under a train; (5) failure to apply or stop short of derail as required; (6) failure to secure a hand brake or failure to secure sufficient hand brakes; or (7) in the case of a person performing a dispatching function or block operator function, issuance of a train order or establishment of a route that fails to provide proper protection for a train.


\textsuperscript{80} \textit{Id.}

\textsuperscript{81} Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988).

\textsuperscript{82} \textit{Id.} at 587.
tributable to the government. The Court found that a railroad that complies with Subpart C does so by compulsion of sovereign immunity, thereby coming within fourth amendment coverage. Furthermore, by promulgating Subpart D, the government conferred a right upon the FRA to receive biological samples and test results. Moreover, the Subpart D regulations preempted state law and was intended to supersede collective bargaining agreements. The Court concluded that the government had more than a passive role with respect to the testing, thereby implicating the fourth amendment.

The second issue was whether the drug tests were searches or seizures. The Court held that the blood tests, urinalyses, and breath tests all constituted searches under the fourth amendment. The tests intruded on an individual's expectation of privacy which society had recognized as reasonable. The Court also found that the tests failed to constitute a seizure because they did not interfere with the employee's freedom of movement.

The third issue was whether the warrantless drug testing of employees without individualized suspicion was reasonable under the fourth amendment. While acknowledging that a warrant is generally required to make a search reasonable, the Court noted that sometimes "special needs, beyond normal law enforcement may make the warrant and probable cause requirements impracticable." To ascertain whether the Government had a "special need" the Court balanced the intrusion on the individual's privacy interest against the promotion of legitimate governmental interests.

The interest advanced on behalf of the government was ensuring the safety of railroad passengers. RLEA did not dispute the fact that employees subject to testing held safety sensitive positions and the Court recognized public safety as a valid interest. However, the Court had to determine if that interest was strong enough to justify an intrusion on the employees' privacy absent a warrant.

83. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1411-12 (1989). The fourth amendment is only applicable to the government, its agents or instruments. Therefore, the railroad had to be acting as an agent or instrument of the government in order for the intrusion to be analyzed under the fourth amendment.
84. Id. at 1411.
85. Id.
86. Id.
87. Id. at 1412.
88. See supra notes 17-19 and accompanying text for definition of "search."
89. See supra notes 20-21 and accompanying text for a definition of "seizure."
93. Id.; see supra notes 31-37 and accompanying text regarding "special needs" and see supra notes 25-30 and accompanying text regarding balancing tests.
95. Id.
96. Id.; see also Skinner, 109 S. Ct. at 1402 (noting the extensive problem of drug and alcohol abuse in the railroad industry).
The Court noted that the purpose of a warrant is to assure that searches or seizures are not random or arbitrary.97 Furthermore, a warrant ensures that a search is narrow in scope.98 Finally, a warrant requires that a neutral magistrate determine whether the intrusion is justified.99

The Court found that requiring a warrant under the circumstances would not further these aims.100 The Court reasoned that the regulations were specific and well-known to the employees and that they required little discretion to administer.101 Moreover, while time was spent obtaining a warrant, evidence of the metabolites of the drugs may be destroyed.102

The Court compared Skinner to other cases where the warrant requirement was found to be inappropriate.103 It observed that railroad supervisors were not familiar with the "intricacies of . . . Fourth Amendment (sic) jurisprudence"104 and held that a warrant was not essential to make the searches in this case reasonable.105

Even though the Court determined that a warrant was not required, warrantless searches generally require "some quantum of individualized suspicion" to make the search reasonable.106 However, the Court noted that such a requirement was not a "constitutional floor" beyond which a search would be unreasonable.107 The Court also stated that when an individualized suspicion requirement may jeopardize a valid governmental interest, the search should be upheld despite the absence of an individualized suspicion.108

The Court then weighed the asserted individual privacy interests and found that neither the blood test,109 the urinalysis110 nor the breath test111 was a significant intrusion on those interests. Furthermore, the Court established that the employees had a diminished expectation of privacy because they were employed in a pervasively regulated indus-
try. These privacy interests were balanced against the government’s interest in preventing harm to railroad passengers from employees in safety-sensitive positions. The Court held that the government interest outweighed the individual interest and, therefore, displaced the individualized suspicion requirement. Finally, the Court asserted that the regulations would also detect and deter drug use.

2. Concurring Opinion

Justice Stevens concurred that the government’s interest significantly outweighed the intrusion on an individual’s privacy. However, he disagreed with the majority’s rationale that the regulations would deter drug use.

