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National Treasury Employees Union v. Von Raab— Will the War Against Drugs Abrogate Constitutional Guarantees?

I. INTRODUCTION

With the national campaign for a “drug-free America,”¹ the constitutionality of mandatory drug testing in the public sector has been vaulted into the national limelight. Controversy has erupted over the government’s right to eliminate drugs from the workplace, juxtaposed to the individual’s fourth amendment right to be free from arbitrary governmental action.²

The fourth amendment requires that all searches and seizures be reasonable.³ With drug testing programs, reasonability is questioned when employees are tested *en masse*, without suspicion of individual drug use.⁴ The highly intrusive nature of compelled urination on dignity and privacy interests demands that protection be afforded the individual employee. However, proponents of drug testing subordinate these considerations to the greater interest of the public in ensuring safety and work productivity.

In attempting to resolve this dilemma, the Supreme Court in *National Treasury Employees Union v. Von Raab*⁵ held that mandatory drug testing of federal employees is permissible, even without suspi-

1. On August 15, 1986, President Reagan declared a “national mobilization” against drug abuse. He proposed a six-point program for the eradication of drugs. The President’s primary goal was a “drug free workplace for all Americans.” Comment, *Behind the Hysteria of Compulsory Drug Screening in Employment: Urinalysis Can Be a Legitimate Tool for Helping Resolve the Nation’s Program if Competing Interests of Employer and Employee are Equitably Balanced*, 25 DUQ. L. REV. 597, 605 n.9 (1987); see *infra* notes 121-39, 278-88 and accompanying text.

2. Comment, *Random Drug Testing in the Government Sector: A Violation of Fourth Amendment Rights?*, 62 TUL. L. REV. 1373, 1373 (1988). “Our country is currently debating whether the government in its capacity as an employer has the right to subject an employee to a drug test.” *Id.*

3. U.S. CONST. amend. IV; see also *infra* notes 7-11 and accompanying text.

4. In order to create a safe working environment and maintain productivity, proponents of drug testing argue that uniform procedures must be implemented. However, under the fourth amendment, all searches must be “reasonable,” and reasonability requires that particularized suspicion of illicit behavior be shown. See *infra* notes 7-29 and accompanying text.

5. 109 S. Ct. 1384 (1989).

cion, if justified by compelling governmental interests.⁶ Employers hail the decision as an endorsement of drug testing. However, advocates of civil liberties vehemently denounce the infringement upon constitutional guarantees as unprecedented.

This Note will discuss the propriety of the *Von Raab* decision in sanctioning governmental drug testing. Part II delineates the constitutional framework for determining unreasonable searches and seizures. It also will analyze the legislative and executive responses to mandatory drug testing and the current confusion in the federal courts concerning the constitutionality of testing in the absence of suspicion of drug use. Part III will present the facts of *Von Raab*, while Part IV will analyze the majority and dissenting opinions. The weaknesses of the majority's decision will be discussed in Part V, along with its impact on constitutional guarantees. Subsequent court decisions delimiting the applicability of *Von Raab's* compelling governmental interest rationale also will be considered. Finally, the dramatic impact that the national drug campaign may have in broadening future court decisions will be discussed.

II. HISTORICAL BACKGROUND

A. Constitutional Framework

Under the fourth amendment of the United States Constitution, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated"⁷ The amendment safeguards the privacy, dignity, and security interests of individuals against arbitrary invasion by government officials.⁸ However, the fourth amendment proscribes only "unreasonable" searches and seizures.⁹ As such, if the governmental action is "reasonable," privacy may be invaded.¹⁰ The deter-

6. *Id.* at 1396.

7. U.S. CONST. amend IV.

8. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1411 (1989) (Court considered whether railway employees involved in an accident had privacy interests in urine samples); *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967) (protections of the fourth amendment also apply to regulatory searches); *see also Delaware v. Prouse*, 440 U.S. 648, 653-54 (1979) (in the absence of suspicion or otherwise lawful detention, investigative stops of automobiles made by roving patrols violate privacy interest protected under the fourth amendment); *United States v. Martinez-Fuerte*, 428 U.S. 543, 554-55 (1976) (although routine checkpoint stops "intrude to a limited extent on motorists' right to 'free passage without interruption,'" such stops are constitutionally permissible if detention of motorists is brief).

9. The rationale of the fourth amendment is to protect against the arbitrary discretion of government agents to conduct searches of persons and places in which an individual maintains a reasonable expectation of privacy. Note, "*Jar Wars*" in the Workplace: *The Constitutionality of Urinalysis Programs Designed to Eliminate Substance Abuse Among Federal Employees*, 38 SYRACUSE L. REV. 937, 943 (1987).

10. A search is reasonable if reasonable grounds exist to believe that the proposed

mination of reasonableness under the fourth amendment is made on a case-by-case basis.¹¹

The warrant clause of the fourth amendment provides that "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."¹² Through the operation of this clause, the fourth amendment establishes the means by which, and the extent to which, an individual's privacy may be invaded.¹³ The warrant clause, in combination with the reasonableness requirement, prompted the Supreme Court, in the seminal case of *Katz v. United States*,¹⁴ to decide that warrantless searches "are *per se* unreasonable under the [f]ourth [a]mendment—subject only to a few specifically established and well-delineated exceptions."¹⁵

In demarcating the boundaries to which warrantless searches and seizures may be conducted, the courts have weighed the invasion of the individual's fourth amendment rights against the government's interest in conducting the search.¹⁶ If the search is deemed "reasonable" in light of the legitimate governmental interests advanced, the search will be upheld as constitutionally sound. In conducting this balance, case law generally has recognized the following exceptions to the warrant requirement: (1) search incident to an arrest;¹⁷ (2) automobile search;¹⁸ (3) plain view;¹⁹ (4) stop and frisk;²⁰ (5) consent;²¹

search will uncover evidence of a crime or violation, if the scope of the search is "not excessively intrusive," and if the means adopted are "reasonably related to the objective of the search." Ayers, *Constitutional Issues Implicated by Public Employee Drug Testing*, 14 WM. MITCHELL L. REV. 337, 341 (1988) (citing *Taylor v. O'Grady*, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987)). For a description of the guidelines determining "reasonableness," see *infra* note 27.

11. *Brown v. Winkle*, 715 F. Supp. 195, 196 (N.D. Ohio 1989) (referring to *Von Raab*). "[T]ranslation of the abstract prohibition against 'unreasonable searches and seizures' into workable guidelines for the decision of particular cases is a difficult task which has for many years divided the members of this Court." *Camara*, 387 U.S. at 528.

12. U.S. CONST. amend IV.

13. *Brown*, 715 F. Supp. at 196.

14. 389 U.S. 347 (1967).

15. *Id.* at 357 (footnote omitted).

16. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (citing *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977); *United States v. Martinez-Fuerte*, 428 U.S. 543, 555 (1976)).

17. At the time of arrest, police may conduct a search of the arrestee and areas within the arrestee's immediate control for dangerous weapons or destructible evidence. See, e.g., *United States v. Robinson*, 414 U.S. 218, 220-24 (1973) (police arrested the defendant for illegally operating a motor vehicle, conducted a "pat-down" search, and found heroin on his person). Additionally, there is no requirement that the officers fear for their safety or believe that evidence will be found. *Id.* at 236.

18. As long as the automobile is lawfully detained by the police, a warrantless

(6) exigent circumstances;²² (7) searches conducted at international borders;²³ and (8) administrative searches.²⁴

In applying the constitutional framework of a search and seizure analysis, three elements must be considered to determine the reasonableness of the governmental action. First, the court must determine

search may be conducted when the officer has probable cause to believe that evidence will be found therein. *See, e.g., Carroll v. United States*, 267 U.S. 132, 160-61 (1925) (search of roadster valid where police had probable cause to believe that the occupants were bootleggers). The nature of the automobile's mobility justifies the warrantless search. *Id.* at 153.

19. If police are legitimately on the premises and inadvertently observe in plain view the fruits or instrumentalities of crime, they may seize such evidence without a warrant. *See, e.g., Texas v. Brown*, 460 U.S. 730, 736-40 (1983) (seizure of narcotics valid when officer was in a legitimate position to view the object and the object appeared suspicious).

20. The police may legitimately stop and conduct a pat-down search of detainee's outer clothing for weapons if the officer has an articulable, reasonable suspicion of criminal activity, and if the officer suspects the detainee is armed and dangerous. *See, e.g., Terry v. Ohio*, 392 U.S. 1, 30-31 (1968) (reasonable for officer to investigate suspicious behavior and to conduct a frisk for weapons if officer believed that detainee was "casing a stickup").

21. A warrantless search may be conducted when consent is knowingly, voluntarily, and intelligently given. *See, e.g., Schneckloth v. Bustamonte*, 412 U.S. 218, 248-49 (1973) (warrantless search of defendant's trunk permitted where driver of car gave consent to conduct search and opened trunk to accommodate officer in conducting the search).

22. The police may make a warrantless search and seizure if evidence is likely to disappear or to be destroyed before a warrant can be obtained. *See, e.g., Schmerber v. California*, 384 U.S. 757, 770-71 (1966) (taking blood sample in absence of a warrant was reasonable where arresting officer had probable cause to believe that the defendant was driving while intoxicated).

23. Routine searches conducted by government agents at an international border need not be supported by a warrant or by probable cause. *See, e.g., United States v. Montoya de Hernandez*, 473 U.S. 531, 541 (1985) (detention of traveler at international border is justified where customs officials reasonably suspect traveler to be smuggling contraband in alimentary canal).

24. Administrative searches may assume various forms. Because of the nature of the school environment, public school officials do not need probable cause or a prior warrant to conduct a search. *See, e.g., New Jersey v. T.L.O.*, 469 U.S. 325, 337-43 (1985) (school principal validly searched student's purse because he had a reasonable suspicion to believe that the purse would contain evidence of a school violation). If a search is conducted as a regulatory search, government inspectors need not have a traditional warrant based upon probable cause. Rather, an administrative warrant showing a neutral plan of regulatory enforcement will suffice. *See, e.g., Camara v. Municipal Court*, 387 U.S. 523, 530-31 (1967) (inspections of businesses or residences by fire, health, or housing officials must be made pursuant to an administrative warrant). Furthermore, a warrant is not required when searches of highly regulated businesses are conducted. *See, e.g., Shoemaker v. Handel*, 795 F.2d 1136, 1142-43 (3d Cir.) (Racing Commission may take random urine samples from jockeys to maintain public confidence in the horse-racing industry), *cert. denied*, 479 U.S. 986 (1986). If the area is one in which Congress has implemented a federal regulatory scheme, warrantless searches may be conducted. *See, e.g., Donovan v. Dewey*, 452 U.S. 594, 606 (1981) (pervasive regulation of strip-mining industry); *United States v. Biswell*, 406 U.S. 311, 317 (1972) (pervasive regulation of gun sales); *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 77 (1970) (pervasive regulation of liquor sales).

whether a search has been made.²⁵ Second, the court must use a two-part inquiry to determine whether the search violated the individual's reasonable expectation of privacy: (1) whether the individual exhibited an expectation of privacy; and (2) whether society will accept such expectation as being reasonable.²⁶ Finally, if society recognizes the legitimacy of the individual's subjective expectation, then the court must determine whether the search was reasonable under the fourth amendment.²⁷ In the absence of a warrant, the court balances the individual's privacy expectations against the governmental interests in conducting the search.²⁸ When the invasion of privacy expectations is minimal and the requirement of probable cause or reasonable suspicion would otherwise frustrate the purpose behind conducting the search, the search may still be deemed reasonable if compelling governmental interests are advanced.²⁹ In determining whether mandatory drug testing violates the fourth amendment, each of these elements must be analyzed in the proper employment context.

