

A RESOLUTION OF THE BOARD OF COUNTY COMMISSIONERS OF ST. JOHNS COUNTY, FLORIDA, MAKING FINDINGS OF FACT AND ESTABLISHING THE CRITERIA AND PRIORITIES OF CARE FOR ST. JOHNS COUNTY NON MANDATED SOCIAL SERVICE PROGRAMS.

BE IT RESOLVED by the Board of County Commissioners of St. Johns County, Florida (the "Board") as follows:

Section 1. The Board hereby finds and determines the following:

- A. St. Johns County (the "County") is not required by state or federal law to provide free non mandated welfare assistance or social services to any person whatsoever.
- B. Nevertheless, St. Johns County has for many years demonstrated its commitment to providing assistance to individuals and families residing in the County who are in need by funding numerous non mandated social service programs in an effort to ensure a minimum quality of life standard for its residents.
- C. County funds are a precious and limited resource and are obtained by the County by taxing or assessing its citizens or their property, by charging increased sales taxes, by charging user fees for County services or by receiving moneys from other sources that, in fact, must extract such funds from private persons or corporations.
- D. The County is confronted with significant funding priorities such as police protection, fire protection, road and bridge maintenance and repair, and flood protection that require the County to ration its limited funds.
- E. In that regard, the Board is determined to focus its human resources efforts to support and encourage self-sufficiency and full employment rather than dependency in order to ensure efficiency and avoid waste.
- F. Studies in San Diego County, California have shown that 18 to 22 percent of Aid For Dependent Children mothers have substance abuse problems. San Diego County has implemented a pilot drug testing and treatment program as a requirement for AFDC eligibility as a means of assisting drug impacted AFDC families toward sobriety; the intent being to make sure receipt of free public funds is a temporary solution for families and not a lifestyle.
- G. San Diego County has also determined that approximately 25 percent of general relief recipients screened are determined to be chemically dependent.

- H. Since implementing its drug testing and treatment program for welfare recipients, San Diego County has experienced a dramatic drop in welfare applicants, indicating that many "welfare abusers" have been weeded out.
- I. The Courts have recognized that the use of illegal drugs induces disorderly conduct and is incompatible with clear-thinking, honesty and clear insightedness. See Chandler v Miller, 73 F.3d 1543 (11th Cir. 1996) and Vernonia School District v Wayne Acton, 515 U.S. __, 132 L. Ed. 2d 564, 115 S. Ct. __ (1995). The Courts have also recognized that illegal drugs have a deleterious effect on a person's motivation, memory, judgement, reaction and performance (Vernonia School District). The Florida Legislature has found and determined (Florida Statute 112.0455(3)) that drug use creates a variety of workplace problems, including increased absenteeism, increased financial burden on health and benefit programs and decreased worker productivity. It follows then, that the use of illegal drugs is inconsistent with gainful employment and self sufficiency.
- J. Additionally, the United States Supreme Court has recognized that drug abuse is one of the most serious problems confronting our society today. National Treasury Employees Union v Von Raab, 489 U.S. 656, 674 (1989). It is in the public interest that the County discourage the use of illegal drugs by its citizens.
- K. A review of recent case law upholding the right of employers to require applicants for employment and selected employees to take and pass tests pertaining to illegal drug use shows that drug test requirements are becoming widespread throughout the United States and are accepted by society as a reasonable limited intrusion into individual privacy expectations.
- L. Additionally, the United States Supreme Court (in Von Raab) has recognized that providing extensive background information as part of an application procedure diminishes expectations of privacy in respect to drug tests. The extensive personal background questionnaire filled out by County social service assistance applicants, as a requirement by St. Johns County, significantly reduces the applicant's expectation of privacy. Personal information such as social security number, employment history, monthly income, expenses, assets, bank accounts, medical problems, and family member information, is required as a part of the application procedure. Additionally, it is not uncommon in Florida for persons applying for or receiving a variety of different services, privileges, or opportunities, such as employment, athletics, medical care, dental care, and driver's licenses to be required to answer inquiries or pass tests pertaining to illegal drug use.
- M. It is not economically feasible and could possibly result in an unacceptable invasion of privacy to investigate, scrutinize and monitor the day-to-day lives of applicants for, or beneficiaries of, the County's non mandated social services in order to determine whether there is reasonable suspicion or probable cause to believe that one, or any of, such persons is ineligible for non mandated County social services by reason of using illegal drugs. Unlike employees, such persons are not in the eight hour a day - five day a week - presence and supervision of

an employer that can otherwise provide such monitoring.

- N. Requiring applicants for, and recipients of, free non mandated non earned County social service assistance to take and pass tests for illegal drugs is no more intrusive than requiring federal government custom agents to take and pass tests for illegal drugs in order that they may continue to work for their pay (as approved in Von Raab) or than requiring candidates for state public office to take and pass tests for illegal drugs (as approved in Chandler v Miller).
- O. Each potential applicant for, or recipient of, free non mandated non earned County social service assistance will be given advance notice that such person may avoid the requirement of taking the test for illegal drugs required by this resolution by merely choosing not to apply for, or receive, non mandated County social service assistance.
- P. The test for illegal drugs required by this resolution may be avoided at the sole option of each citizen and resident of the County without notice to any government official by merely not seeking or receiving free non mandated County social service assistance.
- Q. A recent non-scientific poll by The St. Augustine Record asked the readers of The St. Augustine Record whether the County should proceed with plans to require that welfare recipients take drug tests. Of the 421 responses to the poll, 400 (95 percent) responded that the tests should be required. Such poll indicates that the society in which the applicant for, or user of, non mandated County social services lives does not believe that an applicant for, or user of, non mandated County social services has a sufficient reasonable expectation of privacy to justify such applicant or user from not being required to take and pass a drug test as a condition to receiving non mandated County social services.
- R. The County's requirement that a person applying for, or receiving, free non mandated County social service assistance must take and pass a test for illegal drugs is not designed to aid in law enforcement in the criminal context in that, as determined above, each citizen and resident of the County may avoid such test by not applying for such social service assistance and no provision is made to advise law enforcement authorities whether or not a person passed or failed a test. A warrant for each such test is thus not required by the Fourth Amendment to the United States Constitution.
- S. The Tenth Amendment to the United States Constitution reserves to the States all powers that are not prohibited by the Constitution or delegated by the Constitution to the United States. The Florida Constitution and Chapter 125, Florida Statutes grant Home Rule Power to the County.
- T. It is within the power of the County to put limitations on the amount of money the County will spend to provide free non mandated County social services. It is also within the County's power to devise rational means for (i) limiting the number of persons who will receive such

free County assistance and (ii) prescribing qualifications for eligibility for such County assistance.

Section 2. Applicants for, and persons receiving benefits from, the non-mandated social service programs administered by St. Johns County consisting of (i) outpatient testing, (ii) physician services, (iii) medication, and (iv) hospitalization (collectively referred to herein sometimes as "non mandated County social services"), may receive, or continue to receive, benefits from such social service programs if the following criteria are met:

1. Individuals and families seeking non mandated County social services must complete the County's Social Services application including proof of residency.
2. The income level for all participants in non mandated County social service programs shall not exceed 100% of the most current Federal Poverty Guidelines.
3. The assets of the applicant or family seeking or using non mandated County social service programs, as determined in the manner set forth in Exhibit A attached hereto, shall not exceed \$2,500.
4. The applicant or other family member seeking or using non mandated County social service programs must demonstrate that they are employed, or unemployable due to mental or physical disabilities.
5. Each applicant for and user of a non mandated County social service program will be subject to taking and passing one or more tests for illegal drugs as a condition to being or remaining eligible for such services.

Section 3. County staff is directed to draft and adopt a drug testing policy that sets forth the procedures to be used to enforce the drug testing requirement set forth in Section 2 above prior to implementing the drug testing requirement. Such policy shall address and accomplish the following:

- A. Identify or provide a means for identifying (such as reference to specific statutory law) each of the illegal drugs that the tests will be designed to detect and the use of which will disqualify a person from receiving non mandated County social services. Additionally, provisions shall be made to limit the tests solely to the detection of such illegal drugs and for no other purpose.
- B. Provide advance notice or reasonable opportunity for advance notice to each applicant for, and recipient of, non mandated County social services. The notice shall identify each non mandated County social service that is subject to the drug test requirement and shall advise that there is a drug testing requirement as a condition to applying for and receiving each such non mandated County social service. The notice shall also advise that the required drug tests may be avoided by not applying for or receiving the identified non mandated County social services. As used above - advance notice - means notice prior to communicating directly with a County employee or agent who receives applications for such non mandated County social

services and/or who dispenses such services.

- C. Provide actual notice to each applicant for, and recipient of, a non mandated County social service. The notice shall advise that there is a drug testing requirement as a condition to applying for and receiving such non mandated County social service. The notice shall also advise that the required drug test may be avoided by not applying for or receiving the non mandated County social service.
- D. Provide a procedure whereby each person who takes a drug test pursuant to this resolution is advised before taking the test that he or she may, but is not required to, advise the County employee or agent who initiates the testing procedure or administers the test of any prescription and over the counter medication such person is taking and that such person may, but is not required to, advise appropriate County staff of such prescription and over the counter medications during his or her appeal, if any, of a positive test result. Such procedure shall endeavor to assure that only the person submitting the medicine information and those persons who need to know the medicine information in order to evaluate the test results or devise alternate tests that account for the medicine know such medicine information.
- E. If the person receiving the notice and advice described in subparagraphs C and D above still wishes to receive non mandated County social services, require such person to sign a written acknowledgment that he or she received and understood the notice and advice.
- F. Provide a procedure whereby a percentage of persons receiving non mandated County social services are randomly required to take and pass the test for illegal drugs as a condition to their continued receipt of such services.
- G. Provide a procedure whereby County staff may require a person receiving non mandated County social services to take and pass a test for illegal drugs as a condition to their continued receipt of such services when County staff has an articulated reasonable suspicion that such person is using illegal drugs.
- H. Provide a procedure whereby each person being tested is assured a reasonable degree of dignity and privacy while producing and submitting his or her urine, blood or other sample consistent with the County's need to assure reliability of the sample.
- I. Provide a procedure whereby the test samples are correlated to the person giving the drug test sample by a number or some other code so that the person's name is not readily made known to each person who handles and/or tests the sample.
- J. Provide a procedure regarding the chain of custody of the drug test specimens and drug test results to assure reasonable privacy to the persons submitting the test specimens and to assure that the test specimens are not tampered with and that each test specimen and test result remains correlated to the name of the person who submitted the specimen.
- K. Provide a procedure to (i) promptly notify each person that fails the drug test that his or her

test showed the presence of an illegal drug(s) and (ii) advise such person which illegal drug(s) were identified by the test. Such notification procedure shall endeavor to assure that only the person submitting the test sample and those persons who need to know the test results in order to carry out the County's social service policy know the results of the tests.

- L. Provide a procedure whereby a person who fails a drug test may appeal the test results and identify the circumstances whereby a person has a right to take one or more additional tests.
- M. Notify each person who fails a drug tests taken pursuant to this resolution of the local drug abuse assistance programs that may be available to such person.
- N. Provide time periods and/or other criteria under which a person who failed a drug test taken by reason of this resolution may reapply for eligibility for the non mandated County social services addressed by this resolution.

Section 4. The County Administrator or his designee is hereby given the authority to authorize special or medical exemptions.

Section 5. Should any section, subsection, subparagraph, clause or provisions of this resolution, or any amendment hereto, be declared by a court of competent jurisdiction to be invalid, the same shall not affect the validity of this resolution as a whole or any part thereof, other than the part so declared to be invalid.

PASSED AND ADOPTED by the Board of County Commissioners of St. Johns County, State of Florida, this 10th day of September, 1996.

BOARD OF COUNTY COMMISSIONERS
OF ST. JOHNS COUNTY, FLORIDA

By: Donald Jordan
Chairman Donald Jordan

ATTEST: CARL "BUD" MARKEL, CLERK

By: Denora Newsome
Deputy Clerk

EXHIBIT A

ASSETS

DEFINITION

Assets are those possessions which an individual owns. Assets include liquid resources such as checking and savings accounts, savings certificates, bonds, stocks, and non-liquid resources such as: non-homestead property, land, and business equipment, minus indebtedness. Indebtedness is the amount due to satisfy contract terms against an item to establish ownership. This includes interest over the full term of the contract, but does not include commissions, fees or penalties involved in selling the asset.