3. Dissenting Opinion

The dissent, while acknowledging the severity of the drug problem, criticized the majority for “[allowing] basic constitutional rights to fall prey to momentary emergencies.” Justice Marshall, joined by Justice Brennan, suggested that the majority was taking another dangerous step towards reading the probable-cause requirement out of the fourth amendment entirely and replacing it with the “special needs” test. The dissenters also suggested that without the probable cause requirement, the fourth amendment is devoid of the meaning which the framers intended to give it. Furthermore, according to the dissenters, the probable cause requirement has traditionally been “an indispensable prerequisite” to conducting searches and that, even when the “Rorschach-like” balancing test has been applied, searches have generally been upheld as reasonable only when supported by probable cause.

The majority was further criticized for expanding the “special needs” exception and allowing the deepest intrusion into individual privacy, all without any level of individualized suspicion. While the dissenters did recognize the dangers associated with drug use by employees in safety-sensitive positions, they stressed that even laudable goals cannot justify abrogating the express words of the Constitution.

112. Id.; see supra notes 38-44 and accompanying text regarding the Administrative Exception to pervasively regulated industries.
113. Id. at 1421.
114. Id. at 1422 (Stevens, J., concurring).
115. Id. (“If the risk of serious personal injury does not deter their use of these substances, it seems highly unlikely that the additional threat of loss of employment would have any effect on their behavior.”).
116. Id. at 1423 (Marshall, J., dissenting). Another opponent of drug testing, George Lundberg, editor of the Journal of the American Medical Association, labeled such programs “Chemical McCarthyism.” SCIENCE, Nov. 6, 1987, at 744.
118. Id.
119. Id.
120. Id. at 1425.
121. Id. at 1424.
122. Id. at 1425.
123. Id. at 1426. "There is no drug exception to the Constitution, any more than there
The dissenters also felt that the traditional fourth amendment analysis should have been applied instead of the "special needs" balancing test. Under the traditional framework, a warrant could have been obtained. The dissenters argued that there was actually more than one search at issue — specifically, the collecting and chemical analysis of both blood and urine. While the dissenters conceded that exigent circumstances justified the waiver of the warrant for collecting the samples, they maintained that nothing prevented the employer from obtaining a warrant before performing the chemical analysis. Furthermore, the dissenters argued that the testing procedures were highly intrusive, and, therefore, a finding of probable cause was necessary. The dissenters said that because the majority allowed a highly intrusive search without any level of suspicion its reasoning was clearly erroneous.

The dissenters also argued that other privacy interests were at stake because other personal information can be uncovered from tests of bodily fluids. Furthermore, the dissenters suggested that individual privacy rights were invaded further by allowing criminal prosecutors access to the test results. The tests themselves were also criticized because they did not measure current impairment. Finally, the dissenters concluded by asserting that the majority's deterrence rationale was simply absurd.

III. National Treasury Employees Union v. Von Raab

A. Facts

The National Treasury Employees Union ("NTEA"), a federal employment labor union, brought suit against the Commissioner of the United States Customs Service ("Service") challenging the constitutionality of the Service's drug-screening program. Employees seeking a transfer or promotion to a position involving drug interdiction, the carrying of firearms, or the handling of "classified" information were

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124. First, has a search taken place? Second, was the search made pursuant to a warrant or undertaken pursuant to a recognized exception to the warrant requirement? Third, was the search based on probable cause or validly based on lesser suspicion because it was minimally intrusive? Lastly, was the search conducted in a reasonable manner?

125. Id.

126. Id.

127. Id.

128. Id.

129. Skinner, 109 S. Ct. at 1429. Not only can drug and alcohol use be discovered but so can other disorders such as epilepsy, diabetes or clinical depression.

130. Id. at 1431.

131. Id.

132. "It is simply implausible that testing employees after major accidents occur . . . will appreciably discourage them from using drugs or alcohol." Id. at 1432.

133. An important responsibility of the Customs Department is the interdiction and seizure of contraband, including illegal drugs. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1387 (1989).

134. Id. at 1388.
required to submit to urinalysis.\textsuperscript{135} The transfer or promotion was contingent upon giving a urine sample.

NTEA claimed that the testing program violated the fourth amendment because there was no requirement of probable cause or individualized suspicion. The district court held that the testing program violated the fourth amendment, and, accordingly, enjoined its enforcement. The United States Court of Appeals for the Fifth Circuit vacated the injunction\textsuperscript{136} and held that the testing program constituted a reasonable search because the government had a compelling interest in detecting employee drug use and because the search was limited in scope. The Supreme Court granted \textit{certiorari}.