B. Has the Individual's Right to Privacy Been Violated?

In guarding against arbitrary governmental acts, the individual must exhibit a reasonable expectation of privacy in the place or items being searched.³⁰ Additionally, society must recognize the individual's subjective expectation of privacy as "reasonable."³¹ When analyzing drug testing in the employment setting, the employee's subjective expectation of privacy must be examined according to the

25. *Katz v. United States*, 389 U.S. 347, 350-53 (1967).

26. *See id.* at 360-61 (Harlan, J., concurring). This inquiry determines the degree of intrusiveness of any search. Searches of personal effects are considered the least intrusive, while interferences with bodily integrity are the most intrusive. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986).

27. In *Bell v. Wolfish*, 441 U.S. 520 (1979), the Court established guidelines for the determination of "reasonableness":

The test of reasonableness under the [f]ourth [a]mendment 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 that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Id. at 559 (citations omitted).

28. *Id.* at 560 (Court balanced security interests of prison facility against the privacy rights of the inmates and held that cavity searches may be conducted with less than probable cause).

29. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1417 (1989).

30. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

31. *Id.*

nature of his employment.³² Depending on the occupational context, the employee may experience a diminished expectation of privacy.³³ For example, because of the nature of military service, military personnel do not have the same privacy interests as civilian employees.³⁴ Similarly, employees of pervasively regulated industries such as liquor sales and distribution,³⁵ gun sales,³⁶ mining,³⁷ and horse racing³⁸ enjoy a lesser expectation of privacy than those employees in industries which are not federally regulated.³⁹ Likewise, employees whose jobs are extremely dangerous to public welfare and safety experience a diminished expectation of privacy.⁴⁰

Society also must be able to recognize the employee's subjective expectations as "reasonable" to secure fourth amendment protection against arbitrary searches and seizures.⁴¹ The determination of reasonableness requires the application of a balancing test, weighing the invasion of privacy rights against the need to search.⁴² Factors to be weighed include the scope and manner of the search conducted and

32. See Developments in the Law, *The Constitutional Issues of Drug Testing in the Workplace*, 23 WILLAMETTE L. REV. 553, 556-58 (1987) [hereinafter *Constitutional Issues*].

33. *Id.* at 557 (suggesting that bus drivers, police officers, pilots, air traffic controllers, truck drivers, and nuclear plant operators have diminished expectations of privacy because of the direct effect their occupations have on the safety of others).

34. See Committee for GI Rights v. Callaway, 518 F.2d 466, 474 (D.C. Cir. 1975) (although members of the military are entitled to constitutional protection, the need for observance and discipline "may render permissible within the military that which would be constitutionally impermissible outside of it").

35. See Colonnade Catering Corp. v. United States, 397 U.S. 72, 77 (1970).

36. See United States v. Biswell, 406 U.S. 311, 316 (1972).

37. See Donovan v. Dewey, 452 U.S. 594, 599-607 (1981).

38. See Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

39. This diminished expectation of privacy experienced by workers in highly regulated industries is also known as the administrative search exception. See *supra* note 24 and accompanying text. This exception applies when "Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan*, 452 U.S. at 600.

40. Examples include air traffic controllers, pilots, mass transit operators, and bus and truck drivers. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1418 (1989) (railroad employees' diminished expectation of privacy in pervasively regulated industry designed to insure safety of traveling public); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (employees of nuclear power plant experience diminished privacy expectations); *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (city employees of electrical plant enjoy reduced privacy expectations due to hazardous nature of work).

41. See *Constitutional Issues*, *supra* note 32, at 558-59.

42. *New Jersey v. T.L.O.*, 469 U.S. 325, 337-38 (1985): "On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order." *Id.*

the justification for its inception.⁴³

The issue of society's interpretation of reasonableness in the drug testing context can be framed as follows: whether society will recognize as reasonable the employee's privacy expectations in not being compelled to donate urine samples in the scope of employment.⁴⁴ The lower court in *Von Raab* noted that the excretion of bodily fluids and wastes is "one of the most personal and private functions."⁴⁵ When surveillance is required as part of the chain of custody, the exposure of anatomical parts can be an extremely humiliating experience.⁴⁶ Furthermore, the results of urinalysis testing reveal not only the ingestion of a substance but also disorders such as epilepsy and diabetes.⁴⁷ Because such information can be improperly used by employers, the employee's expectation of privacy also embraces the personal and medical information revealed by the chemical analysis of bodily fluids.⁴⁸

If the employee's job is deemed hazardous, society will not recognize his privacy expectations in bodily fluids as "reasonable" when weighed against public safety concerns.⁴⁹ Similarly, if the employee is working in a highly regulated industry, society may not recognize privacy expectations because of the need for federal regulation within that industry.⁵⁰ Thus, the employment context determines the extent to which privacy expectations will be recognized as reasonable and will be afforded protection under the fourth amendment.⁵¹

43. *Id.* at 341-42.

44. *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986) ("While urine is routinely discharged from the body, it is generally discharged and disposed of under circumstances that warrant a legitimate expectation of privacy.").

45. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 387 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

46. *Capua*, 643 F. Supp. at 1514.

47. *Id.* at 1515. "[C]ompulsory urinalysis forces plaintiffs to divulge private, personal medical information [including epilepsy and diabetes] unrelated to the government's professed interest in discovering illegal drug abuse." *Id.*

48. *Id.*

49. *Brown v. Winkle*, 715 F. Supp. 195, 197 (N.D. Ohio 1989) (court failed to recognize privacy rights of candidates for selection as fire fighters because of the hazardous nature of the work).

50. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1418 (1989); *see also Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

51. *See supra* notes 32-40 and accompanying text.

C. Whether Drug Testing Constitutes a Search?

In analyzing the constitutionality of a drug-screening program, the taking of bodily fluids necessarily must involve a "search" recognizable under the fourth amendment. *Schmerber v. California*⁵² was the first case to apply a fourth amendment search and seizure analysis to bodily intrusions.⁵³ The Supreme Court found that the extraction of blood from a suspected drunk driver was a valid search.⁵⁴

Other courts have analogized the taking of urine to the involuntary extraction of blood and have held urinalysis to be a search under the fourth amendment.⁵⁵ Both blood and urine can be chemically analyzed for remnants of recent alcohol or drug use.⁵⁶ Because of the possibility of revealing personal information,⁵⁷ individuals have a reasonable expectation of privacy in their bodily fluids.⁵⁸ Thus, both the taking of blood and the taking of urine constitute a search within the meaning of the fourth amendment.⁵⁹

However, proponents of drug testing argue that a chemical analysis performed to detect illegal substances is not a search or a seizure under the fourth amendment.⁶⁰ Unlike blood, one has no privacy expectation in bodily waste because it is abandoned once excreted from the body.⁶¹ Thus, the proponents argue that urinalysis testing does

52. 384 U.S. 757 (1966).

53. "Because we are dealing with intrusions into the human body rather than with state interferences with property relationships or private papers—'houses, papers, and effects'—we write on a clean slate." *Id.* at 767-68.

54. *Id.* at 771.

55. See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1412-13 (1989) (post-accident urinalysis test of railway employees considered a search); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1513 (D.N.J. 1986) (urinalysis testing of fire fighters constitutes a search under the fourth amendment); *Storms v. Coughlin*, 600 F. Supp. 1214, 1217-18 (S.D.N.Y. 1984) (urinalysis testing of prison inmates considered to be a search and seizure); see also *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 942 (D.C. Cir. 1987) (urinalysis testing constitutes a search); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.) (blood and urinalysis testing of mass transit workers constitutes a search), *cert. denied*, 429 U.S. 1029 (1976); *Jones v. McKenzie*, 628 F. Supp. 1500, 1508 (D.D.C. 1986) (urinalysis testing of public school employees considered a search and seizure), *rev'd in part, vacated in part*, 833 F.2d 335 (D.C. Cir. 1987), *cert. granted sub nom. Jones v. Jenkins*, 109 S. Ct. 1633, *modified and aff'd*, 878 F.2d 1476 (D.C. Cir. 1989); *McDonell v. Hunter*, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985) (governmental taking of urine specimen is a seizure within the meaning of the fourth amendment), *aff'd as modified*, 809 F.2d 1302 (8th Cir. 1987).

56. *Capua*, 643 F. Supp. at 1513.

57. For types of anatomical information revealed, see *supra* notes 47-48 and accompanying text.

58. *Capua*, 643 F. Supp. at 1513.

59. See *supra* note 55.

60. See *United States v. Jacobsen*, 466 U.S. 109, 123 (1984) (lab analysis for the use of *unlawful substances* is not a search).

61. This can be analogized to the disposal of trash. The Supreme Court has held that abandoned trash is outside an individual's reasonable privacy expectations. See Brief for United States at 30-31, *National Treasury Employees Union v. Von Raab*, 816

not constitute a search because society is unwilling to recognize as reasonable the privacy interests associated with abandoned excrement.⁶²

Despite these countervailing arguments, the Court, since its decision in *Schmerber*, consistently has held that mandatory urinalysis and blood testing constitute a search under the fourth amendment.⁶³

D. *Quantum of Suspicion*

Under the letter of the law, searches are per se unreasonable absent a valid warrant based on probable cause.⁶⁴ However, generally recognized exceptions to the warrant requirement⁶⁵ exist when "*special needs*, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."⁶⁶ When the burden and delay of obtaining the warrant frustrates the governmental purpose in conducting the search⁶⁷ or reduces the deterrent effect in responding quickly to evidence of misconduct,⁶⁸ government officials must be permitted to respond without meeting the rigorous demands of the warrant requirement. In such instances, a balancing test is applied to assess the practicality of the warrant requirement and probable cause standard.⁶⁹ The test weighs the government's interest in conducting the search against the individual's privacy rights.⁷⁰

The most expansively used exceptions to the warrant requirement are searches conducted pursuant to reasonable suspicion and searches

F.2d 170 (5th Cir. 1987) (No. 86-1879), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989); *see also* California v. Greenwood, 486 U.S. 35, 39-42 (1988) (no reasonable expectation of privacy to garbage placed in opaque bag for trash collection). *See generally* United States v. Dela Espriella, 781 F.2d 1432, 1437 (9th Cir. 1986); United States v. O'Bryant, 775 F.2d 1528, 1533-34 (11th Cir. 1985); United States v. Vahalik, 606 F.2d 99, 100-01 (5th Cir. 1979), *cert. denied*, 444 U.S. 1081 (1980); United States v. Crowell, 586 F.2d 1020, 1025 (4th Cir. 1978), *cert. denied*, 440 U.S. 959 (1979). Despite the abandonment theory, the *Von Raab* lower court noted that individuals maintain a legitimate privacy expectation "until the decision is made to flush the urine down the toilet," and the toilet is actually flushed. *Von Raab*, 649 F. Supp. at 387.

62. *See supra* notes 41-51 and accompanying text.

63. *See supra* note 55.

64. U.S. CONST. amend IV; *see also* Katz v. United States, 389 U.S. 347, 357 (1967). *See generally* United States v. Karo, 468 U.S. 705 (1984).

65. *See supra* notes 17-24 and accompanying text.

66. Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (emphasis added) (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)).

67. *See* Camara v. Municipal Court, 387 U.S. 523, 533 (1967).

68. *See* Griffin, 483 U.S. at 876.

69. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1414 (1989).

70. *Id.*

conducted under the administrative exception.⁷¹ In *New Jersey v. T.L.O.*,⁷² the Court indicated that in the absence of a warrant, searches generally must be based upon probable cause.⁷³ Only when special needs preclude a showing of probable cause is a lesser quantum of suspicion acceptable.⁷⁴ However, "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable."⁷⁵

*Terry v. Ohio*⁷⁶ was the first case to permit limited bodily intrusions under a lower standard than probable cause.⁷⁷ The *Terry* decision allows police to detain a person and conduct a limited pat-down search for weapons.⁷⁸ However, the officer must have a "reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity."⁷⁹

Regarding bodily searches, the reasonable suspicion standard enunciated in *Terry* has been extended to strip searches of prison inmates⁸⁰ and international travelers.⁸¹ This standard also has been utilized in searches of places and personal effects. Specifically, the courts have permitted searches of a student's belongings,⁸² a probationer's home,⁸³ and work-related searches of an employee's office.⁸⁴

The administrative search exception also evades the warrant requirement in pervasively regulated industries.⁸⁵ With heavily regu-

71. Comment, *supra* note 2, at 1378.

72. 469 U.S. 325 (1985).