REQUIREMENT

In order to be eligible for assistance, the individual or family must not have assets in excess of the maximum standards established by the St. Johns County Board of County Commissioners which is \$2,500.

AVAILABILITY OF ASSETS

Assets are considered as being available when actually available or when the applicant has the legal ability to make such funds available. Assets which are not available due to legal restrictions or factors beyond their control are considered to be unavailable and will not be counted in determining eligibility, provided such restrictions were not created by the applicant.

Determination of the availability of assets which appear unavailable due to legal restrictions must be determined by the County Administrator or his designee.

Examples:

- Client inherited property in another state. He provides legal papers which appear to indicate that he cannot sell it.
- A trust fund has been established for a minor child. It appears that neither the child nor his parents have access.

Determination of the availability of assets which appear unavailable due to factors beyond the applicant's control must be reviewed by the Director of Social Services. If necessary, the case should be forwarded to the County Administrator or his designee for final determination.

Examples:

- Client owns a small piece of property in another state. He states that his attempts to sell it have been unsuccessful. A real estate agency verifies that the property is in a remote area, is too small to build upon, and that no one has shown interest in buying it at any price.
- Client owns a stamp collection which is valued at \$3,000. The collection is located in his ex-wife's safety deposit box and she refuses to permit him access.

Determination that converting a non-liquid asset would prevent the client from future earnings or would prevent the client from obtaining immediate and necessary care must be made by the Director of Social Services.

Examples:

- Client has a lawn maintenance business and owns approximately \$5,000 worth of equipment. He is temporarily ill and fully intends to return to his business within five months.
- Client is attempting to sell his business property as he has a chronic condition and will be unable to return to work. A real estate agent verifies that the listed price is fair, but that no one has shown interest in the property. Client is in need of immediate care.

TRANSFER OF ASSETS

A client must not make an assignment, sale, gift or transfer of assets with the intent of meeting or maintaining eligibility for assistance.

When it is determined that an asset was transferred with the sole intent of meeting or maintaining eligibility, assistance must be denied and an ineligibility period determined by dividing the value of the asset by the Federal Poverty Level for the assistance

group. The determination of ineligibility must be based on the intent of the transfer rather than the value received.

Client must be asked whether an asset affecting eligibility has been transferred or sold within the 90 day period preceding the date of application or the date(s) for which assistance is being requested. If a client has transferred or sold an asset, the interviewer must request and record detailed information concerning the transaction.

The client's statement is usually sufficient to determine the intent of the transfer. When the intent is unclear, the case should be referred for investigation.

When it appears that an asset was sold or transferred in order to meet or maintain eligibility, the case must be referred to the Social Services Director for review and determination. If necessary, the case may be referred to the County Administrator or his designee for final determination.

The Department has the burden of proof in cases involving this policy. It is therefore essential that the records include detailed information concerning the type of asset transferred, date, to whom, and reason for transfer.

Clients have the right to dispose of assets below the asset limit or those not affecting eligibility. However, the net value received from such disposition must be assessed to determine if the value affects eligibility.

CONVERSION OF ASSETS

Proceeds from the sale or conversion of an asset are considered assets rather than income, even when cash is received. Documentation/verification of the new asset must be obtained and the proceeds or converted asset must be evaluated to determine whether the new asset affects eligibility.

Examples:

- Client cashed a certificate of deposit. The cash is considered an asset.
- Client sold an automobile. The cash is considered an asset.
- Client cashed a \$300 certificate of deposit and used the cash as a down payment on an automobile. The automobile is not considered an asset.

The County has always excluded cars as an asset when someone works.

Examples:

- In the case of a married couple with two cars and only one person working, the second car of lesser value, would be considered an asset.
- However, if both are employed neither vehicle would be considered an asset.

OWNERSHIP

A client whose name is listed as the sole owner of an asset will be considered to have exclusive use or access to the asset. Clients who claim that they do not have sole access or that they are administering the asset for another person, will be informed that the Department policy does not acknowledge such claims.

A client who's name is listed as the joint owner of an asset, will be considered to have access to the total value of the asset. Clients who claim not to have access or to have joint access, must provide verification to substantiate their statements.

Examples:

- Client's name is listed as the sole owner of a savings account. Client states that his name is only listed as his mother is unable to take care of her financial matters.
- Client's name is listed as the joint owner of a checking account. Client provides verification that the account belongs to her mother and that her name is only listed for emergency purposes. A study of the client's financial management also indicates that she has not accessed the account. Asset will not be considered when determining eligibility.

Unusual situation should be referred to the Social Services Director for review and recommendation.

INELIGIBLE FOR OTHER PROGRAMS

Clients who are ineligible for a State or Federal program due to excess assets, but whose assets do not affect eligibility for Department assistance, will be provided with assistance for a two month period. In such situations, the client must be informed of this policy and encouraged to make appropriate plans.

Example:

- Client is ineligible for AFDC assistance due to the value of a 1993 Buick. Client will be eligible for Department assistance for a maximum period of two months.

ASSETS WHICH AFFECT ELIGIBILITY

The following is a list of those assets which affect eligibility and which must be documented/verified prior to authorizing assistance.

Bank Accounts

Accounts which are held in a financial institution and are usually paid upon demand. The asset value is the balance in the account on the date of eligibility determination.

- Documentation or verification: Information which lists all owners and account balances.
- Sources of Information: Bank statements, contact with financial institution, letter from account holder.

Income Producing Property

Income producing property may include vehicles, tools, livestock, equipment, machinery and similar goods owned, usually in quantities beyond the customary needs of normal living, and in fact, used by members of an assistance group to produce income for support of the group. This may include income producing property owned by a recipient who is currently unemployed, but can reasonably be expected to return to work. However, if there is no expectation that the recipient will return to work, at least in that particular field, then the personal property shall be considered as a resource.

Business Equipment:

- Documentation or verification: Information which lists the ownership of property and the type, make, model and age of machinery or equipment.
- Sources of Information: County tax assessor, reputable business dealer.

Cash:

This includes money in possession of a client or to which the client has access.

- Documentation or verification: Information from the client regarding the amount of cash and its location.
- Sources of information: The client's statement is acceptable.

Collections:

This includes gun, coin, stamp, antique, or other collections which are of value.

Documentation or verification: Written statement from a reputable dealer which outlines the type of collection and its' current cash value.

Sources of information: Local club or organization, dealer or business.

Individual Investments:

This includes stocks, bonds, certificates of deposit, mutual funds, deferred compensation plans, IRA's, etc.

- Documentation or verification: Information from a financial institution or investment company which is sufficient to establish ownership.
- Sources of information: Information on the current market or cash value may be secured from the bank, investment company, newspaper, etc. The source and date of the quotation must be recorded.

Real Estate:

This includes any land, house, mobile home, condominium, or houseboat which is not the homestead. The value is the county tax assessed value minus any indebtedness against the property.

- Documentation or verification: Information which includes the name of the owner, legal description, amount of indebtedness, name of lien holder and assessed value.
- Sources of information: Deed, liens, county records, or contact with lien holder.

ASSETS WHICH DO NOT AFFECT ELIGIBILITY

The following are those assets which do not affect eligibility. Documentation or verification is only required if information appears questionable.

Homestead:

The house, mobile home, condominium or boat, which the client owns and in which he/she resides is recognized as homestead property. The composition of homestead property is determined by the county tax assessor.

When the client permanently leaves the homestead and establishes a residence elsewhere, the homestead becomes an asset regardless of how it is considered for tax purposes. If the home is temporarily unoccupied due to the client's illness, casualty loss or natural disaster and the client clearly intends to return, the home continues to be considered as homestead.

- Documentation or verification: Information containing the owner's name and the legal description. The client must state whether the property is occupied, and if not give a reason.
- Sources of information: Tax statements, deeds, county property records, fire department records, police records, etc.

Life Estate:

Life estate entitles the holder to occupy a property for the remainder of his lifetime, to collect rents and profits from the property and make him/her responsible for taxes. Life estate does not entitle the holder to sell the property, but neither can the owner sell the property without the consent of the person hold life estate.

- Documentation or verification: Information containing the name of the person holding life estate, the exact name of the owner and the location of the property.
- Sources of Information: Deeds, county property records, legal records, etc.

Real Estate - Inherited Not Probated:

This is property which will be inherited by the client, but which cannot be sold because the estate or will has not been probated.

- Documentation or verification: Information concerning the location of the property, names of heirs, name of attorney, status of will or ostate.
- Sources of information: Attorney for the heirs, Office of the County Probate Judge, Probate Court records, executor of the will.

Grants:

Grants to any undergraduate student for educational purposes which are made or insured under any program or any grant which is made for educational purposes and the sponsor of such grant precludes the use of such funds for maintenance purposes. All resources remaining from student grants if:

- The sponsor of the grant precludes its use for maintenance purposes.
- The work/study program is administered by the college or university in which the undergraduate student is enrolled.

[489 US 656]

NATIONAL TREASURY EMPLOYEES UNION, et al., Petitioners

v

WILLIAM VON RAAB, Commissioner, United States Customs Service

489 US 656, 103 L Ed 2d 685, 109 S Ct 1384

[No. 86-1879]

Argued November 2, 1988. Decided March 21, 1989.

Decision: Fourth Amendment held not violated by United States Customs Service drug testing requirement for employees seeking transfer or promotion to certain positions.

SUMMARY

In 1986, the Commissioner of the United States Customs Service announced implementation of an employee drug testing program, which would require urinalysis tests—designed to detect the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine—for employees who sought transfer or promotion to three categories of positions: those which (1) directly involved the interdiction of illegal drugs; (2) required the carrying of a firearm; or (3) required the handling of “classified” materials. A union of federal employees and a union official filed suit against the Commissioner in the United States District Court for the Eastern District of Louisiana, and alleged that the drug testing program violated various laws, including the search and seizure provisions of the Federal Constitution’s Fourth Amendment. The District Court (1) expressed the view that the program constituted an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy; (2) enjoined the drug testing program; and (3) ordered the Customs Service not to require drug tests of any applicants for covered positions (649 F Supp 380). On appeal, a divided panel of the United States Court of Appeals for the Fifth Circuit vacated the injunction and expressed the view that (1) the Customs Service program, by requiring an employee to produce a urine sample for chemical testing, effected a search within the meaning of the Fourth Amendment; but (2) the searches required by the program were reasonable under the Fourth Amendment (816 F2d 170). After the Court of Appeals’ decision, the United States Department of

Briefs of Counsel, p 1019, *infra*.

Health and Human Services (HHS), in accordance with a recently enacted federal statute (PL 100-71, § 503, 5 USCS § 7301 note), promulgated regulations governing certain federal employee drug testing programs.

On certiorari, the United States Supreme Court affirmed so much of the judgment of the Court of Appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms, vacated the judgment to the extent that the judgment upheld the testing of applicants for positions requiring the handling of "classified" materials, and remanded the case for further proceedings. In an opinion by KENNEDY, J., joined by REHNQUIST, Ch. J., and WHITE, BLACKMUN, and O'CONNOR, JJ., it was held that (1) the court would consider the HHS regulations to the extent that they supplemented or displaced the Commissioner's original directive; (2) where, as in the case at hand, the Federal Government required employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples were searches that had to meet the reasonableness requirement of the Fourth Amendment; (3) the public interest in the Customs Service program had to be balanced against the privacy concerns implicated by the tests, without reference to the usual presumption in favor of the warrant and probable cause procedures specified in the Fourth Amendment, because the program was not designed to serve the ordinary needs of law enforcement; (4) the balance of privacy and governmental interests did not require a warrant in the context of the Customs Service program; (5) with respect to positions which directly involved the interdiction of illegal drugs or required the carrying of a firearm, the testing of such employees was reasonable under the Fourth Amendment, even in the absence of probable cause or some level of individualized suspicion; but (6) with respect to positions which required the handling of "classified" materials, there was a question whether the Customs Service had defined the category more broadly than necessary to meet the purposes of the program; and (7) upon remand, the Court of Appeals should (a) examine the Customs Service criteria used in determining what materials are "classified," and in deciding whom to test under that category, and (b) consider, in assessing the reasonableness of requiring tests for the "classified" materials category, pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which the employees were already subject.

MARSHALL, J., joined by BRENNAN, J., dissenting, expressed the view that (1) in the case at hand, as in *Skinner v Railway Labor Executives' Asso.* (1989) 489 US 602, 103 L Ed 2d 639, 109 S Ct 1402, the court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause was unprincipled and unjustifiable; but (2) even if he believed that balancing analysis was appropriate under the Fourth Amendment, he would still dissent from the court's judgment in the case at hand, for the reasons stated in the opinion by SCALIA, J., and the reasons noted by the dissenting Court of Appeals judge below relating to the inadequate tailoring of the Customs Service program.