\textbf{B. Supreme Court Decision}

\textbf{1. Majority Opinion}

After analyzing \textit{Skinner}, the Court analyzed the instant case on a similar basis — namely, whether the testing program at issue met the reasonableness requirement of the fourth amendment.\textsuperscript{137}

The government interests advanced were the detection and deterrence of drug use.\textsuperscript{138} Writing for the Court, Justice Kennedy found that these interests constituted a "special need"\textsuperscript{139} which justified dispensing with the warrant and probable cause requirements.\textsuperscript{140}

NTEA conceded that a warrant was not required\textsuperscript{141} but argued that the testing program should still be based on probable cause. The Court, however, balanced the government's interests against the intrusion on individual privacy rights and concluded that the government's need to conduct suspicionless searches was more important.\textsuperscript{142} Specifically, the Court found that the government had a compelling interest in ensuring that employees involved in drug interdiction have "unimpeachable in-
tegrity and judgment.' Furthermore, the Court found a compelling governmental interest in protecting the public from promoting an employee with impaired perception and judgment to a position that required the carrying of a firearm. Finally, a governmental interest was also found in protecting "truly sensitive information" from an employee who might compromise such information.

Balanced against these interests were the rights of individual privacy. The Court determined that Service employees had a diminished expectation of privacy and that, therefore, the government's interest outweighed the individual's interest. Nevertheless, NTEA maintained that the program was unjustified because it was not implemented in response to a perceived drug use problem and because the program was not sufficiently effective. The Court, however, upheld the validity of the suspicionless tests for jobs involving drug interdiction and the use of firearms. While the Court seemed to indicate that it might uphold the testing of employees who handle "truly sensitive" information, it did not specifically decide that issue. The primary issues on remand were to determine what materials were "classified" and which categories of employees were subject to testing.

2. Dissenting Opinion

In a strong dissent, Justice Scalia, joined by Justice Stevens, argued that the search upheld in Von Raab was clearly unreasonable. In Skinner, there was clear evidence of drug and alcohol use and a causal connection between such use and a serious threat to public safety. However, in Von Raab, there was no evidence of drug use by Service employees. In fact, it appeared in the record that the Commissioner had stated that the Service was, in his opinion, "largely drug free."

Justice Scalia further argued that the majority was searching in vain for a problem which could be remedied simply by drug testing. According to Justice Scalia, the majority's parade of horribles — i.e., potential for bribery, employees unsympathetic to their mission of drug interdiction, and impairment of perception or judgment — are pure specula-

143. Id. at 1395.
144. Id.
145. Id. at 1396.
146. Id. at 1394.
147. Id. Indeed, only 5 out of 3600 employees tested positive. Additionally, NTEA claims employees can avoid detection by abstaining for a few days before the test or by adulterating their sample. Id.
148. Id. at 1396.
149. Id. "We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, under compulsion of circumstances or for other reasons, . . . might compromise [such] information." Id. (quoting Department of Navy v. Egan, 484 U.S. 518 (1988)).
150. The Court remanded the issue to the court of appeals.
151. Von Raab, 109 S. Ct. at 1398.
152. Id. at 1398 (Scalia, J., dissenting).
153. Id. at 1400.
tion. Instead, Justice Scalia contended that the government's true interest was to set an example with the Service's testing program in response to a societal problem rather than to remedy an existing problem in the Service.

While Justice Scalia acknowledged that there are valid exceptions to the requirement of particularized suspicion, the exceptions are generally based on well-demonstrated evils in the specific field. The dissenters argue that in Von Raab there was no such demonstration and the testing was allowed only to remedy a general social harm. The dissenters recognized that while eliminating drug use may be a commendable goal, it is an unacceptable justification for invading an individual's fourth amendment rights.

Justices Marshall and Brennan also dissented for the reasons stated in Justice Scalia's dissent and for the reasons set forth in the dissenting opinion in Skinner.

IV. Comments

The Supreme Court trivialized the fourth amendment protections against unreasonable searches and seizures by its pronouncements in Skinner and Von Raab. While courts have been almost unanimous in requiring some level of individualized suspicion before allowing mass drug testing, railroad workers and Service employees may now be subjected to intrusive searches without any showing of particularized suspicion.

However, the impact of the Skinner and Von Raab decisions may not be as devastating as it initially seems. The government was not given carte blanche to test all governmental employees in all cases. These decisions are limited to safety-sensitive positions, drug interdiction positions, positions requiring the carrying of firearms, and positions

154. Id.
155. Id. at 1401 ("To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is 'clean,' and . . . will demonstrate the determination of the Government to eliminate this scourge of our society!").
156. Id.
157. Id.
158. Id. ("[T]he impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.").
159. In 1986, Shoemaker and McDonnel were decided. These cases clearly fell within the administrative exception to highly regulated industries. See supra notes 57-69 and accompanying text. Additionally, many courts viewed Shoemaker as an aberration. See Note, Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights? Tul. L. Rev. 1373, 1383; see also American Fed'n of Government v. Weinberger, 651 F. Supp. 726, 735 (S.D. Ga. 1986) ("The facts of Shoemaker are distinguishable from the facts before the court and, as the trend of recent cases indicates, the decision does not seem to be in keeping with the prevailing case law.").
162. Id.
involving access to classified information.\textsuperscript{163} The Court did not define which "safety-sensitive" positions are subject to testing\textsuperscript{164} nor did it discuss random drug testing. The exclusion of a discussion on random testing is significant because current Department of Transportation regulations\textsuperscript{165} mandate random drug testing. The Court limited its decision to the specific facts of each case.