73. *Id.* at 340.

74. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 560-61 (1976) (permanent checkpoint stops, implemented to prohibit flow of illegal aliens across borders, comprised "special need" abrogating requirement of individualized suspicion).

75. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1417 (1989) (citing *Martinez-Fuerte*, 428 U.S. at 561).

76. 392 U.S. 1 (1968).

77. *United States v. Place*, 462 U.S. 696, 702 (1983) (citing *Michigan v. Summers*, 452 U.S. 692, 698 (1981)).

78. *Terry v. Ohio*, 392 U.S. 1, 22 (1968).

79. *Place*, 462 U.S. at 702 (citing *Terry*, 392 U.S. at 22).

80. See, e.g., *Bell v. Wolfish*, 441 U.S. 520 (1979).

81. See, e.g., *United States v. Oyekan*, 786 F.2d 832, 837 (8th Cir. 1986) (strip search and x-ray examination of international travelers are permissible if a reasonable suspicion exists that the traveler is a drug courier). *But see United States v. Montoya de Hernandez*, 473 U.S. 531, 541 n.4 (1985) ("Because the issues are not presented today we suggest no view on what level of suspicion, if any, is required for nonroutine border searches such as strip, body cavity, or involuntary x-ray searches.").

82. See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985) (school official may conduct search of student's personal belongings and effects when reasonable grounds exist to suspect that the student violated a school regulation).

83. See, e.g., *Griffin v. Wisconsin*, 483 U.S. 868, 878 (1987) (probation regime would be unduly disrupted by requirement of probable cause).

84. See, e.g., *O'Connor v. Ortega*, 480 U.S. 709, 725-26 (1987) (public employer may reasonably intrude upon privacy expectations of employee and conduct a limited search of employee's desk if a non-investigatory, work-related purpose exists for the search, or if employer has reasonable suspicion of employee misconduct).

85. Note, *Mandatory Drug Testing of Public Sector Employees: Constitutional Im-*

lated industries, the state's interest in conducting random searches is paramount to the employee's expectation of privacy.⁸⁶ In the past, this exception has been narrowly applied to industries traditionally regulated by the federal government.⁸⁷ However, many courts have expanded application of the administrative search exception to other employment contexts as a rationale for drug testing in the workplace.⁸⁸ Thus, the administrative search exception provides authority for uniform testing of the workplace even absent probable cause or reasonable suspicion that employees are using drugs.

E. The Drug Testing Cases

Under the administrative exception to the warrant requirement, the courts have permitted drug testing in the public employment sector.⁸⁹ Two requirements must be satisfied for a successful application of the administrative exception: (1) a "strong state interest in conducting an unannounced search" must exist; and (2) "the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the [parties] of the search."⁹⁰ If these two requirements are met, employers in the public sector may initiate mandatory drug-testing programs *en masse*.

The early cases held that absent probable cause, the employer must meet the reasonable suspicion standard to conduct valid drug testing programs under the fourth amendment.⁹¹ Evidence of rea-

plications, 65 U. DET. L. REV. 315, 320 (1988). For a discussion of pervasively regulated industries, see *supra* note 24 and accompanying text.

86. Note, *supra* note 9, at 950; see also *Rushton v. Nebraska Pub. Power Dist.*, 653 F. Supp. 1510, 1524 (D. Neb. 1987); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

87. See *supra* notes 35-39 and accompanying text.

88. Comment, *supra* note 2, at 1379. Governments are utilizing the administrative exception to rationalize employee drug testing while attempting to "bring employment as a whole within the administrative exception." *Id.*

89. See, e.g., *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

90. See *Constitutional Issues*, *supra* note 32, at 566 (citing *Shoemaker*, 795 F.2d at 1142).

91. See, e.g., *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264, 1267 (7th Cir.) (permitting drug testing of bus drivers if suspected of being under the influence of drugs), *cert. denied*, 429 U.S. 1029 (1976); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 387 (E.D. La. 1986) (noting that the "dragnet approach, a large-scale program of searches and seizures made without probable cause or even a reasonable suspicion, is repugnant to the United States Constitution"), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1518 (D.N.J. 1986) (opining that "states' interest will not be significantly impaired by the individualized reasonable suspicion stan-

sonable suspicion may include continuing absences from work, poor work performance, accidents occurring on the job, and reports from superiors and co-workers of improper employee behavior on the job.⁹² Thus, in order to impose drug testing on the individual employee, the employer must have sufficient grounds to believe that employee substance abuse has negatively affected work productivity or endangered the lives of others.⁹³

In *Division 241, Amalgamated Transit Union v. Suscy*,⁹⁴ the United States Court of Appeals for the Seventh Circuit held that urinalysis and blood testing of bus drivers by the City Transit Authority were constitutionally valid when the employee was suspected of being under the influence of drugs or directly involved with a serious collision or accident.⁹⁵ The public interest in mass transit safety superseded employee objection to urinalysis testing.⁹⁶ However, in these early cases, the employee still was reasonably protected from unannounced and pervasive testing through the requirement of reasonable suspicion.⁹⁷

In *Allen v. City of Marietta*,⁹⁸ the United States District Court for the Northern District of Georgia discussed the reasonable suspicion standard directed in *Suscy* regarding the drug testing of employees in hazardous work environments.⁹⁹ The court believed that such tests were permissible if imposed to cure or prevent employee misconduct.¹⁰⁰ The court analogized the rights of public employees to those of private employees¹⁰¹ and stated that public employees have the same constitutional protections as do private employees.¹⁰² The court also believed that government employers have rights equivalent to

ard"). *But see* *Allen v. City of Marietta*, 601 F. Supp. 482, 491 (N.D. Ga. 1985) (while upholding the reasonable suspicion standard, the court indicated in dicta that random testing would be permissible in certain situations).

92. *Constitutional Issues, supra* note 32, at 565.

93. Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening*, 35 EMORY L.J. 1011, 1070 (1986).

94. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

95. *Id.* at 1267.

96. *Id.*

97. *Id.* The court held that sufficient probable cause exists to justify urinalysis testing on operating employees if they were involved directly in an accident or suspected of drug impairment. *Id.*

98. 601 F. Supp. 482 (N.D. Ga. 1985).

99. *Id.* at 491. In *Allen*, tests were administered to an employee working in an electrical generating plant, an extremely hazardous environment for the employee, his co-workers, and the public at large. *Id.* at 484.

100. *Id.* at 491.

101. *Id.*

102. *Id.* However, other commentators believe that government employees have a diminished expectation of privacy because of their employment in the public sector. *See, e.g.*, Note, *supra* note 85, at 320. "[T]he community may legitimately demand that [the public employee] give up some part of his or her interest in privacy and security to advance the community's vital interest in law enforcement." *Id.*

private employers in maintaining work performance and employee productivity.¹⁰³ Thus, the court's rationale for permitting drug testing was to ensure public safety in a hazardous work environment.¹⁰⁴ Although a reasonable suspicion of employee misconduct was present in this case, the court did not require this standard as a prerequisite to testing.¹⁰⁵ Rather, the strong public interest in maintaining a safe work environment was the controlling factor.¹⁰⁶

*Shoemaker v. Handel*¹⁰⁷ was the first case to hold that, in the absence of suspicion, random drug testing does not violate the fourth amendment. Here, the Third Circuit permitted daily random breathalyzer testing and urine sampling of jockeys on the basis of the administrative exception to the warrant requirement and the pervasive regulation of the horse racing industry.¹⁰⁸ Because of the strong governmental interest in the integrity of the horse racing industry, the employees' privacy expectations had been reduced.¹⁰⁹ Thus, the court found that those who voluntarily choose to become involved in a pervasively regulated industry acquiesce to its regulatory demands.¹¹⁰ Through the administrative exception to the warrant requirement, the *Shoemaker* court held that suspicionless drug testing of employees is constitutionally permissible in pervasively regulated industries.¹¹¹

Many cases have criticized the *Shoemaker* decision as being too intrusive.¹¹² In *Capua v. City of Plainfield*,¹¹³ the U.S. District Court for the District of New Jersey held that mandatory urinalysis testing

103. *Allen*, 601 F. Supp. at 491. Since the fourth amendment does not apply to private employers, this dictum by the court evidences a liberal view of drug testing and a general tendency to permit implementation. See also *O'Connor v. Ortega*, 480 U.S. 709 (1987).

104. *Allen*, 601 F. Supp. at 491.

105. *Id.* The court stated that the permissibility of drug testing and other warrantless searches may be a "subjective factual question for the trier of fact." *Id.*

106. *Id.*

107. 795 F.2d 1136 (3d Cir.), cert. denied, 479 U.S. 986 (1986).

108. *Id.* at 1142; see also *supra* notes 85-88 and accompanying text.

109. *Shoemaker*, 795 F.2d at 1142.

110. *Id.*; see also *Constitutional Issues*, *supra* note 32, at 563. "[W]here the employee knowingly seeks and receives federal employment in a 'pervasively regulated industry,' the very nature of the industry along with the high degree of regulation serves as notice that drug testing programs will be utilized." *Id.* (citing *Shoemaker*, 795 F.2d at 1142). Such notice of pervasive regulation, along with voluntary acceptance of employment, will serve as an implied consent to drug testing schemes. *Id.*

111. *Shoemaker*, 795 F.2d at 1142.

112. See, e.g., *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 735 (S.D. Ga. 1986).

113. 643 F. Supp. 1507 (D.N.J. 1986).

of city fire fighters, conducted without notice or evidence of reasonable suspicion, was highly intrusive on their privacy expectations.¹¹⁴ The court distinguished *Shoemaker* by stating that the *Shoemaker* exception to the reasonable suspicion requirement was narrowly tailored to apply only in pervasively regulated industries.¹¹⁵ Thus, the court denounced mandatory testing in the absence of reasonable suspicion of drug use or pervasive industry regulation.¹¹⁶

*McDonell v. Hunter*¹¹⁷ was the first case since *Shoemaker* to permit random drug testing.¹¹⁸ Unlike *Shoemaker*, the *McDonell* case did not involve a highly regulated industry. However, the *McDonell* court analogized the state's interest in maintaining prison security to the Racing Commission's interest in *Shoemaker* in safeguarding public confidence.¹¹⁹ Thus, the Eighth Circuit balanced governmental interests against privacy expectations and upheld random urine testing of prison guards who had daily contact with inmates.¹²⁰ Although seen as a victory for proponents of drug testing, the *McDonell* decision is actually narrowly construed because of the diminished expectations of privacy associated with prison facilities and the strong institutional interest in maintaining prison security.

F. Legislative and Executive Responses to Mandatory Drug Testing

In the midst of these drug testing cases, former President Reagan declared a "War On Drugs" and signed Executive Order No. 12,564,¹²¹ on September 15, 1986. The order discussed the serious effects that drugs have on the national work force. It specifically noted that federal employees using drugs are less efficient and less reliable than their sober and lucid co-workers and, as a result, pose serious risks to the safety of co-workers and the public at large.¹²² Additionally, national security and public safety are threatened when drug-impaired employees have access to sensitive information.¹²³ The overall effect of drug use by a substantial portion of the national work force is the annual loss of billions of dollars in decreased work

114. *Id.* at 1514. The court stated that "[t]he invidious effect of such mass, roundup urinalysis is that it casually sweeps up the innocent with the guilty . . ." *Id.* at 1517. Thus, the burden is shifted to each fire fighter to prove his innocence by means of a "highly intrusive urine test." *Id.* The *Capua* court found such a presumption of guilt to contradict the individual guarantees of the Constitution. *Id.*

115. *Id.* at 1518.