SCALIA, J., joined by STEVENS, J., dissenting, expressed the view that (1)

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(1989) 489 US 656, 103 L Ed 2d 685, 109 S Ct 1384

under the Fourth Amendment, the drug testing program of the Customs Service involved searches particularly destructive of privacy and offensive to personal dignity; (2) neither frequency of drug use by the targeted class of employees nor connection between such use and grave harm had been demonstrated or was even likely; and (3) the Customs Service rules were a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

HEADNOTES

Classified to U.S. Supreme Court Digest, Lawyers' Edition

Search and Seizure § 15 — employee drug testing — reasonableness — a United States Customs Service drug testing program—which portion, as modified by United States Department of Health and Human Services, 1a-1m. With respect to a portion of

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63A Am Jur 2d, Public Officers and Employees §§ 326, 327; 68 Am Jur 2d, Searches and Seizures §§ 10, 29, 54, 105

22 Am Jur Proof of Facts 385, Identification of Substances by Instrumental Analysis

USCS, Constitution, Amendment 4; 5 USCS § 7301 note

RIA Employment Coordinator ¶¶ EP-18,452—EP-18,460, PM-14,708, PM-14,725—PM-14,733

US L Ed Digest, Appeal §§ 1692.3, 1750; Search and Seizure §§ 2, 11, 15, 25

Index to Annotations, Compulsion or Compulsory Matters; Drugs and Narcotics; Privacy; Public Officers and Employees; Rules or Regulations; Search and Seizure; Treasury Department; Urine Test

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

ANNOTATION REFERENCES

Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.

Physical examination or exhibition of, or test upon, suspect or accused, as violating rights guaranteed by Federal Constitution. 16 L Ed 2d 1332, 22 L Ed 2d 909.

Validity, under Federal Constitution, of regulations, rules, or statutes requiring random or mass drug testing of public employees or persons whose employment is regulated by state, local, or federal government. 86 ALR Fed 420.

Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed 119.

Requiring submission to physical examination or test as violation of constitutional rights. 25 ALR2d 1407.

Services (HHS) regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test, designed to detect the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine, from employees who apply for transfer or promotion to positions which directly involve the interdiction of illegal drugs or require the carrying of a firearm—the testing of such employees is reasonable under the Federal Constitution's Fourth Amendment, even in the absence of probable cause or some level of individualized suspicion, because (1) the Federal Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of the nation's borders or the life of the citizenry outweigh the privacy interests of the employees, who, by virtue of the special and obvious physical and ethical demands of such positions, enjoy a diminished expectation of privacy as to the intrusions occasioned by such urine tests; (2) the prescribed testing procedures do not carry the grave potential for the arbitrary and oppressive interference with the privacy and personal security of individuals that the Fourth Amendment was designed to prevent; and (3) in all the circumstances, the program bears a close and substantial relationship to the Customs Service's goal. (Marshall, Brennan, Scalia, and Stevens, JJ., dissented from this holding.)

Appeal §§ 1692.3, 1750 — validity of drug testing program — remand for clarification — matters to be considered

2a-2g. With respect to a Federal Court of Appeals decision holding

that the search and seizure provisions of the Federal Constitution's Fourth Amendment were not violated by a United States Customs Service drug testing requirement for employees who seek transfer or promotion to positions requiring the handling of "classified" materials, the United States Supreme Court will vacate the judgment and remand the case to the Court of Appeals for further proceedings, including such proceedings as may be necessary to clarify the scope of the "classified" materials category, where the Supreme Court is unable, on the record before it, to determine whether the Fourth Amendment's reasonableness requirement is met by the Customs Service program for such positions—as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note)—for (1) it is not evident that those occupying all the positions selected for coverage are likely to gain access to sensitive information, and (2) such an apparent discrepancy raises the question whether the Customs Service has defined the category more broadly than necessary to meet the purposes of its drug testing program; the Supreme Court will direct the Court of Appeals, upon remand, (1) to examine the Customs Service criteria used in determining what materials are "classified," and in deciding whom to test under that category, and (2) to consider, in assessing the reasonableness of requiring tests for the "classified" materials category, pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which the employees are already subject.

(Scalia and Stevens, JJ., dissented in part from this holding).

Appeal § 1662 — federal program — effect of subsequent regulations

3a, 3b. In reviewing, on certiorari, a Federal Court of Appeals decision holding that the search and seizure provisions of the Federal Constitution's Fourth Amendment were not violated by a United States Customs Service employee drug testing program, the United States Supreme Court will consider United States Department of Health and Human Services (HHS) regulations governing certain federal employee drug testing programs, to the extent that the HHS regulations supplement or displace the original directive of the Commissioner of the Customs Service, where (1) after the Court of Appeals' decision, the HHS regulations were promulgated in accordance with a recently enacted federal statute (PL 100-71, § 503, 5 USCS § 7301 note); (2) under § 503, the HHS regulations control to the extent that the regulations add to, or depart from, any procedures adopted as part of a federal drug screening program covered by PL 100-71; and (3) both parties agree that the Customs Service program must conform to the HHS regulations.

Search and Seizure §§ 2, 11 — what constitutes search — employee drug testing — reasonableness requirement

4a, 4b. Where the Federal Government requires employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reason-

ableness requirement of the Federal Constitution's Fourth Amendment; thus, the Fourth Amendment's reasonableness requirement must be met by a United States Customs Service drug testing program which, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employees who seek transfer or promotion to certain positions.

Search and Seizure §§ 5, 25 — Fourth Amendment — necessity of warrant — probable cause

5. Under the Federal Constitution's Fourth Amendment, a search must be supported, as a general matter, by a warrant issued upon probable cause, but neither a warrant nor probable cause, nor any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance; where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the government's interest to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. (Marshall and Brennan, JJ., dissented in part from this holding.)

Evidence § 102; Search and Seizure §§ 11, 25 — presumption — necessity of warrant — probable cause — employee drug testing

6a, 6b. In determining whether there is a special need which justifies a departure from the ordinary

warrant and probable cause requirements of the Federal Constitution's Fourth Amendment with respect to a United States Customs Service drug testing program—which, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employees who seek transfer or promotion to certain positions—the public interest in the Customs Service program must be balanced against the privacy concerns implicated by the tests, without reference to the usual presumption in favor of the procedures specified in the Fourth Amendment's warrants clause, because the Customs Service program is not designed to serve the ordinary needs of law enforcement, where (1) the program's test results may not be used in a criminal prosecution of the employee without the employee's consent; and (2) the purposes of the program are (a) to deter drug use among those eligible for promotion to sensitive positions within the Customs Service and (b) to prevent the promotion of drug users in those positions. (Marshall and Brennan, JJ., dissented from this holding; Scalia and Stevens, JJ., dissented in part from this holding.)

Search and Seizure § 25 — necessity of warrant — employee drug testing

7a-7d. The balance of privacy and governmental interests does not, under the Federal Constitution's Fourth Amendment, require a warrant in the context of a United States Customs Service drug testing program—which, as modified by United States Department of Health and Human Services regulations

promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employees who seek transfer or promotion to certain positions—for (1) even if Customs Service employees are more likely to be familiar with the procedures required to obtain a warrant than most other government workers, requiring a warrant would serve only to divert valuable agency resources from the pressing responsibilities of Customs Service's primary mission; and (2) a warrant would provide little or nothing in the way of additional protection of personal privacy, where (a) the circumstances justifying such testing and the permissible limits of such intrusions are defined narrowly and specifically, and are well known to covered employees, (b) the process, instead of being subject to the discretion of an official in the field, becomes automatic when an employee elects to apply for a covered position, and (c) there are no special facts for a neutral magistrate to evaluate, because the Customs Service does not make a discretionary determination to search based upon a judgment that certain conditions are present. (Marshall and Brennan, JJ., dissented from this holding.)

Search and Seizure § 24 — warrant — purpose

8. Under the Federal Constitution's Fourth Amendment, a warrant serves primarily (1) to advise the citizen that an intrusion is authorized by law and limited in its permissible scope, and (2) to interpose a neutral magistrate between the citizen and the law enforcement officer engaged in the often competitive enterprise of ferreting out crime.

Search and Seizure § 5 — Fourth Amendment — probable cause

9. Even where it is reasonable to dispense with the warrant requirement of the Federal Constitution's Fourth Amendment, a search ordinarily must be based upon probable cause; the probable cause standard, however, is peculiarly related to criminal investigations; in particular, the traditional probable cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, especially where the government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person; in certain limited circumstances, the government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. (Marshall and Brennan, JJ., dissented in part from this holding.)

Search and Seizure §§ 8, 11 — employee drug testing — travelers entering country

10. With respect to the validity, under the Federal Constitution's Fourth Amendment, of a portion of a United States Customs Service drug testing program—which portion, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employees who seek transfer or promotion to positions directly involved in the interdiction of illegal drugs—

the Federal Government's compelling interest in insuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment, is at least as important as the Federal Government's interest in searching travelers entering the country, which travelers may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, because of the national self-protection which reasonably requires one entering the country to identify himself or herself as entitled to come in, and the person's belongings as effects which may lawfully be brought in. (Scalia and Stevens, JJ., dissented in part from this holding.)

Search and Seizure §§ 5, 15 — use of deadly force

11. The values of the Federal Constitution's Fourth Amendment are furthered by an action which insures against the creation of the dangerous risk that Federal Government employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force, because the use of deadly force may violate the search and seizure provisions of the Fourth Amendment in certain circumstances. (Scalia and Stevens, JJ., dissented in part from this holding.)

Search and Seizure §§ 8, 11 — workplace — search of person or of effects

12. For purposes of the Federal Constitution's Fourth Amendment, while the operational realities of the workplace will rarely affect an employee's expectations of privacy with respect to searches of the employee's person, or of personal effects that the employee may bring to the workplace, certain forms of public em-

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ployment may diminish privacy expectations even with respect to such personal searches, so that (1) employees of the United States Mint should expect to be subject to certain routine personal searches when they leave the workplace every day; and (2) those who join the United States military or intelligence services not only may be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions.

Search and Seizure § 15 — employee drug testing — intrusiveness

13a, 13b. For purposes of determining whether there is a violation of the reasonableness requirement of the Federal Constitution's Fourth Amendment, the procedures prescribed by a United States Customs Service employee drug testing program—as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note)—for the collection and analysis of the requisite urinalysis test samples from employees who seek transfer or promotion to three categories of positions, significantly minimize the intrusiveness of the program, where (1) only employees who have been tentatively accepted for promotion or transfer to one of the three categories are tested, and applicants know at the outset that a drug test is a requirement of those positions; (2) the employees are notified in advance of the scheduled sample collection; (3) there is no direct observation of the act of urination, as the employee may provide a specimen in

the privacy of a stall; (4) urine samples may be examined only for the program's specified drugs—marijuana, cocaine, opiates, amphetamines, and phencyclidine; (5) the combination of enzyme-multiplied-immunoassay technique (EMIT) and gas chromatography/mass spectrometry (GC/MS) tests required by the Customs Service is highly accurate, assuming proper storage, handling, and measurement techniques; and (6) an employee need not disclose personal medical information to the Federal Government unless the employee's test result is positive, and even then any such information is reported to a licensed physician. (Scalia and Stevens, JJ., dissented in part from this holding.)

Search and Seizure § 15 — employee drug testing — reasonableness — lack of results — deterrence

14a-14d. With respect to a portion of a United States Customs Service employee drug testing program—which portion, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employees who seek transfer or promotion to positions which directly involve the interdiction of illegal drugs or require the carrying of a firearm—the program is not rendered unreasonable, for purposes of the Federal Constitution's Fourth Amendment, by the mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing, because (1) there is little reason to believe that American workplaces are immune from the pervasive social problem of drug abuse; (2) the detection of employee

drug impairment can be a difficult task, especially where, as in the Customs Service, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments; (3) the almost unique mission of the Customs Service gives the Federal Government a compelling interest in insuring that many of these covered employees do not use drugs even off duty; (4) the program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect those employees who use drugs, a deterrence goal which is not unreasonable, in light of the extraordinary safety and national security hazards that would attend the promotion of drug users to the covered positions; (5) where the possible harm against which the government seeks to guard is substantial, the need to prevent the harm's occurrence furnishes an ample justification for reasonable searches calculated to advance the government's goal; and (6) when the government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct is more logically viewed as a hallmark of success. (Scalia and Stevens, JJ., dissented from this holding.)