It appears from \textit{Skinner} and \textit{Von Raab} that the Court is all too willing to disregard the requirement of reasonable individualized suspicion in drug testing cases. However, cases decided subsequent to \textit{Skinner} and \textit{Von Raab} may provide some clue as to whether the requirement will be read out completely.

One of the first cases decided after \textit{Skinner} and \textit{Von Raab} upheld the validity of drug testing as a part of a routine medical examination.\textsuperscript{166} In \textit{Jenkins v. Jones},\textsuperscript{167} a school bus attendant involved in the transportation of handicapped children brought suit to enjoin the use of a urinalysis testing program. In light of \textit{Skinner} and \textit{Von Raab}, the Court found that the government had a legitimate interest in the children's safety which outweighed the individual's expectation of privacy. It must be noted, however, that a reasonable suspicion of drug use did exist.

Random drug testing was also recently addressed in \textit{Hartness v. Bush}.\textsuperscript{168} In that case, employees of the Executive Office of the President and the General Services Administration sought to enjoin a drug testing program. The program required urinalysis of employees in "sensitive" and safety-related positions. The court was unwilling to allow random testing since there was no reasonable, articulable and individualized suspicion of drug use. The court observed that, as a result of \textit{Skinner} and \textit{Von Raab}, particularized suspicion was not a requirement in performing mass drug tests, however, the court concluded that there must still be some sort of \textit{generalized} suspicion.\textsuperscript{169} Because neither individualized nor generalized suspicion was present, the random drug testing program was enjoined.\textsuperscript{170}

Probably the most significant decision handed down after \textit{Skinner} and \textit{Von Raab} dealt with the Department of Justice's random drug testing program.\textsuperscript{171} The challenged program required prosecutors in criminal cases, employees with access to grand jury proceedings, and personnel holding top secret national security clearances to be subject to random urinalysis.\textsuperscript{172}

\textsuperscript{163} Id. at 1398.
\textsuperscript{164} The Court did not give an indication as to what it thought about positions requiring a "high degree of trust and confidence" such as are included in the Department of Defense regulations and the Drug Free Workplace Act.
\textsuperscript{165} See supra note 7.
\textsuperscript{167} Id.
\textsuperscript{169} Id. at 991.
\textsuperscript{170} Id. at 994.
\textsuperscript{171} Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989).
\textsuperscript{172} Incumbents serving under Presidential appointment and incumbents whose duties
Like Von Raab, the governmental interests advanced were the integrity of the workforce, public safety, and protection of sensitive information. With respect to the integrity interest, the court noted that the government may only search its employees "when a clear [and] direct nexus exists between the nature of the employee’s duty and the nature of the feared violation." No such nexus existed in this case. Consequently, the court found that the integrity interest could not justify the testing.

The court likewise held that the public safety interest was not a sufficient justification. The court distinguished the public safety rationale in Von Raab and Skinner from that advanced by the Justice Department. Von Raab dealt with the immediacy of the threat while in the Justice Department, "the chain of causation between misconduct and injury is considerably more attenuated."

The only governmental interest which was held to justify the intrusion of drug testing was the protection of confidential information. Citing Von Raab the court found that "truly sensitive" information most assuredly includes top national security information. The court held that employees with top secret national security clearance may be subject to random drug testing.

The Harmon decision is significant for two reasons. First, it clarifies the "classified information" interest advanced in Von Raab. Second, it addresses the validity of random drug testing programs, something both Von Raab and Skinner refused to do. The Harmon decision carefully limited the scope of the confidential information interest and recognized that "truly sensitive information . . . cannot include all information which is confidential or closed to public view."

Since the Department of Justice’s random drug testing program was upheld, similar programs in the Department of Education and the Department of Transportation have also been upheld as constitutional.

V. CONCLUSION

It appears that courts are willing to sacrifice the fourth amend-
ment’s individualized particularized suspicion requirement in order to win the war on drugs. 181 Admittedly, getting rid of drugs is a laudable goal. However, as the court in Capua v. City of Plainfield 182 said:

If we choose to violate the rights of the innocent in order to discover and act against the guilty, then we will have transformed our country into a police state and abandoned one of the fundamental tenets of our free society. In order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle. 183

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183. Id. at 1511.