116. *Id.* at 1522.

117. 809 F.2d 1302 (8th Cir. 1987).

118. Comment, *supra* note 2, at 1384.

119. *McDonell v. Hunter*, 809 F.2d 1302, 1308 (8th Cir. 1987).

120. *Id.*

121. Exec. Order No. 12,564, 3 C.F.R. 224 (1987) [hereinafter Exec. Order No. 12,564].

122. *Id.*

123. *Id.*

productivity.¹²⁴

To combat the effects of employee drug use, former President Reagan allocated \$900 million¹²⁵ to implement drug testing, treatment, and rehabilitative programs in the federal workplace.¹²⁶ The Executive Order required that the head of each federal agency develop a plan for achieving the objective of a drug-free workplace.¹²⁷ The agency plan must include a policy statement, establish employee assistance programs, maintain supervisory training programs, and provide for a referral system to put drug users in contact with treatment centers.¹²⁸

The Executive Order authorizes drug testing of federal employees.¹²⁹ Although random drug testing procedures only apply to those employees occupying "sensitive positions,"¹³⁰ each federal agency has

124. *Id.*

125. Note, *supra* note 9, at 937.

126. *See id.*

127. *See* Exec. Order No. 12,564, *supra* note 121, § 2.

128. *Id.* §§ 2-5; *see also* Note, *supra* note 9, at 940-42.

129. Executive Order No. 12,564 provides in part:

Sec. 3. *Drug Testing Programs*

- (a) The head of each Executive agency shall establish a program to test for the use of illegal drugs by employees in sensitive positions. The extent to which such employees are tested and the criteria for such testing shall be determined by the head of each agency, based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.
- (b) The head of each Executive agency shall establish a program for voluntary employee drug testing.
- (c) In addition to the testing authorized in subsections (a) and (b) of this section, the head of each Executive agency is authorized to test an employee for illegal drug use under the following circumstances:
 - (1) When there is a reasonable suspicion that any employee uses illegal drugs;
 - (2) In an examination authorized by the agency regarding an accident or unsafe practice; or
 - (3) As part of or as a follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program.
- (d) The head of each Executive agency is authorized to test any applicant for illegal drug use.

Exec. Order No. 12,564, *supra* note 121, § 3.

130. *See id.* §§ 3(a), 7(d). An employee occupying a "sensitive position" includes those in law enforcement, employees designated "Special Sensitive, Critical-Sensitive, or Noncritical-Sensitive" under chapter 731 of the *Federal Personnel Manual*, all presidential appointees, employees with "secret" and "top secret" security clearances, and any other employee that an agency head determines is in a position involving national security, protecting life and property, public health or safety, or involving other duties with a "high degree of trust and confidence." *Id.*; Note, *supra* note 9, at 941 n.24.

the authority to test when a reasonable suspicion of illegal drug use exists.¹³¹ Furthermore, an agency may conduct a drug test as a follow-up to rehabilitation and treatment under the Employee Assistance Program.¹³² Voluntary drug testing¹³³ also is to be established for all federal employees. Only when an employee tests positive and is unable to refrain from subsequent drug use will disciplinary action be taken.¹³⁴ Despite its focus on assisting and rehabilitating the individual user, the overall significance of Executive Order No. 12,564 is that illegal drugs will not be tolerated in the federal workplace.¹³⁵

Pursuant to the Executive Order, Congress enacted the Drug-Free Workplace Act in the Fall of 1988.¹³⁶ The Act requires companies seeking federal contracts in excess of \$25,000 to eliminate drug use from their premises.¹³⁷ Although not mandating random drug testing, the Drug-Free Workplace Act requires employers to formulate an anti-drug policy, establish a drug-awareness program, and notify the contracting agency of any drug-related violations occurring in the workplace, as well as any employee drug convictions.¹³⁸ Congress's message in approving the act is that "[i]ndividuals are not endowed with a constitutional right to either public employment or illegal drug use . . . [and those] wishing to join the government payroll and receive public funds must be prepared to comply with reasonable conditions."¹³⁹

With the national campaign for a "drug free America," public as well as private employers increasingly have initiated drug testing procedures.¹⁴⁰ However, critics denounce random drug testing proce-

131. Exec. Order No. 12,564, *supra* note 121, § 3(c)(1).

132. *Id.* § 3(c)(3).

133. *See id.* § 3(b).

134. *Id.* § 5(d).

135. The Reagan Administration maintained a strong position against drug use. The Executive Order provides, in part:

The Federal government, as the largest employer in the Nation, can and should show the way towards achieving drug-free workplaces through a program designed to offer drug users a helping hand and, at the same time, demonstrating to drug users and potential drug users that drugs will not be tolerated in the Federal workplace. . . .

SECTION 1. *Drug-Free Workplace.*

(a) Federal employees are required to refrain from the use of illegal drugs.

(b) The use of illegal drugs by Federal employees, whether on duty or off duty, is contrary to the efficiency of the service.

(c) Persons who use illegal drugs are not suitable for Federal employment.

Exec. Order No. 12,564, *supra* note 121.

136. Drug-Free Workplace Act, Pub. L. No. 100-690, § 5151, 102 Stat. 4304 (1988).

137. *Id.*

138. *Id.* § 5151, at 4304-05; *see also* Wollner, *Business Groups Oppose Bill to Limit Drug Testing*, 5 ROCHESTER BUS. J., No. 6, § 1, at 14 (1989).

139. Fein & Reynolds, *Drug Testing No 4th Amendment Threat*, LEGAL TIMES, May 8, 1989, at 22, col. 3.

140. Currently, about five million Americans receive drug tests during the year,

dures as "unreasonable" under the mandates of the fourth amendment. The infringement upon individual privacy expectations, in the absence of suspicion, starkly contradicts constitutional guarantees.

The judiciary, undecided as to the validity of drug testing when individualized suspicion is absent, has exacerbated the issue with inconsistent rulings. Various courts have held as follows: (1) random testing is highly intrusive of personal privacy rights in the absence of reasonable suspicion;¹⁴¹ (2) testing is permissible only when national security is endangered or a severe threat to public safety or property exists;¹⁴² and (3) drug testing is permissible in a highly regulated industry even in the absence of reasonable suspicion.¹⁴³ In response to these disparate circuit court rulings, the United States Supreme Court granted certiorari in *National Treasury Employees Union v. Von Raab*¹⁴⁴ to ultimately determine the constitutionality of drug testing in the absence of reasonable suspicion.¹⁴⁵

most of which are given as a condition of employment. Kurkjian, *Justices OK Drug Tests in Some Jobs*, Boston Globe, Mar. 22, 1989, (National/Foreign), at 1. Businesses are increasingly turning to drug testing as a means of ensuring safety and efficiency in the work environment. According to a 1988 survey by Business and Legal Reports Inc., approximately 32% of larger U.S. companies and 17% of smaller businesses are likely to test job applicants. See Wollner, *supra* note 138, at 14.

141. See *American Fed'n of Gov't Employees v. Weinberger*, 651 F. Supp. 726, 733 (S.D. Ga. 1986) (urinalysis search highly intrusive, requiring evidence of reasonable suspicion even when employee's position is one which could endanger public safety and welfare); *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 387 (E.D. La. 1986) (drug testing plan is overly intrusive in absence of probable cause or reasonable suspicion), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989); *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1514 (D.N.J. 1986) (urinalysis testing is a highly intrusive and humiliating experience, requiring compliance "with minimal constitutional mandates" of reasonable suspicion).

142. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414-15 (1989) (government's interest in preventing casualties in railroad operations justified post-accident testing of employees and testing of employees who violate safety rules); *Weinberger*, 651 F. Supp. at 735 (court rejected random testing but equivocated that such testing might be constitutional if national security was threatened or if an inherent danger existed to persons or property).

143. See *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562, 566 (8th Cir. 1988) (random testing allowed because employees in highly regulated nuclear power industry have a reduced expectation of privacy); *Shoemaker v. Handel*, 795 F.2d 1136, 1142 (3d Cir.) (testing allowed in highly regulated horse racing business), *cert. denied*, 479 U.S. 986 (1986).

144. 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

145. See Comment, *supra* note 2, at 1380 n.43.

III. BACKGROUND OF THE CASE

A. Facts

In May 1986, the Customs Service Commissioner initiated a mandatory drug testing program for employees seeking transfer to positions involving drug interdiction, use and possession of firearms, or access to classified materials. Employees who refused to comply with the screening procedures were permitted to retain current positions without any punitive consequences. However, employees with positive test results would be subject to dismissal in the absence of a satisfactory explanation of legitimate drug use. Test results would not be used for criminal purposes.

Testing procedures provided that the employee report to a monitor, provide photographic identification, and remove outer garments and personal belongings. The employee is permitted to urinate in private, but the monitor remains nearby to "listen for the normal sounds of urination."¹⁴⁶ The sample then is turned over to the monitor, who examines it for temperature and color to protect against adulteration. The monitor then attaches identification tags and a tamper proof seal over the container. A chain of custody form is signed by the employee and initialed by the monitor. The sample is sealed in a plastic bag and submitted to the laboratory for an enzyme-multiplied-immunoassay technique (EMIT) analysis for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. A gas chromatography/mass spectrometry test (GC/MS) is performed for confirmation purposes if the EMIT results are positive. Positive test results are reported to the medical review officer who evaluates the tests, medical history, and any other relevant information provided by the employee. In the absence of an employee's legitimate explanation of the presence of illegal substances, the test results are provided to the Customs Service for use in disciplinary procedures.¹⁴⁷

B. Procedural Facts

A suit was originally filed by a federal employees' union on behalf of Customs employees desiring a transfer to the scrutinized positions. Petitioners argued that the mandatory drug screening program was an unreasonable search and seizure under the fourth amendment which must be enjoined. The district court enjoined the program, finding it "utterly repugnant to the United States Constitution."¹⁴⁸ The U.S. Court of Appeals for the Fifth Circuit vacated the injunc-

146. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1388 (1989).

147. *Id.* at 1388-89.

148. *National Treasury Employees Union v. Von Raab*, 649 F. Supp. 380, 391 (E.D. La. 1986), *vacated*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

tion upon finding that the search was reasonable under the fourth amendment,¹⁴⁹ in light of the strong governmental interests advanced.¹⁵⁰ The Supreme Court granted certiorari to determine whether suspicionless drug testing programs were reasonable under the fourth amendment.¹⁵¹

IV. ANALYSIS OF THE CASE

A. *Majority Opinion*

In examining the constitutionality of suspicionless drug testing programs, a majority of the Court¹⁵² held that drug testing of Customs Service employees seeking transfer to jobs involving drug interdiction or the possession and use of firearms was reasonable under the fourth amendment.¹⁵³ However, the Court found the record insufficient to determine the extent to which suspicionless drug testing of employees with access to classified material was permitted.¹⁵⁴ In coming to this decision, the Court performed the traditional analysis of reasonableness under the fourth amendment.¹⁵⁵

1. Positions Involving Drug Interdiction and the Use and Possession of Firearms

In determining that mandatory drug testing constituted a search under the fourth amendment, the Court discussed its decision in *Skinner v. Railway Labor Executives' Association*.¹⁵⁶ In *Skinner*, the Supreme Court held that chemical testing of blood, breath, and urine were searches which must meet the requirement of reasonableness

149. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 180 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989). The court found that the testing procedures were reasonable because notice was provided to the employee and direct observation of urination was not required. *Id.*; *see also Von Raab*, 109 S. Ct. at 1389.

150. *Von Raab*, 109 S. Ct. at 1387. These interests included maintaining "public confidence in the integrity of the service" and ensuring employees' fitness to interdict illegal drugs. *Id.* at 1389.

151. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384 (1989).