Search and Seizure § 15 — employee drug testing — reasonableness — avoidance of detection

15a, 15b. With respect to a United States Customs Service employee drug testing program—which, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), requires a urinalysis test from employ-

ees who seek transfer or promotion to certain positions—the Customs Services program cannot be considered unreasonable, under the Federal Constitution's Fourth Amendment, on the ground that illegal drug users can allegedly avoid the detection with ease by means of temporary abstinence or by surreptitious adulteration of urine specimens, where (1) addicts may be unable to abstain for even a limited period of time, or may be unaware of the "fade-away effect" of certain drugs; (2) no employee can reasonably expect to deceive the test by abstinence, for such avoidance techniques are fraught with uncertainty and risk; and (3) no employee can expect attempts at adulteration to succeed, in view of the precautions taken by the sample collector to insure the integrity of the sample.

Search and Seizure §§ 8, 11 — persons and luggage — airports

16a-16c. With respect to the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of the passengers' carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive, if the validity of such searches for purposes of the Federal Constitution's Fourth Amendment is generally conceded—because of the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane—then the Federal Government is not precluded from conducting such searches absent a demonstration of danger as to any particular airport or airline, because it is sufficient that the Federal Government have a compelling interest in preventing an otherwise pervasive

societal problem from spreading to the particular context; nor, in view of the deterrent purpose of such searches, does the validity of the Federal Government's airport screening program necessarily turn on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program.

Search and Seizure § 15 — employee drug testing — reasonableness — access to sensitive information

17. For purposes of determining whether a Federal Government drug testing program is reasonable, under the Federal Constitution's Fourth Amendment, the Federal Government has a compelling interest in protecting truly sensitive information from those who, under compulsion of circumstances or for other reasons, might compromise such information; moreover, Federal Government employees who seek promotions to positions where they handle such truly sensitive information can be required, under the Fourth Amendment, to submit to a urine test under a United States Customs Service drug testing program—which, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note) requires a urinalysis test for employees who seek transfer or promotion to certain positions—especially if positions requiring employ-

ees to handle such truly sensitive information also require background investigations, medical examinations, or other intrusions that may be expected to diminish the employees' expectations of privacy in respect of a urinalysis test.

Evidence § 102 — presumptions — Fourth Amendment

18. For purposes of determining the validity, under the Federal Constitution's Fourth Amendment, of a United States Customs Service employee drug testing program which, as modified by United States Department of Health and Human Services regulations promulgated in accordance with a federal statute (PL 100-71, § 503, 5 USCS § 7301 note), covers employees who seek transfer or promotion to three categories of positions—those which (1) directly involve the interdiction of illegal drugs, (2) require the carrying of a firearm, and (3) require the handling of "classified" materials—the United States Supreme Court, with respect to such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger," will assume that those positions were selected for coverage under the drug testing program by reason of the incumbent's access to "classified" materials, where it is not clear that the positions would fall under either of the other two categories.

SYLLABUS BY REPORTER OF DECISIONS

The United States Customs Service, which has as its primary enforcement mission the interdiction and seizure of illegal drugs smuggled

into the country, has implemented a drug-screening program requiring urinalysis tests of Service employees seeking transfer or promotion to

positions having a direct involvement in drug interdiction or requiring the incumbent to carry firearms or to handle "classified" material. Among other things, the program requires that an applicant be notified that his selection is contingent upon successful completion of drug screening, sets forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy, and provides that test results may not be turned over to any other agency, including criminal prosecutors, without the employee's written consent. Petitioners, a federal employees' union and one of its officials, filed suit on behalf of Service employees seeking covered positions, alleging that the drug-testing program violated, *inter alia*, the Fourth Amendment. The District Court agreed and enjoined the program. The Court of Appeals vacated the injunction, holding that, although the program effects a search within the meaning of the Fourth Amendment, such searches are reasonable in light of their limited scope and the Service's strong interest in detecting drug use among employees in covered positions.

Held:

1. Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. *Cf. Skinner v. Railway Labor Executives' Assn.*, ante, at 616-618, 103 L Ed 2d 639, 109 S Ct 1402. However, because the Service's testing program is not designed to serve the ordinary needs of

law enforcement—i. e., test results may not be used in a criminal prosecution without the employee's consent, and the purposes of the program are to deter drug use among those eligible for promotion to sensitive positions and to prevent the promotion of drug users to those positions—the public interest in the program must be balanced against the individual's privacy concerns implicated by the tests to determine whether a warrant, probable cause, or some level of individualized suspicion is required in this particular context. *Railway Labor Executives*, ante, at 619-620, 103 L Ed 2d 639, 109 S Ct 1402.

2. A warrant is not required by the balance of privacy and governmental interests in the context of this case. Such a requirement would serve only to divert valuable agency resources from the Service's primary mission, which would be compromised if warrants were necessary in connection with routine, yet sensitive, employment decisions. Furthermore, a warrant would provide little or no additional protection of personal privacy, since the Service's program defines narrowly and specifically the circumstances justifying testing and the permissible limits of such intrusions; affected employees know that they must be tested, are aware of the testing procedures that the Service must follow, and are not subject to the discretion of officials in the field; and there are no special facts for a neutral magistrate to evaluate, in that implementation of the testing process becomes automatic when an employee pursues a covered position.

3. The Service's testing of employees who apply for promotion to positions directly involving the interdiction

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tion of illegal drugs, or to positions that require the incumbent to carry firearms, is reasonable despite the absence of a requirement of probable cause or of some level of individualized suspicion.

(a) In light of evidence demonstrating that there is a national crisis in law enforcement caused by the smuggling of illicit narcotics, the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment. It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment. These governmental interests outweigh the privacy interests of those seeking promotion to such positions, who have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test by virtue of the special, and obvious, physical and ethical demands of the positions.

(b) Petitioners' contention that the testing program is unreasonable because it is not based on a belief that testing will reveal any drug use by covered employees evinces an unduly narrow view of the context in which the program was implemented. Although it was not motivated by any perceived drug problem among Service employees, the program is nevertheless justified by the extraordinary safety and national security hazards that would attend the promotion of drug users to the sensitive positions in question. Moreover, the mere circumstance that all but a few of the employees tested are innocent does not impugn the program's validity, since it is designed to prevent the substantial harm that could be caused by the

promotion of drug users as much as it is designed to detect actual drug use.

(c) Also unpersuasive is petitioners' contention that the program is not a sufficiently productive mechanism to justify its intrusion on Fourth Amendment interests because illegal drug users can easily avoid detection by temporary abstinence or by surreptitious adulteration of their urine specimens. Addicts may be unable to abstain even for a limited period or may be unaware of the "fade-away effect" of certain drugs. More importantly, since a particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy and may extend for as long as 22 days, and since this information is not likely to be known or available to the employee in any event, he cannot reasonably expect to deceive the test by abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions built into the program to ensure the integrity of each sample.

4. The record is inadequate for the purpose of determining whether the Service's testing of those who apply for promotion to positions where they would handle "classified" information is reasonable, since it is not clear whether persons occupying particular positions apparently subject to such testing are likely to gain access to sensitive information. On remand, the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric and should, in assessing the reasonableness of requiring tests of those employees, consider pertinent informa-

tion bearing upon their privacy expectations and the supervision to which they are already subject.

816 F2d 170, affirmed in part, vacated in part, and remanded.

Kennedy, J., delivered the opinion of the Court, in which Rehnquist, C.

J., and White, Blackmun, and O'Connor, JJ., joined. Marshall, J., filed a dissenting opinion, in which Brennan, J., joined. Scalia, J., filed a dissenting opinion, in which Stevens, J., joined.

APPEARANCES OF COUNSEL

Lois G. Williams argued the cause for petitioners.

Solicitor General Charles Fried argued the cause for respondent.

Briefs of Counsel, p 1019, *infra*.

OPINION OF THE COURT

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Justice Kennedy delivered the opinion of the Court.

[1a, 2a] We granted certiorari to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.

I

A

The United States Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the United States, collecting revenue from imports, and enforcing customs and related laws. See United States Customs Service, Customs U. S. A., Fiscal Year 1985, p 4. An important responsibility of the Service is the interdiction and

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seizure of contraband, including illegal drugs. *Ibid.* In 1987 alone, Customs agents seized drugs with a retail value of nearly \$9 billion. See United States Customs Service, Customs U. S. A., Fiscal Year 1987, p 40. In the routine discharge of their duties, many Customs employees have direct contact with those who traffic in drugs for

profit. Drug import operations, often directed by sophisticated criminal syndicates, *United States v Mendenhall*, 446 US 544, 561-562, 64 L Ed 2d 497, 100 S Ct 1870 (1980) (Powell, J., concurring), may be effected by violence or its threat. As a necessary response, many Customs operatives carry and use firearms in connection with their official duties. App 109.

In December 1985, respondent, the Commissioner of Customs, established a Drug Screening Task Force to explore the possibility of implementing a drug-screening program within the Service. *Id.*, at 11. After extensive research and consultation with experts in the field, the task force concluded "that drug screening through urinalysis is technologically reliable, valid and accurate." *Ibid.* Citing this conclusion, the Commissioner announced his intention to require drug tests of employees who applied for, or occupied, certain positions within the Service. *Id.*, at 10-11. The Commissioner stated his belief that "Customs is largely drug-free," but noted also that "unfortunately no segment of society is immune from the threat of illegal drug use." *Id.*, at 10. Drug interdiction has become the agency's primary enforcement mission, and the Commissioner stressed that "there is no room in the Customs Service for those who break the laws prohibit-

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ing the possession and use of illegal drugs." *Ibid.*

In May 1986, the Commissioner announced implementation of the drug-testing program. Drug tests were made a condition of placement or employment for positions that meet one or more of three criteria. The first is direct involvement in drug interdiction or enforcement of related laws, an activity the Commissioner deemed fraught with obvious dangers to the mission of the agency and the lives of customs [489 US 661]

agents. *Id.*, at 17, 113. The second criterion is a requirement that the incumbent carry firearms, as the Commissioner concluded that "[p]ublic safety demands that employees who carry deadly arms and are prepared to make instant life or death decisions be drug free." *Id.*, at 113. The third criterion is a requirement for the incumbent to handle "classified" material, which the Commissioner determined might fall into the hands of smugglers if accessible to employees who, by reason of their own illegal drug use, are susceptible to bribery or blackmail. *Id.*, at 114.

After an employee qualifies for a position covered by the Customs testing program, the Service advises

him by letter that his final selection is contingent upon successful completion of drug screening. An independent contractor contacts the employee to fix the time and place for collecting the sample. On reporting for the test, the employee must produce photographic identification and remove any outer garments, such as a coat or a jacket, and personal belongings. The employee may produce the sample behind a partition, or in the privacy of a bathroom stall if he so chooses. To ensure against adulteration of the specimen, or substitution of a sample from another person, a monitor of the same sex as the employee remains close at hand to listen for the normal sounds of urination. Dye is added to the toilet water to prevent the employee from using the water to adulterate the sample.

[3a] Upon receiving the specimen, the monitor inspects it to ensure its proper temperature and color, places a tamper-proof custody seal over the container, and affixes an identification label indicating the date and the individual's specimen number. The employee signs a chain-of-custody form, which is initialed by the monitor, and the urine sample is placed in a plastic bag, sealed, and submitted to a laboratory.¹

1. [3b] After this case was decided by the Court of Appeals, 816 F2d 170 (CA5 1987), the United States Department of Health and Human Services, in accordance with recently enacted legislation, Pub L 100-71, § 503, 101 Stat 468-471, promulgated regulations (hereinafter HHS Regulations or HHS Reg) governing certain federal employee drug-testing programs. 53 Fed Reg 11979 (1988). To the extent the HHS Regulations add to, or depart from, the procedures adopted as part of a federal drug-screening program covered by Pub L 100-71, the HHS Regulations control. Pub L 100-71, § 503(b)(2)(B), 101 Stat. 470. Both parties agree that the Customs Service's drug-testing program must conform to the HHS Regulations. See Brief for Petitioners 6, n 8; Brief for Respondent 4-5, and n 4. We there-

fore consider the HHS Regulations to the extent they supplement or displace the Commissioner's original directive. See *California Bankers Assn. v Shultz*, 416 US 21, 53, 39 L Ed 2d 812, 94 S Ct 1494 (1974); *Thorpe v Housing Authority of Durham*, 393 US 268, 281-282, 21 L Ed 2d 474, 89 S Ct 518, 49 Ohio Ops 2d 374 (1969).