152. Justice Kennedy wrote the majority opinion, joined by Chief Justice Rehnquist and Justices White, Blackmun and O'Connor. Justice Marshall's dissent was joined by Justice Brennan, and Justice Scalia's dissent was joined by Justice Stevens. *Id.* at 1387.

153. *Id.* at 1396.

154. *Id.*

155. *See supra* notes 25-29 and accompanying text.

156. 109 S. Ct. 1402 (1989). *Skinner* was decided on the same day as *Von Raab*. *See, Von Raab*, 109 S. Ct. at 1390.

under the fourth amendment.¹⁵⁷

In determining the legitimacy of individual privacy expectations challenged by compelled urination, the Court gave a one-sentence acknowledgement of the possible validity of such concerns.¹⁵⁸ Without discussing the importance of bodily integrity and the great privacy expectations traditionally afforded excretory functions, the Court simply concluded that "certain forms of public employment may diminish privacy expectations . . ."¹⁵⁹

In essence, the Court applied the rationale of *O'Connor v. Ortega*,¹⁶⁰ requiring the assessment of employee privacy expectations to be made in the context of "the operational realities of the workplace."¹⁶¹ However, the rule of *O'Connor* permits a limited search of an employee's office for work-related purposes when there is evidence of employee misconduct.¹⁶² Thus, the Court took a rule limited to *personal property* searches supported by reasonable suspicion and used it for authority to conduct a highly intrusive *bodily search* without evidence of individualized suspicion. Evidently, the Court believed the privacy expectations of the individual to be outweighed by the importance of job descriptions that include carrying firearms and interdicting drugs.

In analyzing the third element of the test of reasonableness, the Court reiterated the historical development of the warrant requirement, probable cause, and individualized suspicion.¹⁶³ Traditionally, a search required a valid warrant based on probable cause.¹⁶⁴ Through Supreme Court cases, exceptions developed to the warrant requirement: (1) when special governmental needs exist;¹⁶⁵ and (2) when the issuance of a warrant would provide no additional protection for individual privacy expectations.¹⁶⁶ Here, the government's special needs consisted of ensuring the physical fitness and integrity of Customs officials in sensitive positions.¹⁶⁷ Because employees

157. *Skinner*, 109 S. Ct. at 1412-13.

158. The Court stated that "[t]he interference with individual privacy that results from the collection of a urine sample . . . could be substantial in some circumstances." *Von Raab*, 109 S. Ct. at 1393 (emphasis added).

159. *Id.* The Court then listed various public workers with diminished privacy expectations, including employees of the U.S. Mint, and the military and intelligence services. *Id.* at 1393-94.

160. 480 U.S. 709, 717 (1987).

161. *Von Raab*, 109 S. Ct. at 1393; see also *supra* note 84.

162. *O'Connor v. Ortega*, 480 U.S. 709, 728-29 (1987).

163. *Von Raab*, 109 S. Ct. at 1390-92.

164. *Id.* at 1390.

165. *Id.*; see also *supra* notes 65-70 and accompanying text.

166. *Von Raab*, 109 S. Ct. at 1391. The Court stated that the main purpose of a warrant is to provide notice to the individual of the scope of the search to be conducted. Where notice is already provided to the individual employee of the testing requirements, a warrant would be superfluous. *Id.*

167. *Id.* at 1393.

seeking transfer to these positions were forewarned of the prerequisite drug testing procedures, the Court argued that the issuance of a warrant would not provide any additional protection to the individual employee.¹⁶⁸ Furthermore, the requirement of obtaining a warrant would redirect valuable resources from the Service's primary goals.¹⁶⁹ In light of these elements, a warrant should not be required for the implementation of drug testing procedures.

The Court further elaborated that, in the absence of a warrant, a search usually must be based on probable cause.¹⁷⁰ However, the Court noted that probable cause is characteristic of criminal investigations and not particularly suited to regularly conducted administrative searches.¹⁷¹ Since the urinalysis requirement in this instance was an administrative function, routinely conducted in the promotion of individuals to sensitive positions, there was no need for probable cause to exist.

Additionally, the Court stated that the requirement of reasonable suspicion also may be excused to discover or prevent the development of dangerous conditions in which compelling governmental interests are at stake.¹⁷² However, the Court failed to delineate circumstances in which reasonable suspicion may be overlooked.

In the absence of suspicion, governmental interests are weighed against individual privacy concerns to determine whether a search may still be considered reasonable under the fourth amendment.¹⁷³ If the governmental interests are sufficiently compelling and the interference with individual privacy rights are relatively minor, then the search will be constitutionally permissible.¹⁷⁴

In conducting this balance, the majority of the Court greatly emphasized the importance of the governmental interests at stake, while giving passing reference to individual privacy concerns.¹⁷⁵ The

168. *Id.* at 1391; *see supra* note 166.

169. *Von Raab*, 109 S. Ct. at 1391.

170. *Id.*

171. *Id.* at 1391-92. For authority, the Court cited *Colorado v. Bertine*, 479 U.S. 367, 371 (1987) (inventory search of suspect's van); *United States v. Martinez-Fuerte*, 428 U.S. 543, 557 (1976) (vehicle stops near the Mexican border); and *Camara v. Municipal Court*, 387 U.S. 523, 535-36 (1967) (apartment search by a housing inspector).

172. *Von Raab*, 109 S. Ct. at 1391-92. Without citing to clear authority, the Court stated that case precedent has dismissed any measure of particularized suspicion when the government's need to prevent and discover the development of dangerous conditions so requires. *Id.*

173. *See supra* note 28 and accompanying text.

174. *See supra* note 29 and accompanying text.

175. *Von Raab*, 109 S. Ct. at 1392-96; *see also supra* note 64 and accompanying text.

Court believed that the state has compelling interests in safeguarding public confidence in the integrity of the Customs Service while maintaining the physical fitness of officials in sensitive positions.¹⁷⁶ The Court elaborated on the important role that the Customs Service plays in protecting the nation's borders against drug traffickers.¹⁷⁷ Alternatively, the Court hypothesized as to the damage which would be inflicted upon society if corrupted Customs officials were placed in charge of drug interdiction.¹⁷⁸ Drug use by Customs officials would not only serve to undermine public confidence, but also would endanger the safety of co-workers and the public at large¹⁷⁹ and would subject society to the possible importation of sizeable narcotics shipments. The Court held that in view of the potential harm to the nation's well-being that corrupted officials could inflict, the state's interest in preventing the promotion of drug users to sensitive positions is paramount to individual privacy concerns.¹⁸⁰ Evidently, the Court was so adamant in its moral convictions concerning the importance of the governmental interests at stake that it found it unnecessary to even weigh the competing concerns of individual privacy rights.

The Court addressed two additional points presented by the petitioners concerning the reasonableness of the Customs testing program. First, the petitioners argued that the drug screening program was not implemented in response to evidence of suspected drug use within the Service and was therefore unjustified in its inception and inappropriate in application.¹⁸¹ To support their argument, the petitioners cited statements made by the Service's Commissioner one month before the program was implemented. The Commissioner stated that "[t]he Customs Service has been known throughout the law enforcement community as an agency whose employees demonstrate noteworthy integrity," and that he believed that the Service was "largely drug free."¹⁸² The Commissioner also admitted that the scope of substance abuse was not the reason for the program's implementation.¹⁸³

176. *Von Raab*, 109 S. Ct. at 1393.

177. *Id.* at 1392. The Court characterized the magnitude of the drug problem as one which "affect[s] the health and welfare of our population" and one which has created a "veritable national crisis in law enforcement." *Id.* (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)).

178. *Von Raab*, 109 S. Ct. at 1393. The Court believed that "sizeable drug shipments" would be imported into the states if customs officials actively collaborated with drug traffickers or were "unsympathetic to [the Customs Service's] mission of interdicting drugs." *Id.*

179. *Id.*

180. *Id.* at 1396.

181. *Id.* at 1394.

182. See Brief for Petitioners at 7, *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1986) (No. 86-1879), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989) [hereinafter Brief for Petitioners].

183. *Id.*

The petitioners additionally presented statistics illustrating the inappropriateness of the drug screening program in the Customs Service. During the three-month period prior to the district court's injunction, only five out of 3600 samples tested were reported as confirmed positive.¹⁸⁴ Thus, petitioners argued that the infringement upon privacy rights could not be justified when random testing was implemented in an area of public service which was relatively drug free.¹⁸⁵

In response, the Court extrapolated that drug abuse is an all-pervasive societal problem which has permeated the American workplace.¹⁸⁶ The court rationalized the propriety of urinalysis testing by stating that the fact that the majority of the employees tested were free from fault did not make the program unsuitable,¹⁸⁷ especially when the harm against which the government sought to protect was substantial.¹⁸⁸

The petitioners presented a second argument concerning the effectiveness of urinalysis testing when the employee could take steps to avoid discovery of drug use.¹⁸⁹ By abstaining from drug use, drinking additional fluids, or adding minute amounts of soap or salt to the urine sample as a neutralizing agent,¹⁹⁰ the employee could successfully evade detection. The Court refuted the claims of abstinence as a means of thwarting chemical detection by acknowledging the ignorance of users as to the "fade-away effect" of various drugs.¹⁹¹ The Court also believed the number of successful adulteration attempts would be minimized by the preventative measures taken by the monitor prior to sealing the container.¹⁹² As a result, those attempting to

184. *Von Raab*, 109 S. Ct. at 1394.

185. *Id.*

186. *Id.* at 1395. "Petitioners do not dispute, nor can there be doubt, that drug abuse is one of the most serious problems confronting our society today. There is little reason to believe that American workplaces are immune from this pervasive social problem" *Id.*

187. *Id.*

188. *Id.*

189. *Id.* The petitioners believed the Customs' drug testing program was not a "sufficiently productive mechanism to justify [its] intrusion upon [f]ourth [a]mendment interests," because illegal drug users can avoid detection with ease" *Id.* at 1395 (citing *Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979)).

190. Brief for Petitioners, *supra* note 182, at 5 n.7.

191. *Von Raab*, 109 S. Ct. at 1396. For example, the common drug user is unaware that marijuana is detectable only for about one day if used once per week; three days if used between two to six times per week; and approximately 5.3 days if used on a daily basis for longer than six months. Brief for Petitioner, *supra* note 182, at 9.

192. The monitor retrieves the sample from the employee promptly after urination

deceive the test by abstaining from drug use or tampering with the sample most likely would be disappointed.¹⁹³

2. Positions with Access to Classified Material

In analyzing the random testing of employees seeking transfer to positions with access to classified material, the Court recognized the compelling governmental interests involved in safeguarding highly sensitive information.¹⁹⁴ However, the Court remanded this portion of the case to determine the scope of employment categories which should be covered under a drug testing program of this type.¹⁹⁵ Evidently, the Court approved the random drug testing of employees with access to sensitive information. A distinction was made, however, between "sensitive information,"¹⁹⁶ to which the Court was willing to provide protection, and "classified material," as defined by the Customs Service.

The Customs Service had designated certain positions, such as accountants, animal caretakers, attorneys, baggage clerks, co-op students, electricians, mail clerks, and messengers, as requiring toxicological testing because of their potential access to *classified materials*.¹⁹⁷ The Court held these categorical groupings to be too broadly defined because not all of these employees would gain access to *sensitive information*.¹⁹⁸ The Court did not define either term, however, and remanded the case with instructions for the lower court to assess the criteria used by the Service in its determination of "classified materials."¹⁹⁹

The majority opinion advocated the application of a balancing test to determine the reasonableness of random drug screening to secure the confidentiality of sensitive information.²⁰⁰ The Court remanded the case with instructions to the lower court to weigh the competing interests of employees' privacy expectations and the degree of supervision presently maintained in the absence of drug testing.²⁰¹ Although the Court approved of the drug testing program in this instance, as based upon the compelling governmental interests rationale, it left to the appellate court the duty of defining the boundaries of its application.

and tests it for proper color and temperature. For testing procedures, see *supra* text accompanying notes 147-48.

193. *Von Raab*, 109 S. Ct. at 1396.

194. *Id.*

195. *Id.* at 1397.

196. *Id.*; see also *supra* note 130.

197. *Von Raab*, 109 S. Ct. at 1397 (emphasis added).

198. *Id.* (emphasis added).

199. *Id.*

200. *Id.*

201. *Id.*

B. Dissenting Opinions

The dissenting opinion of Justice Marshall²⁰² denounced the majority Court's abandonment of probable cause as required under the fourth amendment.²⁰³ Justice Marshall failed to elaborate on his reasons for dissenting, but referred to his dissenting opinion in *Skinner v. Railway Labor Executives' Association* for support.²⁰⁴ In *Skinner*, Justice Marshall condemned the Court's implementation of massive, post-accident testing procedures of railway workers.²⁰⁵ Justice Marshall felt that the majority court ignored "the text and doctrinal history of the [f]ourth [a]mendment," requiring intrusive searches to be conducted pursuant to probable cause.²⁰⁶ By dispensing with this constitutional requirement,²⁰⁷ the Supreme Court ensured that the "worst casualty of the war on drugs will be the precious liberties of our citizens."²⁰⁸

The dissenting opinion of Justice Scalia²⁰⁹ agreed with the majority that a search may be conducted in the absence of probable cause or reasonable suspicion if special needs exist.²¹⁰ However, Justice Scalia diverged from the majority by identifying those special needs as social, as opposed to governmental.²¹¹ He provided examples of social needs, such as maintaining order in the classroom where drugs and violence pervade;²¹² detecting the entrance of illegal aliens;²¹³ and

202. *Id.* at 1398 (Marshall, J., dissenting). Justice Brennan joined in Justice Marshall's dissent.

203. *Id.* (Marshall, J., dissenting).

204. *Id.* (Marshall, J., dissenting).

205. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1423 (1989) (Marshall, J., dissenting).

206. *Id.* (Marshall, J., dissenting).

207. In *Skinner*, Marshall recognized that through case law, a lesser quantum of suspicion has been sustained when privacy invasions are minimal and government conduct falls short of "a full-scale search." *Id.* at 1424 (Marshall, J., dissenting). Administrative searches pursuant to a regulatory plan, also have been permitted in the absence of suspicion when the encounters are brief and nonintrusive. *Id.* (Marshall, J., dissenting). However, the Court's extension of the "special needs" exception for chemical testing of bodily fluids, when the nature of the search is highly intrusive and, in the absence of particularized suspicion, has served to read "the probable cause requirement out of the [f]ourth [a]mendment." *Id.* at 1423 (Marshall, J., dissenting).

208. *Id.* (Marshall, J., dissenting).

209. Justice Scalia wrote a separate dissent with whom Justice Stevens joined.

210. *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting).

211. The determination of whether a search is reasonable depends upon "the social necessity that prompts the search." *Id.* (Scalia, J., dissenting).

212. See *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). "[D]rug use and violent crime in the schools have become major social problems." *Von Raab*, 109 S. Ct. at 1399 (Scalia, J., dissenting).

213. See *United States v. Martinez-Fuerte*, 428 U.S. 543, 551-52 (1976).

preventing drug-related railroad collisions.²¹⁴ Each of these examples serves to characterize the pervasive social need by longevity of the problem and seriousness of the harm.

Justice Scalia's dissent found no social need justifying the abandonment of particularized suspicion by the Customs Service in the drug testing program.²¹⁵ Historically, there had been no pervasive problem of drug addiction by Customs employees.²¹⁶ In fact, the Customs Commissioner stated that the Service is "largely drug-free" and that the reason for urinalysis testing was not employee substance abuse.²¹⁷ Thus, the majority's broad generalizations concerning the pervasiveness of drug use as a societal problem and its evident permeation into the American workplace were too attenuated to justify random drug testing.²¹⁸

Likewise, there was no documented evidence as to the gravity of the harm inflicted by physically impaired Customs employees.²¹⁹ Although the majority opinion hypothesized the "irreparable damage" which could occur when "unsympathetic" employees are placed in charge of drug interdiction,²²⁰ there was no demonstrated evidence of such catastrophic injury. Unlike the railroad industry, in which forty-five drug impaired accidents occurred during an eight-year period, resulting in thirty-four deaths and millions of dollars in property damage,²²¹ the majority failed to cite to specific instances of serious social harm within the Customs Service.

As a result, the Customs Service's drug testing program would "do little to alleviate the hypothetical dangers of corruption and unsafe use of firearms conjured up as justification for it."²²² Nor would such testing serve to eliminate ethical infractions among those Customs officials who do not use drugs.²²³ Thus, Justice Scalia believed that the majority's justification for the impairment of individual liberties, in the absence of a pressing social need, was exemplary.²²⁴ If the officials who enforce our country's laws do not personally comply with

214. See *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1402 (1989). "[T]he problem of alcohol use on American railroads is as old as the industry itself . . ." *Von Raab*, 109 S. Ct. at 1399 (Scalia, J., dissenting) (quoting *Skinner*, 109 S. Ct. at 1407 & n.1).

215. *Von Raab*, 109 S. Ct. at 1400 (Scalia, J., dissenting).

216. *Id.* at 1399-1400 (Scalia, J., dissenting).

217. See *supra* notes 182-83 and accompanying text.

218. See *Von Raab*, 109 S. Ct. at 1395.

219. *Id.* at 1400 (Scalia, J., dissenting).

220. See *id.* at 1393-94; see also *supra* notes 179-81 and accompanying text.

221. *Von Raab*, 109 S. Ct. at 1400 (Scalia, J., dissenting).

222. Taylor, *Drug Test Case Rips Into Privacy*, LEGAL TIMES, Mar. 27, 1989, at 15.

223. *Id.*

224. *Von Raab*, 109 S. Ct. at 1401 (Scalia, J., dissenting). "What better way to show that the Government is serious about its 'war on drugs' than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity?" *Id.* (Scalia, J., dissenting).

their mandates, then neither will the public at large.²²⁵

Justice Scalia objected to this symbolic justification for an otherwise unreasonable search.²²⁶ Absent a pervasive social harm demonstrating a specific need for drug testing procedures, searches which are particularly offensive to human dignity should not be deemed reasonable under the fourth amendment.²²⁷ The validation of such searches serves as "a kind of immolation of privacy and human dignity in symbolic opposition to drug use."²²⁸

V. IMPACT

The majority opinion in *Von Raab* is a moral and passionate decision shaped by popular desires and the urgency of the national campaign to eradicate illegal drugs. It stands as a symbol of governmental intolerance for drug use; however, it also is an omen forecasting the erosion of more constitutional guarantees. Although laudable in its attempts to prevent the scourge of drugs from entering America's frontier, the decision is ill-conceived as it serves to disparage the Constitution and ravish the rights of the individual.

A. Weaknesses in the Majority Opinion

The majority attempts to justify the infringement upon constitutional protections through a compelling governmental interest rationale. However, the Court's argument evades the principle issues at bar and is wrought with defective reasoning. In applying the constitutional framework for analyzing fourth amendment violations, the Court ineffectively discussed the elements of the test of reasonableness.

In determining whether the reasonable expectations of the employee were violated, the Court completely ignored the significant impact that compelled urination and disposal of bodily fluids has on privacy expectations.²²⁹ The Court did not address the legitimacy of

225. *See id.* (Scalia, J., dissenting).

226. *Id.* (Scalia, J., dissenting).

227. *See id.* at 1400 (Scalia, J., dissenting).

228. *Id.* at 1398 (Scalia, J., dissenting).

229. Even the appellate court recognized the significance of bodily intrusions on privacy expectations:

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.

such concerns nor did it address whether society would recognize employees' privacy expectations as reasonable.²³⁰ To determine the legitimacy of privacy expectations, courts normally weigh individual privacy rights against the need to search, the scope of the search, and the nature of the work environment.²³¹ If the workplace is exceptionally hazardous or federally regulated, the employee's privacy expectations necessarily will be reduced.²³² In these situations, highly intrusive searches will more likely be permitted.

Rather, the Court simply stated that the infringement upon privacy expectations from compelled urination "could be substantial in some circumstances."²³³ The fact that the Court delegated only one sentence of its majority opinion to an issue which has split the federal circuits evidences the Court's superficial analysis and its obvious bias in favor of drug screening. By ignoring individual privacy concerns, the Court severely weakened its position by not giving fair and equal treatment to issues traditionally regarded as indispensable to any fourth amendment analysis.

In determining the reasonableness of the search, the Court failed to provide case law justifying the abandonment of individualized suspicion in the absence of a valid warrant.²³⁴ Through case law, however, an exception to the requirement of reasonable suspicion has evolved in connection with administrative searches.²³⁵ In the absence of suspicion, administrative searches may be conducted in highly regulated industries or when public health, safety, and welfare is at stake.²³⁶ In all other situations, reasonable suspicion must be present prior to implementation of drug testing procedures.²³⁷ Here, the main controversy is whether the standard of reasonable suspicion may be ignored in industries which are not pervasively regulated, where a severe threat to public safety is not posed. The Court did not present an effective argument concerning the tangible risks to which society is exposed in the absence of drug testing in the Customs Service.²³⁸ However, by applying the balancing test and by trumpeting the compelling governmental interest rationale, the Court furtively circumvented the requirement of reasonable suspicion.

National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175, *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989).

230. See *supra* notes 30-51 and accompanying text.

231. See *supra* notes 42-43 and accompanying text.

232. See *supra* notes 49-51 and accompanying text.

233. See *supra* note 158 and accompanying text.

234. See *supra* notes 28, 173 and accompanying text.

235. Note, *supra* note 9, at 950-52.

236. See *supra* note 143 and accompanying text.

237. See *supra* note 141 and accompanying text.

238. See *supra* notes 212-14 and accompanying text.

The balancing test applied by the Court failed to weigh the countervailing interests of individual rights in determining the reasonableness of random drug testing. Again, the Court believed the governmental interests in protecting America's frontier and maintaining public confidence were so important that they justified infringements upon individual privacy rights. However, the Court's flaw was in failing to recognize the countervailing individual interests at stake.

Instead of ignoring individual rights, the Court should have recognized the validity of such concerns and expounded upon the Service's attempts to minimize the intrusiveness of the search. By providing advance notice to the employee of the requirements of toxicological testing and by not requiring direct observation of urination by the monitor, the Service limited the interference with personal privacy rights to some extent. Additionally, the search was limited in scope for it only applied to employees seeking promotion to certain positions within the Customs Service. Thus, the Court could have argued that since the privacy intrusions were minimal and important governmental interests were thereby advanced, the Customs' program of drug testing was reasonable under the fourth amendment. Instead, the Court applied a manipulable balancing inquiry which tipped the scales of justice in favor of governmental testing without even giving weight to the privacy concerns of the individual.

Further weaknesses in the majority opinion are evident in the Court's response to petitioners' arguments. Regarding the petitioners' concerns over the inappropriateness of urinalysis testing in an area of public service reputed to be essentially drug free,²³⁹ the Court responded with a tangential discussion of the difficulty of discovering drug impairment and the need for deterring drug use both on and off duty to protect against the dangers of bribery and blackmail.²⁴⁰ Here, the Court's discussion, as presented in response to petitioners' concerns, has no relevancy concerning the unsuitability of drug testing in the absence of drug use in the work environment.

Instead of side-stepping this issue, the Court should have emphasized the validity of the testing procedures as a means of drug deterrence rather than as a means of drug detection. It is highly probable that the implementation of drug testing procedures has served as an incentive for employees to cease their illegal habits in anticipation of

239. See *supra* notes 181-85 and accompanying text.

240. *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1395 (1989).

job advancement.²⁴¹ Thus, the Court could have effectively asserted that the program is not inappropriate in that it has served to deter drug use by those employees seeking positions requiring the carrying of firearms or the interdiction of illegal substances.