One respect in which the original Customs directive differs from the now-prevailing regime concerns the extent to which the employee may be required to disclose personal medical information. Under the Service's original plan, each tested employee was asked to disclose, at the time the urine sample was collected, any medications taken within the last 30 days, and to explain any circumstances under which he may have been in

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The laboratory tests the sample for the presence of marijuana, cocaine, opiates, amphetamines, and phencyclidine. Two tests are used. An initial screening test uses the enzyme-multiplied-immunoassay technique (EMIT). Any specimen that is identified as positive on this initial test must then be confirmed using gas chromatography/mass spectrometry (GC/MS). Confirmed positive results are reported to a "Medical Review Officer," "[a] licensed physician . . . who has knowledge of substance abuse disorders and has appropriate medical training to interpret and evaluate an individual's positive test result together with his or her medical history and any other relevant biomedical information." HHS Reg § 1.2,

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53 Fed Reg 11980 (1988); HHS Reg § 2.4(g), id., at 11983. After verifying the positive result, the Medical Review Officer transmits it to the agency.

Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service. Test results may not, however, be turned over to any other agency, including criminal prosecutors, without the employee's written consent.

B

Petitioners, a union of federal em-

ployees and a union official, commenced this suit in the United States District Court for the Eastern District of Louisiana on behalf of current Customs Service employees who seek covered positions. Petitioners alleged that the Custom Service drug-testing program violated, inter alia, the Fourth Amendment. The District Court agreed. 649 F Supp 380 (1986). The court acknowledged "the legitimate governmental interest in a drug-free work place and work force," but concluded that "the drug testing plan constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion, in violation of legitimate expectations of privacy." Id., at 387. The court enjoined the drug-testing program, and ordered the Customs Service not to require drug tests of any applicants for covered positions.

A divided panel of the United States Court of Appeals for the Fifth Circuit vacated the injunction. 816 F2d 170 (1987). The court agreed with petitioners that the drug-screening program, by requiring an employee to produce a urine sample for chemical testing, effects a search within the meaning of the Fourth Amendment. The court held further that the searches required by the Commissioner's directive are reasonable under the Fourth Amendment.

legitimate contact with illegal substances within the last 30 days. Failure to provide this information at this time could result in the agency not considering the effect of medications or other licit contacts with drugs on a positive test result. Under the HHS Regulations, an employee need not provide information concerning medications when he produces the sample for testing. He may instead

present such information only after he is notified that his specimen tested positive for illicit drugs, at which time the Medical Review Officer reviews all records made available by the employee to determine whether the positive indication could have been caused by lawful use of drugs. See HHS Reg § 2.7, 53 Fed Reg 11985-11986 (1988).

It first noted that "[t]he Service has attempted to minimize the intrusiveness of the search" by not requiring visual observation of the act of urination and by affording notice to the employee that

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he will be tested. *Id.*, at 177. The court also considered it significant that the program limits discretion in determining which employees are to be tested, *ibid.*, and noted that the tests are an aspect of the employment relationship, *id.*, at 178.

The court further found that the Government has a strong interest in detecting drug use among employees who meet the criteria of the Customs program. It reasoned that drug use by covered employees casts substantial doubt on their ability to discharge their duties honestly and vigorously, undermining public confidence in the integrity of the Service and concomitantly impairing the Service's efforts to enforce the drug laws. *Id.*, at 178. Illicit drug users, the court found, are susceptible to bribery and blackmail, may be tempted to divert for their own use portions of any drug shipments they interdict, and may, if required to carry firearms, "endanger the safety of their fellow agents, as well as their own, when their performance is impaired by drug use." *Ibid.* "Considering the nature and responsibilities of the jobs for which applicants are being considered at Customs and the limited scope of the search," the court stated, "the exaction of consent as a condition of assignment to the new job is not unreasonable." *Id.*, at 179.

The dissenting judge concluded that the Customs program is not an effective method for achieving the Service's goals. He argued principally that an employee "given a five

day notification of a test date need only abstain from drug use to prevent being identified as a user." *Id.*, at 184. He noted also that persons already employed in sensitive positions are not subject to the test. *Ibid.* Because he did not believe the Customs program can achieve its purposes, the dissenting judge found it unreasonable under the Fourth Amendment.

[1b, 2b] We granted certiorari. 485 US 903, 99 L Ed 2d 232, 108 S Ct 1072 (1988). We now affirm so much of the judgment of the Court of Appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms. We vacate the
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judgment to the extent it upheld the testing of applicants for positions requiring the incumbent to handle classified materials, and remand for further proceedings.

II

[4a] In *Skinner v Railway Labor Executives' Assn.*, ante, at 616-618, 103 L Ed 2d 639, 109 S Ct 1402, decided today, we held that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy. Our earlier cases have settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer, *O'Connor v Ortega*, 480 US 709, 717, 94 L Ed 2d 714, 107 S Ct 1492 (1987) (plurality opinion); see *id.*, at 731, 94 L Ed 2d 714, 107 S Ct 1492 (Scalia, J., concurring in judgment), and, in view of our holding in *Railway La-ju*

bor Executives that urine tests are searches, it follows that the Customs Service's drug-testing program must meet the reasonableness requirement of the Fourth Amendment.

[5] While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, see, e.g., *Griffin v Wisconsin*, 483 US 868, 873, 97 L Ed 2d 709, 107 S Ct 3164 (1987); *United States v Karo*, 468 US 705, 717, 82 L Ed 2d 530, 104 S Ct 3296 (1984), our decision in *Railway Labor Executives* reaffirms the longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance. *Railway Labor Executives*, ante, at 618-624, 103 L Ed 2d 639, 109 S Ct 1402. See also *New Jersey v T. L. O.*, 469 US 325, 342, n 8, 83 L Ed 2d 720, 105 S Ct 733 (1985); *United States v Martinez-Fuerte*, 428 US 543, 556-661, 49 L Ed 2d 1116, 96 S Ct 3074 (1976). As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or

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some

level of individualized suspicion in the particular context. *Railway Labor Executives*, ante, at 619-620, 103 L Ed 2d 639, 109 S Ct 1402.

[1c, 6a, 7a] It is clear that the Customs Service's drug-testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a

criminal prosecution of the employee without the employee's consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government's concern for safe rail transportation at issue in *Railway Labor Executives*, present a special need that may justify departure from the ordinary warrant and probable-cause requirements.

A

[7b] Petitioners do not contend that a warrant is required by the balance of privacy and governmental interests in this context, nor could any such contention withstand scrutiny. We have recognized before that requiring the Government to procure a warrant for every work-related intrusion "would conflict with 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" *O'Connor v Ortega*, supra, at 722, 94 L Ed 2d 714, 107 S Ct 1492, quoting *Connick v Myers*, 461 US 138, 143, 75 L Ed 2d 708, 103 S Ct 1684 (1983). See also 480 US, at 732, 94 L Ed 2d 714, 107 S Ct 1492 (Scalia, J., concurring in judgment); *New Jersey v T. L. O.*, supra, at 340, 83 L Ed 2d 720, 105 S Ct 733 (noting that "[t]he warrant requirement . . . is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"). Even if Customs Service employees are more likely to be familiar with the proce-

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dures required to obtain a warrant than most other Government workers, requiring a warrant in this context would serve only to divert valuable agency resources from the Service's primary mission.

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The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.

[7c, 8] Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v United States*, 333 US 10, 14, 92 L Ed 436, 68 S Ct 367 (1948). But in the present context, "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . . , and doubtless are well known to covered employees." *Railway Labor Executives*, ante, at 622, 103 L Ed 2d 639, 109 S Ct 1402. Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject "to the discretion of the official in the field." *Camara v Municipal Court of San Francisco*, 387 US 523, 532, 18 L Ed 2d 930, 87 S Ct 1727 (1967). The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discre-

tionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." *South Dakota v Opperman*, 428 US 364, 383, 49 L Ed 2d 1000, 96 S Ct 3092 (1976) (Powell, J., concurring).

B

[1d, 9] Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause. *Railway Labor Executives*, ante, at 624, 103 L Ed 2d 639, 109 S Ct 1402. Our cases teach, however, that the probable-cause standard "'is peculiarly related to criminal investigations.'" *Colorado v Bertine*, 479 US 367, 371, 93 L Ed 2d 739, 107 S Ct 738 (1987), quoting *South Dakota v*

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Opperman, supra, at 370, n 5, 49 L Ed 2d 1000, 96 S Ct 3092. In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, *Colorado v Bertine*, supra, at 371, 93 L Ed 2d 739, 107 S Ct 738; see also *O'Connor v Ortega*, 480 US, at 723, 94 L Ed 2d 714, 107 S Ct 1492, especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person. Cf. *Camara v Municipal Court of San Francisco*, supra, at 535-536, 18 L Ed 2d 930, 87 S Ct 1727 (noting that building code inspections, unlike searches conducted pursuant to a criminal investigation, are designed "to prevent even the unintentional development of conditions which are hazardous to public health and safety"); *United States v Martinez-Fuerte*, 428 US, at 557, 49

L Ed 2d 1116, 96 S Ct 3074 (noting that requiring particularized suspicion before routine stops on major highways near the Mexican border "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"). Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. E.g., *Railway Labor Executives*, ante, at 624, 103 L Ed 2d 639, 109 S Ct 1402. We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.

The Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. We have adverted before to "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics." *United States v Montoya de Hernandez*, 473 US 531, 538, 87 L Ed 2d 381, 105 S Ct 3304 (1985). See also *Florida v Royer*, 460 US 491, 513, 75 L Ed 2d 229, 103 S Ct 1319 (Blackmun, J., dissenting). Our

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cases also reflect the traffickers' seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics, e.g., *United States v Montoya de Hernandez*, supra, at 538-539, 87 L Ed 2d 381, 105 S Ct 3304; *United States v Ramsey*, 431 US 606, 608-

609, 52 L Ed 2d 617, 97 S Ct 1972 (1977). The record in this case confirms that, through the adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, drug traffickers have managed to bring into this country increasingly large quantities of illegal drugs. App 111. The record also indicates, and it is well known, that drug smugglers do not hesitate to use violence to protect their lucrative trade and avoid apprehension. *Id.*, at 109.

Many of the Service's employees are often exposed to this criminal element and to the controlled substances it seeks to smuggle into the country. *Ibid.* Cf. *United States v Montoya de Hernandez*, supra, at 543, 81 L Ed 2d 381, 105 S Ct 3304. The physical safety of these employees may be threatened, and many may be tempted not only by bribes from the traffickers with whom they deal, but also by their own access to vast sources of valuable contraband seized and controlled by the Service. The Commissioner indicated below that "Customs [o]fficers have been shot, stabbed, run over, dragged by automobiles, and assaulted with blunt objects while performing their duties." App at 109-110. At least nine officers have died in the line of duty since 1974. He also noted that Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and for other integrity violations. *Id.*, at 114. See also *United States Customs Service*, Customs U. S. A., Fiscal Year 1987, p 31 (reporting internal investigations that resulted in the arrest of 24 employees and 54 civilians); *United States Customs Service*, Customs U. S. A., Fiscal Year 1986, p 32 (reporting that 334 criminal and serious

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integrity investigations were conducted during the fiscal year, resulting in the arrest of 37 employees and 17 civilians); United States Customs Service, Customs

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U. S. A., Fiscal Year 1985, p 32 (reporting that 284 criminal and serious integrity investigations were conducted during the 1985 fiscal year, resulting in the arrest of 15 employees and 51 civilians).

[1e, 10] It is readily apparent that the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, "because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." *Carroll v United States*, 267 US 132, 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925). See also *United States v Montoya de Hernandez* supra, at 538, 81 L Ed 2d 381, 105 S Ct 3304; *United States v Ramsey*, supra, at 617-619, 52 L Ed 2d 617, 97 S Ct 1972. This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public in-

terest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

[1f, 11] The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Railway Labor Executives*, ante, at 628, 103 L Ed 2d 639, 109 S Ct 1402. We agree with the Government

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that the 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. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances. See *Tennessee v Garner*, 471 US 1, 7-12, 85 L Ed 2d 1, 105 S Ct 1694 (1985).