Further flaws in the majority opinion also were evidenced in response to the petitioners' second argument concerning the ineffectiveness of testing procedures.²⁴² Petitioners presented expert testimony in the lower court as to the ability of resourceful employees to avoid detection through abstinence and fluid intake.²⁴³ With the exception of addicts, most drug users would be able to produce a "clean sample" within seven days.²⁴⁴ Expert testimony also was employed concerning the inability to anticipate the fade-away effect of various drugs.²⁴⁵ The Court severely discredited its analysis by only addressing the latter testimony. By failing to refute or even acknowledge expert evidence as to successful drug evasion,²⁴⁶ the Court was unable to validly judge the effectiveness of the drug testing program.

In conclusion, the majority's analysis, as written by Justice Kennedy, tends to skirt the issues at hand in determining the reasonableness of mandatory drug testing, dodge the petitioners' inquiries, and hide behind the merits of the government's interests in securing the nation's borders. The majority does not address the significance of the individual privacy interests infringed upon, nor does it adequately discuss the reasons for circumventing the requirement of reasonable suspicion. Rather, the Court uses the compelling governmental interests rationale as a prop to support its decision to affirm the constitutionality of random drug testing.

B. *The Companion Case*—*Skinner v. Railway Labor Executives Association*

The United States Supreme Court decided both *Skinner v. Rail-*

241. In response to the statistics presented by petitioners, the Court could have made the argument that the minute number of confirmed positive results can be viewed as proving the deterrence effect of drug testing.

242. See *supra* notes 189-93 and accompanying text.

243. See *supra* note 191 and accompanying text.

244. See Brief for Petitioners, *supra* note 182, at 9 n.12 (testimony of John Morgan and Dr. David Greenblatt).

245. The expert indicated that the amount of "time it takes for particular drugs to become undetectable in urine can vary widely depending on the individual and may extend for as long as 22 days." *National Treasury Employees Union v. Von Raab*, 109 S. Ct. 1384, 1396 (1989).

246. See *Von Raab*, 109 S. Ct. at 1396. The "[u]ndisputed expert testimony in this case demonstrated that with a few days notice, virtually any individual who uses drugs, except those whose use is so habitual as to be detectable simply by observation on the job, can escape detection through urinalysis merely by temporary abstinence." Brief for Petitioners, *supra* note 182, at 9.

way *Labor Executives' Association*²⁴⁷ and *Von Raab* on the same day. *Skinner* held that post-accident drug testing of railroad workers was permissible without reasonable suspicion of drug impairment at the time the accident occurred.²⁴⁸

In viewing the holdings in *Skinner* and *Von Raab* together, it may be said that the Supreme Court has "torn a gaping hole in the [f]ourth [a]mendment."²⁴⁹ However, the context in which the government may employ mandatory drug testing is limited to: (1) the Customs Service when it believes that a drug-free work force is necessary to its essential mission of stopping drug trafficking across the nation's borders;²⁵⁰ (2) situations in which the government maintains a truly compelling interest in sensitive information;²⁵¹ and (3) the heavily regulated transportation industry where public safety is at stake.²⁵² Thus, the twin decisions appear only to affect jobs involving law enforcement, national security, or public health, welfare, and safety.

Regarding the historical development of search and seizure cases, *Skinner* comports with the reasonableness requirement of the Constitution through the administrative exception to the warrant requirement. The privacy expectations of railroad employees are considerably reduced due to their employment in a highly regulated industry.²⁵³ Additionally, the governmental interest in protecting the safety of the traveling public is significant.²⁵⁴ Thus, in the employment context of a pervasively regulated industry, the state's interest in conducting mandatory drug testing procedures is paramount to the employee's privacy expectations.²⁵⁵

However, the Court's decision in *Von Raab* appears to be an anomaly when viewed from the historical perspective. *Von Raab* does not comport with the administrative exception to the warrant requirement because the Customs Service is not a pervasively regulated in-

247. 109 S. Ct. 1402 (1989).

248. *Id.* at 1421.

249. Taylor, *Trashing the 4th Amendment, Again*, Manhattan Law., Mar. 28, 1989-Apr. 3, 1989 (Commentary), at 10. "In justifying their result, the majority propelled the law down a conceptual slippery slope toward a standardless regime in which innocent individuals who are suspected of no crime could be searched en masse whenever the government could convince the Court that it had a good enough reason." *Id.*

250. *Von Raab*, 109 S. Ct. at 1396.

251. *Id.* at 1397.

252. *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1422 (1989).

253. *Id.* at 1418.

254. *Id.* at 1419.

255. See *supra* notes 85-88 and accompanying text.

dustry. Similarly, the promotion of drug users to positions requiring the use of firearms, access to classified materials, or front-line drug interdiction does not involve public safety to an appreciable degree.²⁵⁶ Thus, *Von Raab* deviates from the general rule requiring reasonable suspicion when the administrative exception does not apply.

The main question at hand is: How far and to what extent will the Supreme Court go to find mandatory drug testing of public employees reasonable under the fourth amendment? *Skinner* represents the traditional application of fourth amendment principles. *Von Raab* represents an extension of these principles through its compelling governmental interests rationale. It is apparent that the Supreme Court, without regard to palpable public safety concerns, is willing to expand the administrative search exception to employment contexts other than pervasively regulated industries.

C. *Subsequent Drug Testing Cases*

Given the wide range of latitude embodied in the *Von Raab* compelling governmental interest rationale, the district courts have been somewhat conservative in implementing suspicionless drug testing programs in different employment environments. Basically, subsequent cases have restricted testing to those employees having the potential to detrimentally affect health, safety, and welfare. Thus, despite the abandonment of pervasive regulation, public safety is still a viable concern under the administrative search exception.

Because of the hazardous nature of the work environments and the corresponding effects on public safety, the courts have extended suspicionless drug testing programs to police and fire departments.²⁵⁷ In *Brown v. City of Detroit*,²⁵⁸ the U.S. District Court for the Eastern District of Michigan drew closely from the *Von Raab* decision and held that there were similarities between Customs officials and police officers employed with the power to use deadly force.²⁵⁹ Based upon the public safety rationale,²⁶⁰ the court in *Brown* upheld random testing procedures.²⁶¹ However, it limited such examinations to of-

256. See *supra* notes 212-13 and accompanying text.

257. See *Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir.) (upholding drug testing of police officers who carry firearms and who interdict drug traffickers), *cert. denied*, 110 S. Ct. 404 (1989); *Brown v. City of Detroit*, 715 F. Supp. 832, 834-35 (E.D. Mich. 1989) (sustaining city police department's random drug testing program based on public safety rationale).

258. 715 F. Supp. 832 (E.D. Mich. 1989).

259. *Id.* at 833-35.

260. "[T]he public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force." *Von Raab*, 109 S. Ct. at 1393.

261. *Brown*, 715 F. Supp. at 833-35. In *Von Raab*, the drug testing program was not

ficers carrying firearms or enforcing the city's drug laws.²⁶² The striking similarities between *Von Raab* and *Brown* demanded that mandatory drug testing be extended to other law enforcement contexts.

Similarly, in *Brown v. Winkle*,²⁶³ the U.S. District Court for the Northern District of Ohio held that drug testing requirements for candidate selections to the fire department did not violate fourth amendment privacy rights.²⁶⁴ The successful performance of fire fighters' duties "depends uniquely on their judgment and dexterity."²⁶⁵ Thus, public safety demands that fire fighters not use "drugs, alcohol, or other performance altering substances while at work, or at other times when the residual effects of use would tend to impair functioning . . ."²⁶⁶ The court stated that it was not unconstitutional to deny drug users employment "in an occupation where proper performance is a matter of life and death . . ."²⁶⁷

Post *Von Raab* decisions have recognized that to sustain suspicionless drug testing under the public safety rationale, the risk threatened by impaired conduct must pose an immediate danger. In *Thomson v. Marsh*,²⁶⁸ the risk of harm associated with the residual effects of drug use in a chemical weapons plant was immediate because the slightest release of the chemical agent "CK" would kill any employee working within a few feet of exposure and seriously injure anyone standing a few yards away.²⁶⁹ Because of the dangerous nature of experimental testing with lethal chemical agents, the Fourth Circuit held that civilian employees working for the Army in the Chemical Personnel Reliability Program experienced a diminished expectation of privacy concerning urinalysis testing.²⁷⁰

Similarly, in *American Federation of Government Employees*,

randomly implemented because it was a one-time exam required by specific employees requesting promotion to sensitive positions. *Von Raab*, 109 S. Ct. at 1390. In *Brown*, the district court expanded the scope of testing procedures by permitting random and periodic testing of police officers who carry guns or who interdict drug traffickers. *Brown*, 715 F. Supp. at 833-35.

262. *Brown*, 715 F. Supp. at 833-35.

263. 715 F. Supp. 195 (N.D. Ohio 1989).

264. *Id.* at 196-98.

265. *Id.* at 197 (citation omitted).

266. *Id.*

267. *Id.*

268. 884 F.2d 113 (4th Cir. 1989).

269. *Id.* at 115.

270. *Id.* at 114-15.

AFL-CIO v. Skinner,²⁷¹ random drug testing was again upheld for employees whose duties bore a “direct and immediate impact on public health and safety, the protection of life and property, law enforcement or national security.”²⁷² The immediacy of the danger posed to hazardous material inspectors²⁷³ consisted of exposure “to poisonous, explosive, and highly flammable commodities that could be . . . suddenly ignited by improper handling.”²⁷⁴ The D.C. Circuit further recognized the direct impact that improper installation and maintenance of flight control equipment by aircraft mechanics could have on life and property.²⁷⁵ Thus, the more immediate and harmful the consequences resulting from any single drug-impaired incident, the more likely that random drug testing will be sustained by the courts.²⁷⁶

Under the authority provided by *Von Raab*, it is apparent that lower federal courts could broadly use the compelling governmental interests rationale to justify random urinalysis testing in many working environments. However, the courts in cases subsequent to the *Von Raab* decision have restricted application of suspicionless drug testing programs to those contexts in which an immediate and tangible risk of harm to public safety and welfare exists.

D. *The National Campaign*

Since Ronald Reagan’s declaration of a “War On Drugs” in 1986,²⁷⁷ the Presidential crusade for a “drug-free America” has gathered popular momentum. Highlighted by media coverage,²⁷⁸ the chilling

271. 885 F.2d 884 (D.C. Cir. 1989).

272. *Id.* at 889.

273. Three groups of employees brought the challenge in this case: motor vehicle operators, Federal Railroad Administration inspectors of hazardous materials, and Federal Aviation Administration Aircraft mechanics. *Id.* at 891.

274. *Id.* (citation omitted).

275. *Id.* at 892 (“[A] drug-related lapse could portend irreparable injury to life and property . . .”); see also *National Fed’n of Fed. Employees v. Cheney*, 884 F.2d 603, 610 (D.C. Cir. 1989) (sustaining Army’s testing of air traffic controllers, pilots, and aviation mechanics because of the “irreversible and calamitous consequences” which could ensue), *cert. denied*, 110 S. Ct. 864 (1990).

276. See, e.g., *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989). In *Harmon*, the court held that an indirect risk of harm associated with a mistake by a Justice Department attorney is not the kind of harm contemplated by the public safety rationale. *Id.* at 491. “The public safety rationale adopted in *Von Raab* and *Skinner* focused on the immediacy of the threat.” *Id.* (emphasis in original). “[A] single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs.” *Id.*

277. See *supra* notes 121-35 and accompanying text.

278. Major newspapers are devoting pages to the subject of drugs, and the television networks are filling much of their air time with the drug issue. “ABC calls its coverage ‘Drugs: A Plague Upon the Land.’ NBC’s is ‘Drug Watch.’ CBS . . . calls it ‘Drugs: One Nation, Under Siege.’” Rosenstiel, *Media Going All-Out on Drug Cover-*

repercussions of drug use have been brought home to the American public. The horrible realities of drug use include babies being born addicted to cocaine, children dealing narcotics at school, and gangland members waging territorial wars in our cities and streets.²⁷⁹ As

age, L.A. Times, Sept. 7, 1989, Part I, at 16, col. 1. The White House maintains that "saturation air time serves the President's purpose and will help them sell to Congress a policy that is still controversial in its details." *Id.*

279. In enacting the United States' policy for a drug-free America by 1995, Congress listed certain statistical findings concerning the detrimental effects of illegal drug use:

Sec. 5251. United States Policy For A Drug-Free America By 1995.