[1g, 12] Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances. *Railway Labor Executives*, ante, at 626, 103 L Ed 2d 639, 109 S Ct 1402. We have recognized, however, that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by su-

pervisors and co-workers that might be viewed as unreasonable in other contexts. See *O'Connor v Ortega*, 480 US, at 717, 94 L Ed 2d 714, 107 S Ct 1492; *id.*, at 732, 94 L Ed 2d 714, 107 S Ct 1492 (Scalia, J., concurring in judgment). While these operational realities will rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace, *id.*, at 716, 725, 94 L Ed 2d 714, 107 S Ct 1492, it is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions. Cf. *Snepp v United States*, 444 US 507, 509, n 3, 62 L Ed 2d 704, 100 S Ct 763 (1980); *Parker v Levy*, 417 US 733, 758, 41 L Ed 2d 439, 94 S Ct 2547 (1974); *Committee for GI Rights v*

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Callaway, 171 US

App DC 73, 84, 518 F2d 466, 477 (1975).

[1h, 13a] We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty likewise have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness. Cf. *In re Caruso v Ward*, 72 NY2d 433, 441, 530 NE2d 850, 854-855 (1988). While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.²

2. [1l, 13b] The procedures prescribed by the Customs Service for the collection and analysis of the requisite samples do not carry the grave potential for "arbitrary and oppressive interference with the privacy and personal security of individuals," *United States v Martinez-Fuerte*, 428 US 543, 554, 49 L Ed 2d 1116, 96 S Ct 3074 (1976), that the Fourth Amendment was designed to prevent. Indeed, these procedures significantly minimize the program's intrusion on privacy interests. Only employees who have been tentatively accepted for promotion or transfer to one of the three categories of covered positions are tested, and applicants know at the outset that a drug test is a requirement of those positions. Employees are also notified in advance of the scheduled sample collection, thus reducing to a minimum any "unsettling show of

authority," *Delaware v Prouse*, 440 US 648, 657, 59 L Ed 2d 660, 99 S Ct 1391 (1979), that may be associated with unexpected intrusions on privacy. Cf. *United States v Martinez-Fuerte*, *supra*, at 559, 49 L Ed 2d 1116, 96 S Ct 3074 (noting that the intrusion on privacy occasioned by routine highway checkpoints is minimized by the fact that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere"); *Wyman v James*, 400 US 309, 320-321, 27 L Ed 2d 408, 91 S Ct 381 (1971) (providing a welfare recipient with advance notice that she would be visited by a welfare caseworker minimized the intrusion on privacy occasioned by the visit). There is no direct observation of the act of urination, as the employee

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[14a, 15a] Without disparaging the importance of the governmental interests that support the suspicionless searches of these employees, petitioners nevertheless contend that the Service's drug-testing program is unreasonable in two particulars. First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees, and that the program actually has not led to the discovery of a significant number of drug users. Brief for Petitioners 37, 44; Tr of Oral Arg 11-12, 20-21. Counsel for petitioners informed us at oral argument that no more than 5 employees out of 3,600 have tested positive for drugs. *Id.*, at 11. Second, petitioners contend that the Service's scheme is not a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests," *Delaware v Prouse*, 440 US 648, 658-659, 59 L Ed 2d 660, 99 S Ct 1391 (1979), because illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens. Brief for Petitioners 46-47. These contentions are unpersuasive.

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may provide a specimen in the privacy of a stall.

Further, urine samples may be examined only for the specified drugs. The use of samples to test for any other substances is prohibited. See HHS Reg § 2.1(c), 53 Fed Reg 11980 (1988). And, as the Court of Appeals noted, the combination of EMIT and GC/MS tests required by the Service is highly accurate,

[14b] Petitioners' first contention evinces an unduly narrow view of the context in which the Service's testing program was implemented. 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, as is amply illustrated by our decision in *Railway Labor Executives*. See also *Masino v United States*, 589 F2d 1048, 1050 (Ct Cl 1978) (describing marijuana use by two Customs inspectors). Detecting drug impairment on the part of employees can be a difficult task, especially where, as here, it is not feasible to subject employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments. Indeed, the almost unique mission of the Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from

assuming proper storage, handling, and measurement techniques. 816 F2d, at 181. Finally, an employee need not disclose personal medical information to the Government unless his test result is positive, and even then any such information is reported to a licensed physician. Taken together, these procedures significantly minimize the intrusiveness of the Service's drug-screening program.

seeking such promotions cannot be deemed unreasonable.

[14c, 16a] The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity. The same is likely to be true of householders who are required to submit to suspicionless housing code inspections, see *Camara v Municipal Court of San Francisco*, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), and of motorists who are stopped at the checkpoints we approved in *United States v Martinez-Fuerte*, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074 (1976). The Service's program is designed to prevent the promotion of drug users to sensitive positions as

much as it is designed to detect those employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is

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substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.³

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[1], 15b] We think petitioners' second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—over-

3. [16b] The point is well illustrated also by the Federal Government's practice of requiring the search of all passengers seeking to board commercial airliners, as well as the search of their carry-on luggage, without any basis for suspecting any particular passenger of an untoward motive. Applying our precedents dealing with administrative searches, see, e.g., *Camara v Municipal Court of San Francisco*, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967), the lower courts that have considered the question have consistently concluded that such searches are reasonable under the Fourth Amendment. As Judge Friendly explained in a leading case upholding such searches:

"When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, that danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air." *United States v Edwards*, 498 F2d 496, 500 (CA2 1974) (emphasis in original).

See also *United States v Skipwith*, 482 F2d 1272, 1275-1276 (CA5 1973); *United States v Davis*, 482 F2d 893, 907-912 (CA9 1973). It is true, as counsel for petitioners pointed out at oral argument, that these air piracy precautions were adopted in response to an observable national and international hijacking cri-

sis. Tr of Oral Arg 13. Yet we would not suppose that, if the validity of these searches be conceded, the Government would be precluded from conducting them absent a demonstration of danger as to any particular airport or airline. It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context.

[14d, 16c] Nor would we think, in view of the obvious deterrent purpose of these searches, that the validity of the Government's airport screening program necessarily turns on whether significant numbers of putative air pirates are actually discovered by the searches conducted under the program. In the 15 years the program has been in effect, more than 9.5 billion persons have been screened, and over 10 billion pieces of luggage have been inspected. See Federal Aviation Administration, Semiannual Report to Congress on the Effectiveness of The Civil Aviation Program (Nov. 1988) (Exhibit 6). By far the overwhelming majority of those persons who have been searched, like Customs employees who have been tested under the Service's drug-screening scheme, have proved entirely innocent—only 42,000 firearms have been detected during the same period. *Ibid.* When the Government's interest lies in deterring highly hazardous conduct, a low incidence of such conduct, far from impugning the validity of the scheme for implementing this interest, is more logically viewed as a hallmark of success. See *Bell v Wolfish*, 441 US 520, 559, 60 L Ed 2d 447, 99 S Ct 1861 (1979).

states the case. As the Court of Appeals noted, addicts may be unable to abstain even for a limited period of time, or may be unaware of the "fade-away effect" of certain drugs. 816 F2d, at 180. More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. A particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, this information is not likely to be known or available to the employee. Petitioners' own expert indicated below that the 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. App 66. See also *Railway Labor Executives*, ante, at 631, 103 L Ed 2d 639, 109 S Ct 1402 (noting Court of Appeals' reliance on certain academic literature that indicates that the testing of urine can discover drug use "'for . . . weeks after the ingestion of the drug'"). Thus, contrary to petitioners' suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions taken by the sample collector to ensure the integrity of the sample. In all the circumstances, we are persuaded that the program bears a close and substantial relation to the Service's goal of deterring drug users from seeking promotion to sensitive positions.⁴

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[1k] In sum, we believe the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment.

C

[2c, 17] We are unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required "to handle classified material." App 17. We readily agree that the Government has a compelling interest in protecting truly sensitive information from those who, "under compulsion of circumstances or for other reasons, . . . might compromise [such] information." *Department of Navy v Egan*, 484 US 518, 528, 98 L Ed 2d 918, 108 S Ct 818 (1988). See also *United States v Robel*, 389 US 258, 267, 19 L Ed 2d 508, 88 S Ct 419 (1967) ("We have recognized that, while the Constitution protects against invasions of individual rights, it does not withdraw from the Government the power to safeguard its vital interests . . . The Government can deny access to its secrets to those who would use such information to harm the Nation"). We also agree that employees who seek

4. Indeed, petitioners' objection is based on those features of the Service's program—the provision of advance notice and the failure of the sample collector to observe directly the act of urination—that contribute significantly to diminish the program's intrusion on pri-

vacuity. See *supra*, at 672-673, n 2, 103 L Ed 2d, at 706-707. Thus, under petitioners' view, "the testing program would be more likely to be constitutional if it were more pervasive and more invasive of privacy." 816 F2d, at 180.

promotions to positions where they would handle sensitive information can be required to submit to a urine test under the Service's screening program, especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test. Cf. *Department of Navy v Egan*, supra, at 528, 98 L Ed 2d 918, 108 S Ct 818 (noting that the Executive Branch generally subjects those desiring

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a security clearance to "a background investigation that varies according to the degree of adverse effect the applicant could have on the national security").

[2d, 18] It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All)," "Baggage Clerk," "Co-op Student (All)," "Electric Equipment Repairer," "Mail Clerk/Assistant," and "Messenger." App 42-43. We assume these positions were selected for coverage under the Service's testing program by reason of the incumbent's access to "classified" information, as it is not clear that they would fall under either of the two categories we have already considered. Yet it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees

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more broadly than is necessary to meet the purposes of the Commissioner's directive.

[2e] We cannot resolve this ambiguity on the basis of the record before us, and we think it is appropriate to remand the case to the Court of Appeals for such proceedings as may be necessary to clarify the scope of this category of employees subject to testing. Upon remand the Court of Appeals should examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric. In assessing the reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject.

III

[1f, 4b, 6b, 7d] Where the Government requires its employees to produce urine samples to be analyzed for evidence of illegal drug

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use, the collection and subsequent chemical analysis of such samples are searches that must meet the reasonableness requirement of the Fourth Amendment. Because the testing program adopted by the Customs Service is not designed to serve the ordinary needs of law enforcement, we have balanced the public interest in the Service's testing program against the privacy concerns implicated by the tests, without reference to our usual presumption in favor of the procedures specified in the Warrant Clause, to assess whether the tests required by Customs are reasonable.

[1m, 2f] We hold that the suspi-

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tionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical

and ethical demands of those positions. We do not decide whether testing those who apply for promotion to positions where they would handle "classified" information is reasonable because we find the record inadequate for this purpose.

[29] The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

SEPARATE OPINIONS

Justice Marshall, with whom Justice Brennan joins, dissenting.

For the reasons stated in my dissenting opinion in *Skinner v Railway Labor Executives' Assn.*, ante, p 635, 103 L Ed 2d 639, 109 S Ct 1402, I also dissent from the Court's decision in this case. Here, as in *Skinner*, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on

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probable cause is unprincipled and unjustifiable. But even if I believed that balancing analysis was appropriate under the Fourth Amendment, I would still dissent from today's judgment for the reasons stated by Justice Scalia in his dissenting opinion, post this page, 103 L Ed 2d, at 711, and for the reasons noted by the dissenting judge below relating to the inadequate tailoring of the Customs Service's drug-testing plan. See 816 F2d 170, 182-184 (CA5 1987) (Hill, J.).

Justice Scalia, with whom Justice Stevens joins, dissenting.

The issue in this case is not

whether Customs Service employees can constitutionally be denied promotion, or even dismissed, for a single instance of unlawful drug use, at home or at work. They assuredly can. The issue here is what steps can constitutionally be taken to detect such drug use. The Government asserts it can demand that employees perform "an excretory function traditionally shielded by great privacy," *Skinner v Railway Labor Executives' Assn.*, ante, at 626, 103 L Ed 2d 639, 109 S Ct 1402, while "a monitor of the same sex . . . remains close at hand to listen for the normal sounds," ante, at 661, 103 L Ed 2d, at 699, and that the excretion thus produced be turned over to the Government for chemical analysis. The Court agrees that this constitutes a search for purposes of the Fourth Amendment—and I think it obvious that it is a type of search particularly destructive of privacy and offensive to personal dignity.

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the

uniquely dangerous nature of that environment. See *Bell v Wolfish*, 441 US 520, 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (1979). Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in train accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society.

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I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been "reasonable," the answer depends largely upon the social necessity that prompts the search. Thus, in upholding the administrative search of a student's purse in a school, we began with the observation (documented by an agency report to Congress) that "[m]aintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." *New Jersey v T. L. O.* 469 US 325, 339, 83 L Ed 2d 720, 105 S Ct 733 (1985). When we approved

fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, we observed at the outset that "the Immigration and Naturalization Service now suggests there may be as many as 10 or 12 million aliens illegally in the country," and that "[i]nterdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems." *United States v Martinez-Fuerte*, 428 US 543, 551-552, 49 L Ed 2d 1116, 96 S Ct 3074 (1976). And the substantive analysis of our opinion today in *Skinner* begins, "[t]he problem of alcohol use on American railroads is as old as the industry itself," and goes on to cite statistics concerning that problem and the accidents it causes, including a 1979 study finding that "23% of the operating personnel were 'problem drinkers.'" *Skinner*, ante, at 606, and 607, n 1, 103 L Ed 2d 639, 109 S Ct 1402.

The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.

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Instead, there are assurances that "[t]he Customs Service is our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population," ante, at 668, 103 L Ed 2d, at 704; that "[m]any of the Service's employees are often exposed to [drug smugglers] and to the controlled substances [they seek] to smuggle into the country," ante, at 669, 103 L Ed 2d, at 704; that "Customs officers have been the targets of bribery by drug smugglers on numerous occasions, and several have been removed from the Service for accepting bribes and other integrity violations," *Ibid.*; that "the Govern-

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ment has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," ante, at 670, 103 L Ed 2d, at 705; that the "national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics," *ibid.*; and that "the 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," ante, at 671, 103 L Ed 2d, at 705. To paraphrase Churchill, all this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true. The only pertinent points, it seems to me, are supported by nothing but speculation, and not very plausible speculation at that. It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler—unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less "sympathetic" to their drug-interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less

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sympathetic to their mission of enforcing the traffic laws. (The only difference is that the Customs offi-

cer's individual efforts, if they are irreplaceable, can theoretically affect the availability of his own drug supply—a prospect so remote as to be an absurd basis of motivation.) Nor, finally, is it apparent to me that urine tests will be even marginally more effective in preventing gun-carrying agents from risking "impaired perception and judgment" than is their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers—unless, again, their addiction is so severe that no urine test is needed for detection.

What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horrors actually occurred: an instance, that is, in which the cause of bribetaking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use. Although the Court points out that several employees have in the past been removed from the Service for accepting bribes and other integrity violations, and that at least nine officers have died in the line of duty since 1974, ante, at 669, 103 L Ed 2d, at 704, there is no indication whatever that these incidents were related to drug use by Service employees. Perhaps concrete evidence of the severity of a problem is unnecessary when it is so well known that courts can almost take judicial notice of it; but that is surely not the case here. The Commissioner of Customs himself has stated that he "believe[s] that Customs is largely drug-free," that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this

program," and that he "hope[s] and expect[s] to receive reports of very few positive findings through drug screening." App 10, 15. The test results have fulfilled those hopes and expectations. According to the Service's counsel, out of 3,600 employees

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tested, no more than 5 tested positive for drugs. See ante, at 673, 103 L Ed 2d, at 707.

The Court's response to this lack of evidence is that "[t]here is little reason to believe that American workplaces are immune from [the] pervasive social problem" of drug abuse. Ante, 674, 103 L Ed 2d, at 707. Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable—the secured areas of a nuclear power plant, for example, see *Rushton v Nebraska Public Power District*, 844 F2d 562 (CA8 1988). But if such a generalization suffices to justify demeaning bodily searches, without particularized suspicion, to guard against the bribing or blackmailing of a law enforcement agent, or the careless use of a firearm, then the Fourth Amendment has become frail protection indeed. In *Skinner*, *Bell*, *T. L. O.*, and *Martinez-Fuerte*, we took pains to establish the existence of special need for the search or seizure—a need based not upon the existence of a "pervasive social problem" combined with speculation as to the effect of that problem in the field at issue, but rather upon well known or well demonstrated evils *in that field*, with well known or well demonstrated consequences. In *Skinner*, for example, we pointed to a long history of alcohol abuse in the railroad industry, and noted that in an 8-year period 45 train accidents and incidents had occurred because of

alcohol- and drug-impaired railroad employees, killing 34 people, injuring 66, and causing more than \$28 million in property damage. Ante, at 608, 103 L Ed 2d 639, 109 S Ct 1402. In the present case, by contrast, not only is the Customs Service thought to be "largely drug-free," but the connection between whatever drug use may exist and serious social harm is entirely speculative. Except for the fact that the search of a person is much more intrusive than the stop of a car, the present case resembles *Delaware v Prouse*, 440 US 648, 59 L Ed 2d 660, 99 S Ct 1391 (1979), where we held that the Fourth Amendment prohibited random stops to check drivers' licenses and motor vehicle registrations. The contribution of this practice to highway

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safety, we concluded, was "marginal at best" since the number of licensed drivers that must be stopped in order to find one unlicensed one "will be large indeed." *Id.*, at 660, 59 L Ed 2d 660, 99 S Ct 1391.

Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity. Logically, of course, if those who carry guns can be treated in this fashion, so can all others whose work, if performed under the influence of drugs, may endanger others—automobile drivers, operators of other potentially dangerous equipment, construction workers, school

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crossing guards. A similarly broad scope attaches to the Court's approval of drug testing for those with access to "sensitive information." Since this category is not limited to [489 US 686]

Service employees with drug interdiction duties, nor to "sensitive information" specifically relating to drug traffic, today's holding apparently approves drug testing for all federal employees with security clearances—or, indeed, for all federal employees with valuable confidential information to impart. Since drug use is not a particular problem in the Customs Service, employees throughout the government are no less likely to violate the public trust by taking bribes to feed their drug habit, or by yielding to blackmail. Moreover, there is no reason why this super-protection against harms arising from drug use must be limited to public employees; a law requiring similar testing of private citizens who use dangerous instruments such as guns or cars, or who have access to classified information, would also be constitutional.

There is only one apparent basis that sets the testing at issue here apart from all these other situations—but it is not a basis upon which

the Court is willing to rely. I do not believe for a minute that the driving force behind these drug-testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: "Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security." App 12. Or as respondent's brief to this Court asserted: "[I]f a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends." Brief for Respondent 36. 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? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the [489 US 687]

Service is "clean," and—most impor-

1. The Court apparently approves application of the urine tests to personnel receiving access to "sensitive information." Ante, at 677, 103 L Ed 2d, at 709-710. Since, however, it is unsure whether "classified material" is "sensitive information," it remands with instructions that the Court of Appeals "examine the criteria used by the Service in determining what materials are classified and in deciding whom to test under this rubric." Ante, at 678, 103 L Ed 2d, at 710. I am not sure what these instructions mean. Surely the person who classifies information always considers it "sensitive" in some sense—and the Court does not indicate what particular sort of sensitivity is crucial. Moreover, it seems to me most unlikely that "the criteria used by the Service

in determining what materials are classified" are any different from those prescribed by the President in his Executive Order on the subject, see Exec Order No. 12356, 3 CFR 166 (1982 Comp)—and if there is a difference it is probably unlawful, see § 5.4(b)(2), id., at 177. In any case, whatever idiosyncratic standards for classification the Customs Service might have would seem to be irrelevant, inasmuch as the rule at issue here is not limited to material classified by the Customs Service, but includes (and may well apply principally to) material classified elsewhere in the Government—for example, in the Federal Bureau of Investigation, the Drug Enforcement Administration, or the State Department—and conveyed to the Service. See App 24-25.

tant of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.

There is irony in the Government's citation, in support of its position, of Justice Brandeis' statement in *Olmstead v United States*, 277 US 438, 485, 72 L Ed 944, 48 S Ct 564, 66 ALR 376 (1928) that "[f]or good or for ill, [our Government] teaches the whole people by its example." Brief for Respondent 36. Brandeis was there *dissenting* from the Court's admission of evidence obtained through an unlawful Government wiretap. He was not praising the Government's example of vigor and enthusiasm in combatting crime, but condemning its example that "the end justifies the means," 277 US, at 485, 72 L Ed 944, 48 S Ct 564, 66 ALR 376. An even more apt quota-

tion from that famous Brandeis dissent would have been the following:

"[I]t is . . . immaterial that the intrusion was in aid of law enforcement. Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.*, at 479, 72 L Ed 944, 48 S Ct 564, 66 ALR 376.

Those who lose because of the lack of understanding that begot the present exercise in symbolism are not just the Customs Service employees, whose dignity is thus offended, but all of us—who suffer a coarsening of our national manners that ultimately give the Fourth Amendment its content, and who become subject to the administration of federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own.

never applied *Sabine* in any other circumstance, and petitioner makes no contention that the Purchasers' difficulty in showing no mark-up on petitioner's power has anything to do with commingling other producers' power.

For the foregoing reasons the petition for review is denied.

It is so ordered.



Carl WILLNER, Appellee,

v.

Richard L. THORNBURGH, et al., Appellants.

No. 90-5156.

United States Court of Appeals,
District of Columbia Circuit.

Argued Oct. 11, 1990.

Decided March 29, 1991.

Attorney tentatively accepted for employment by Antitrust Division of Department of Justice brought action challenging drug testing required during prescreening of new employees, and moved for a preliminary injunction. The United States District Court for the District of Columbia, Gerhard A. Gesell, J., 738 F.Supp. 1, granted injunction, and Government appealed. The Court of Appeals, Randolph, Circuit Judge, held that urine tests of applicants for positions as attorneys at Department of Justice do not constitute "unreasonable seizures" under Fourth Amendment.

Injunction vacated.

Henderson, Circuit Judge, filed dissenting opinion.

FERC's counsel seemed to hold that view at oral argument. Nevertheless, we express no opinion

1. Searches and Seizures ⇐78

Drug testing requirement for applicants for attorney positions with Department of Justice serves special governmental needs beyond normal need for law enforcement, and therefore it is necessary to balance attorney's privacy expectations against Government's interest to determine whether it would be impractical to require warrant or some level of individualized suspicion prior to engaging in drug testing. U.S.C.A. Const.Amend. 4.

2. Searches and Seizures ⇐23

Protections of Fourth Amendment are graduated in proportion to privacy interests affected; decreasing levels of intrusiveness require decreasing levels of justification. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇐78

If reasonable privacy interests of employment applicants are less than those of employees, and if testing procedure for applicants is itself unintrusive, Fourth Amendment does not require Government to demonstrate as high a degree of justification for drug testing of applicants as it must to conduct random testing of those already employed. U.S.C.A. Const.Amend. 4.

4. Searches and Seizures ⇐78

Even current employee's expectation of privacy, while reasonable enough to make urine testing a Fourth Amendment search, can be so diminished that search is not unreasonable. U.S.C.A. Const.Amend. 4.

5. Searches and Seizures ⇐26

Employment applicant has some expectation of privacy under Fourth Amendment. U.S.C.A. Const.Amend. 4.

6. Searches and Seizures ⇐26

Applicant for attorney position with Department of Justice, by divulging whether applicant has used marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs, and by consenting to Federal Bureau of Investigation inquiry in

as to whether *Sabine* should have any applicability in a non-commingling case.

which applicant's friends, neighbors, relatives and past and present business associates may be asked if applicant uses drugs, relinquishes whatever privacy applicant might otherwise retain with respect to such information, for Fourth Amendment purposes, even when information is derived from chemical analysis. U.S.C.A. Const. Amend. 4.

7. Searches and Seizures ⇐26

Government cannot defeat 'person's reasonable expectation of privacy merely by giving notice of impending intrusion. U.S.C.A. Const. Amend. 4.

8. Searches and Seizures ⇐78

Urine tests of all applicants for positions as attorneys at Department of Justice did not constitute "unreasonable searches" under Fourth Amendment, since applicants were given advance notice of date, sample would be produced in privacy of small room behind closed door, and applicants were required to undergo thorough and exhaustive background investigation, including disclosure of information about involvement with alcohol and illegal drugs. U.S. C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

Appeal from the United States District Court for the District of Columbia (Civil Action No. 90-0535).

Stephen H. Sachs, Baltimore, Md., with whom Stephen M. Cutler and Gail C. Bernstein, Arthur B. Spitzer and Elizabeth Symonds, Washington, D.C., were on the brief, for appellee.

Robert V. Zener, Atty., Dept. of Justice, with whom Stuart M. Gerson, Asst. Atty. Gen., and Jay B. Stephens, Washington, D.C., U.S. Atty., were on the brief, for appellants.