(a) FINDINGS.—The Congress finds that—

- (1) approximately 37 million Americans used an illegal drug in the past year and more than 23 million Americans use illicit drugs at least monthly, including more than 6 million who use cocaine;
- (2) half of all high school seniors have used illegal drugs at least once, and over 25 percent use drugs at least monthly;
- (3) illicit drug use adds enormously to the national cost of health care and rehabilitation services;
- (4) illegal drug use can result in a wide spectrum of extremely serious health problems, including disruption of normal heart rhythm, small lesions of the heart, high blood pressure, leaks of blood vessels in the brain, bleeding and destruction of brain cells, permanent memory loss, infertility, impotency, immune system impairment, kidney failure, and pulmonary damage, and in the most serious instances, heart attack, stroke, and sudden death;
- (5) approximately 25 percent of all victims of AIDS acquired the disease through intravenous drug use;
- (6) over 30,000 people were admitted to emergency rooms in 1986 with drug-related health problems, including 10,000 for cocaine alone;
- (7) there is a strong link between teenage suicide and use of illegal drugs;
- (8) 10 to 15 percent of all highway fatalities involve drug use;
- (9) illegal drug use is prevalent in the workplace and endangers fellow workers, national security, public safety, company morale, and production;
- (10) it is estimated that 1 of every 10 American workers have their productivity impaired by substance abuse;
- (11) it is estimated that drug users are 3 times as likely to be involved in on-the-job accidents, are absent from work twice as often, and incur 3 times the average level of sickness costs as non-users;
- (12) the total cost to the economy of drug use is estimated to be over \$100,000,000,000 annually;
- (13) the connection between drugs and crime is also well-proven;
- (14) the use of illicit drugs affects moods and emotions, chemically alters the brain, and causes loss of control, paranoia, reduction of inhibition, and unprovoked anger;
- (15) drug-related homicides are increasing dramatically across the Nation;
- (16) 8 of 10 men arrested for serious crimes in New York City test positive for cocaine use;
- (17) illicit drug use is responsible for a substantially higher tax rate to pay for local law enforcement protection, interdiction, border control, and the cost of investigation, prosecution, confinement, and treatment;
- (18) substantial increases in funding and resources have been made available in recent years to combat the drug problem, with spending for in-

a result of the anti-drug campaign and its inflammatory effects on popular opinion, America has embarked upon an era of drug intolerance. Consequentially, the issue of mandatory drug testing has been thrust into the national spotlight.

An example is the declaration by the 100th Congress that the "policy of the United States Government [is] to create a Drug-Free America by [the year] 1995."²⁸⁰ In furtherance of this goal, President Bush announced in September 1989 a national drug strategy coordinating the efforts of all federal agencies.²⁸¹ The President proposed a budget of \$7.9 billion to implement this latest war.²⁸² Domestically, this strategy calls for the enlargement of the criminal justice system at all levels of government, including the installation of more prisons, jails, courts, and prosecutors.²⁸³ Stiffer fines and penalties for illegal drug use also are advocated.²⁸⁴ Additionally, the President emphasized greater use of drug-testing programs by state and municipal

terdiction, law enforcement, and prevention programs up by 100 to 400 percent and these programs are producing results—

- (A) seizures of cocaine are up from 1.7 tons in 1981 to 70 tons in 1987;
 - (B) seizures in heroin are up from 460 pounds in 1981 to 1,400 pounds in 1987;
 - (C) Drug Enforcement Administration drug convictions doubled between 1982 and 1986; and
 - (D) the average sentence for Federal cocaine convictions rose by 35 percent during this same period;
- (19) despite the impressive rise in law enforcement efforts, the supply of illegal drugs has increased in recent years;
 - (20) the demand for drugs creates and sustains the illegal drug trade; and
 - (21) winning the drug war not only requires that we do more to limit supply, but that we focus our efforts to reduce demand.
- (b) DECLARATION—It is the declared policy of the United States Government to create a Drug-Free America by 1995.

Anti-Drug Abuse Act, Pub. L. No. 100-690, § 5251, 102 Stat. 4309, 4309-10 (1988).

280. *Id.* § 5251, at 4310.

281. See Nelson, *Bush Tells Plan to Combat Drugs*, L.A. Times, Sept. 6, 1989, Part I, at 1, col. 5. President Bush's strategy differs from prior Presidential proposals in that it focuses on the casual drug user and provides for a coordinated attack by more than a dozen federal agencies. *Id.* at 11, col. 1-2.

282. *Id.* at 1, col. 5; see also Hunt, *President Proposes Crackdown at Home, Abroad*, L.A. Herald Examiner, Sept. 6, 1989, at A1, col. 6.

283. *The Key Components*, L.A. Herald Examiner, Sept. 6, 1989, at A8, col. 1. Funding will consist of \$350 million for state and local governments for criminal justice and law enforcement, and \$1.2 billion for federal prison construction. *Id.* Funding will further consist of \$250 million to enlarge the capacity of the court system, \$3.1 billion for federal law enforcement, and \$1.6 billion for corrections. Hunt, *supra* note 282, at A8, col. 6. All tolled, the President's proposal in this area will result in an increase of \$2.2 billion for drug-related federal spending. Raum, *Where the Money Will Come From*, L.A. Herald Examiner, Sept. 6, 1989, at A8, col. 2.

284. These include increasing fines for misdemeanor state drug offenses, seizing user's cars, suspending driving privileges, and serving prison terms in "military style boot camps." Hunt, *supra* note 282, at A8, col. 6. The President also advocated the ultimate punishment for drug kingpins—the death penalty. See *Excerpts: For Drug Kingpins, the Death Penalty*, L.A. Times, Sept. 6, 1989, Part I, at 11, col. 3 [hereinafter *Excerpts: For Drug Kingpins*].

governments as well as the private sector.²⁸⁵

Internationally, President Bush has called for a five-year, two billion-dollar campaign to combat drug producers, traffickers, and smugglers in the Andean region.²⁸⁶ The President also is focusing on the elimination of cocaine production through crop eradication. To accomplish these goals, President Bush has pledged U.S. military power to foreign governments to combat the powerful drug cartels within their borders.²⁸⁷ To stop the flow of drugs to America, the President has allocated one and one-half billion dollars to drug interdiction, emphasizing greater use of drug-detection dogs, container inspections, air interdiction, and other methods of interception.²⁸⁸

Given the magnitude of the national campaign and its stark emphasis on law enforcement and drug interdiction, judicial criticism will be somewhat stifled. The judiciary will have difficulty rebuking government-sponsored drug testing as being in contravention to civil liberties when billions of dollars are being spent to expand the criminal justice system and to enforce the nation's drug laws. Popular pressures backing the campaign also may sway judicial favor. Under this onslaught, it is questionable whether the judiciary will emerge from the war against drugs with the ability to judge drug-related issues impartially.

Thus, one can anticipate that the initial reluctance exhibited by the lower courts in extending random drug testing to different employment contexts will dissipate under this assault. If the popular momentum continues, *Von Raab's* compelling governmental interest rationale will ultimately justify random drug testing in any working environment because, in the eyes of the nation, what interest is more compelling than saving America from the throes of addiction?

285. Hunt, *supra* note 282, at A8, col. 6.

286. *Id.* at A8, col. 1; see also *Excerpts: For Drug Kingpins*, *supra* note 284, at 11, col. 3. About \$250 million dollars will be provided to the nations of Peru, Bolivia, and Columbia during 1989 to plan their attacks on drug suppliers. *Highlights of the Bush Plan*, L.A. Times, Sept. 6, 1989, Part I, at 11, col. 1. This amount will increase to \$449 million in 1990. *Id.*

287. The President was quoted as saying:

Our message to the drug cartels is this: The rules have changed. We will help any government that wants our help. When requested, we will for the first time make available the appropriate resources of America's armed forces. We will intensify our efforts against drug smugglers on the high seas, in international airspace and at our borders.

What the President Said, L.A. Herald Examiner, Sept. 6, 1989, at A8, col. 1 (emphasis added).

288. *Id.*

VI. CONCLUSION

With the continuous bombardment of anti-drug propaganda from the Presidential podium, the *Von Raab* decision approving suspicionless drug testing hardly can be characterized as unexpected. The intensity of the national mobilization to eradicate drugs, along with the conservative makeup of the Supreme Court, has forecasted the impending decision. With four Reagan appointees on the bench,²⁸⁹ it is no wonder that many of that administration's goals have recently been implemented, including mandatory drug testing in the federal workplace.²⁹⁰ As evidenced by the composition of the Court and the somewhat slanted delivery of the majority opinion, a politically pliable balancing test has been applied in determining the reasonability of governmental drug testing.

Although somewhat anticipated by the political and national aura, the resounding effects of the *Von Raab* decision should not be lightly overlooked. The fourth amendment provides that all citizens have the right to be free from unreasonable searches and seizures.²⁹¹ The purpose behind amending the Constitution was to ensure that the government has a strong, individualized justification for invading individual privacy rights.²⁹² However, the imposition of suspicionless drug testing on the federal work force will violate the privacy rights of millions of workers without constitutional ratification.²⁹³ The human anatomy, once "draped in constitutional protection,"²⁹⁴ is now nakedly exposed for institutional inspection. By permitting mass governmental intrusions on human dignity and privacy interests

289. During his tenure as President, Ronald Reagan elevated Justice William H. Rehnquist to the position of Chief Justice and appointed Justices O'Connor, Scalia, and Kennedy to positions on the bench.

290. The Court also has delimited abortion rights, curbed affirmative action programs and restricted the scope of civil rights. See Kamen, *Divisive Issues at Center Stage as Court Term Ends*, Wash. Post, July 5, 1989, § 1, at A1, col. 2-3. The *Washington Post* observed:

The 1988-89 term marked the actual beginning of the era of Chief Justice William H. Rehnquist, and the year that the 'Reagan revolution' finally reached the high court. With four Reagan appointees joined by staunchly conservative Justice Byron R. White, the court moved toward enacting many of the Reagan administration's goals.

Id. at A1, col. 2.

291. U.S. CONST. amend IV; see, e.g., *Capua v. City of Plainfield*, 643 F. Supp. 1507, 1517 (D.N.J. 1986).

292. *Capua*, 643 F. Supp. at 1517.

293. See *id.* at 1513. Presently, the greatest impact will be felt by the four million workers in the transportation industry. Kurtjian, *supra* note 140, at 1. Because of public safety concerns, the federal government has ordered the commencement of drug testing procedures in January 1991 for airline pilots, bus and truck drivers, and other common carriers. *Id.*

294. *Capua*, 643 F. Supp. at 1513 (citing *United States v. Afanador*, 567 F.2d 1325 (5th Cir. 1978)).

without individualized suspicion, the Court has embarked upon a dangerous precedent of abrogating constitutional guarantees.

President Bush has characterized drugs as "the gravest domestic threat facing our nation."²⁹⁵ Perhaps, he should also have characterized America's enthusiasm for the abolition of drugs as the gravest domestic threat facing civil liberties. By sanctioning suspicionless drug testing, the Court sacrifices one of the basic tenets of the Constitution and a free society—"the right to be let alone."²⁹⁶

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295. Hunt, *supra* note 282, at A1, col. 6.

296. *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