Before SILBERMAN, HENDERSON and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge RANDOLPH.

Dissenting opinion filed by Circuit Judge HENDERSON.

RANDOLPH, Circuit Judge:

This appeal adds to the list of constitutional challenges to federal drug-testing programs established pursuant to Executive Order No. 12,564, 51 Fed. Reg. 32,889 (1986). Since the Supreme Court's decision in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), which involved a portion of the Customs Service's program, we have ruled on aspects of the drug-testing programs of the Executive Office of the President (*Hartness v. Bush*, 919 F.2d 170 (D.C.Cir.1990)); the Department of Agriculture (*National Treasury Employees Union v. Yeutter*, 918 F.2d 968 (D.C. Cir.1990)); the Department of Transportation (*American Federation of Government Employees v. Skinner*, 885 F.2d 884 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 1960, 109 L.Ed.2d 321 (1990)); the Department of the Army (*National Federation of Federal Employees v. Cheney*, 884 F.2d 603 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990)); and the Department of Justice (*Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990)).

Each of our decisions rendered in the wake of *Von Raab* concerned federal employees who were, as a condition of employment, required to submit urine specimens for testing without any suspicion they were using drugs, and who were selected for testing on a random basis. This case differs from the rest in several respects, the significance of which is in dispute. The plaintiff here is an applicant for government employment. Rather than being selected at random, every applicant must undergo a urine test before being hired for the position he seeks.

Early in 1990, Carl Willner, an attorney, submitted a résumé to the Antitrust Division of the Department of Justice in Washington, D.C. After several interviews, he

received and accepted a conditional offer to join the Antitrust Division as a trial attorney. In connection with his employment application, Mr. Willner completed an extensive form setting forth detailed information about himself. The Federal Bureau of Investigation then conducted an investigation. On the form, Mr. Willner denied having used marijuana, cocaine, narcotics, hallucinogenics or other illegal drugs during the previous five years. He refused, however, to comply with the Department's request that he provide a urine sample.

The Department of Justice drug-testing plan requires all persons tentatively selected for employment in the Department's Offices, Boards and Divisions to provide a urine sample for testing. Applicants are notified at least forty-eight hours in advance of the time and place for the test. If they fail to show up or refuse to provide a urine sample, they are disqualified from further consideration for the job. If the chemical test of their sample is positive, they will not be offered the position and may not reapply for six months. The chemical analysis is designed to detect use of cocaine, marijuana, amphetamines, opiates and phencyclidine, and is the same as that described in *American Federation of Government Employees*, 885 F.2d at 887-88; *National Federation of Federal Employees*, 884 F.2d at 606; and *Harmon*, 878 F.2d at 486.

Before applying to the Antitrust Division, Mr. Willner knew of the Department's drug-testing program and of its requirement that all individuals tentatively selected for employment must undergo urinalysis. While in private practice, Mr. Willner represented the plaintiffs in *Harmon v. Thornburgh*, the first of our drug-testing decisions issued after *Von Raab*. *Harmon* sustained random testing of Department of Justice employees having top secret security clearances, but held that suspicionless urinalysis of other Justice Department personnel violated the Fourth Amendment unless those individuals were engaged in drug prosecutions. In view of *Harmon*, the Justice Department could not require urine tests of attorneys already holding the posi-

tion Mr. Willner sought, unless they were suspected of drug use.

The district court framed the question as: "whether, between a current Antitrust Division attorney and an applicant for such a position, there is a constitutional distinction that would render the testing of the latter permissible under the Fourth Amendment" (Memorandum of District Court, May 15, 1990, at 4) 738 F.Supp. 1. The court found no such distinction and concluded that the government's interests in requiring the test were the same as those *Harmon* rejected as insufficient. The court therefore permanently enjoined the Department of Justice from testing applicants for positions when employees occupying those positions could not be tested.

I

Von Raab, 109 S.Ct. at 1390, and its companion case, *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989), held that the government's collection and testing of urine samples from employees according to the procedures outlined in those decisions invaded "reasonable expectations of privacy" and were therefore Fourth Amendment "searches." Such searches, even if conducted without probable cause or suspicion of drug use, do not necessarily infringe upon the Fourth Amendment's "right of the people to be secure in their persons . . . against unreasonable searches . . ." *Von Raab* ruled that "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 109 S.Ct. at 1390 (emphasis added).

[1] *Von Raab*'s balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others. See *Harmon*,

878 F.2d at 488-89. Nonetheless, balance we must. The condition making it necessary to do so—that the “Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement” (*Von Raab*, 109 S.Ct. at 1390)—is satisfied in this case. *Railway Labor Executives*, 109 S.Ct. at 1414, on which *Von Raab* relied in formulating the standard just quoted, stated that the government’s interest in the “operation of a government office”—here the Department of Justice—presents such “special needs.” 109 S.Ct. at 1390. Furthermore, the Justice Department does not test applicants for law enforcement purposes; the test results are not distributed and cannot be used as evidence in a criminal trial. Exec.Order No. 12,564, 51 Fed.Reg. at 32,892. See also *Von Raab*, 109 S.Ct. at 1390-91.

[2,3] In our other decisions concerning random drug testing of incumbents, the balance we struck turned to a large extent on the nature of the employee’s position. When the job involved drug enforcement or when the employee’s drug use might endanger others, for example, we have recognized that the government’s interests are sufficiently strong to allow random testing. *Harmon*, 878 F.2d at 490-91; *National Treasury Employees Union*, 918 F.2d at 972; *American Federation of Government Employees*, 885 F.2d at 891-92; *National Federation of Federal Employees*, 884 F.2d at 612, 613. The job Mr. Willner sought fell within neither category. But that is neither the beginning nor the end of our inquiry. The protections of the Fourth Amendment are graduated in proportion to the privacy interests affected. Decreasing levels of intrusiveness require decreasing levels of justification. If the reasonable privacy expectations of applicants are less than those of employees and if the testing procedure for applicants is itself unintrusive, the government is not required to demonstrate as high a degree of justification as it must to conduct random testing of those already employed.

II

We shall deal first with the extent of privacy interests applicants such as Mr. Willner possess with respect to urine testing. In other contexts, when “the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search” (*Camara v. Municipal Court*, 387 U.S. 523, 533, 87 S.Ct. 1727, 1733, 18 L.Ed.2d 930 (1967)), the Fourth Amendment does not require a warrant. See *Griffin v. Wisconsin*, 483 U.S. 868, 873-74, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 340, 105 S.Ct. 733, 742, 83 L.Ed.2d 720 (1985); *O'Connor v. Ortega*, 480 U.S. 709, 725-26, 107 S.Ct. 1492, 1501-02, 94 L.Ed.2d 714 (1987) (plurality opinion). When the “privacy interests implicated by the search are minimal,” the Court has recognized, as it did in *Von Raab* and *Railway Labor Executives*, that a warrantless search may be reasonable even in the absence of suspicion of illegal conduct. *T.L.O.*, 469 U.S. at 342 n. 8, 105 S.Ct. at 743 n. 8.

[4,5] As we read the Court’s opinions in *Von Raab* and *Railway Labor Executives*, even a current employee’s “expectation of privacy,” while “reasonable” enough to make urine testing a Fourth Amendment “search,” can be so “diminished” that the search is not “unreasonable.” See *Von Raab*, 109 S.Ct. at 1390, 1394. This simply recognizes that Fourth Amendment “searches” vary in their intrusiveness. Taking a person’s fingerprints, for example, and ransacking a person’s dwelling place, while both “searches” (see *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969)), may require different degrees of justification to make them “reasonable.” The district court in this case was surely correct that “an applicant has some expectation of privacy; in applying for a job he does not thereby consent to, for example, a warrantless search of his home” (Memorandum of District Court, May 15, 1990, at 8). But urine testing, particularly in view of the procedures followed at the Justice De-

partment, is on a different end of the spectrum.

Railway Labor Executives, 109 S.Ct. at 1413, held that urine testing involves two searches, the first when the sample is collected and the second when it is analyzed. As to the first search—the collection process—Justice Department applicants are subjected to far less of an intrusion than were the employees in *Railway Labor Executives* and *Von Raab*. In those cases, a “monitor of the same sex as the employee remain[ed] close at hand to listen for the normal sounds of urination” or to observe directly as the employee produced the sample. *Von Raab*, 109 S.Ct. at 1388; *Railway Labor Executives*, 109 S.Ct. at 1413; *id.* at 1428 (Marshall, J., dissenting); see *Harmon*, 878 F.2d at 486. This procedure, which Justice Scalia found “offensive to personal dignity,” *Von Raab*, 109 S.Ct. at 1398 (dissenting opinion), and which the Court relied upon in finding a Fourth Amendment search, *Railway Labor Executives*, 109 S.Ct. at 1413, is not part of the Justice Department’s program for applicants. There is no purposeful invasion of privacy of the sort involved in *Von Raab* and *Railway Labor Executives*. A Justice Department applicant produces the sample, not in a stall or behind a partition, as in *Von Raab*, but in the privacy of a small room behind a closed door, unless there is reason to suspect tampering. The Program Coordinator of the Department’s drug-testing program, in an undisputed affidavit, stated that the sounds of urination cannot be heard and that the Department “certainly does not expect or require the collection person to hover near the door listening for urination sounds. After the individual is escorted to the enclosure, the collection monitor returns to the waiting room to receive the specimen from the individual.” For these reasons, the collection process at the Department of Justice simulates what is a common medical procedure, an accepted part of a typical physical examination required by athletic teams, colleges, the military, life insurance companies and private employers. See *Bratcher v. United States*, 149 F.2d 742, 745 (4th Cir.), cert. denied, 325 U.S. 885, 65 S.Ct.

1580, 89 L.Ed. 2000 (1945); see also, *McDonnell v. Hunter*, 612 F.Supp. 1122, 1130 n. 6 (S.D.Iowa 1985), modified, 809 F.2d 1302 (8th Cir.1987).

[6] As to the second search involved in urine testing, the chemical analysis, *Railway Labor Executives* indicates that this invades privacy because it may reveal “private medical facts about an employee” (109 S.Ct. at 1413). But applicants for employment at the Justice Department cannot reasonably expect to keep such information secret. The only medical facts revealed to the Justice Department are whether the applicant has recently used illegal drugs. By divulging, as Mr. Willner did, whether he uses, or has used within the past five years, marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs, and by consenting to an F.B.I. investigation in which his friends, neighbors, relatives and past and present business associates may be asked if he uses drugs, an applicant relinquishes whatever privacy he might otherwise retain with respect to such information, even when the information is derived from chemical analysis.

[7] We begin then with a comparatively slight disturbance of the applicant’s privacy. The collection process is dignified and discreet and unlike that described in *Railway Labor Executives* and *Von Raab*; the later test reveals no information that can, under the circumstances, be considered private. Other considerations further diminish the privacy expectations of job applicants like Mr. Willner. They know they will have to undergo a drug test if they are tentatively selected for employment at the Justice Department. Pre-employment testing is not random. Unlike the incumbents in *Harmon*, all applicants must provide a urine sample before being hired. The procedure is scheduled ahead of time and the applicant is given advance notice of the date. All of this, *Von Raab* indicated, reduces “to a minimum” the unsettling effect of unexpected intrusions. *Von Raab*, 109 S.Ct. at 1394 n. 2; see *Harmon*, 878 F.2d at 489. We recognize, of course, that the government cannot defeat a person’s “reasonable” expectation of privacy merely by

giving notice of the impending intrusion. See *Katz v. United States*, 389 U.S. 347, 361, 88 S.Ct. 507, 516, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring); *United States v. Tabor*, 635 F.2d 131, 137 (2d Cir.1980); Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 384 (1974). But the applicant's knowledge of what will be required, and when, affects the strength of his or her interest. We so held in *National Federation of Federal Employees v. Weinberger*, 818 F.2d 935, 943 (D.C.Cir.1987): "Advance notice of the employer's condition, however, may be taken into account as one of the factors relevant to the extent of the employees' legitimate expectations of privacy."

Similarly, it is significant that the individual has a large measure of control over whether he or she will be subject to urine testing. No one is compelled to seek a job at the Department of Justice. See *Wyman v. James*, 400 U.S. 309, 324, 91 S.Ct. 381, 389, 27 L.Ed.2d 408 (1971). If individuals view drug testing as an indignity to be avoided, they need only refrain from applying. This too is an important distinction between applicants and incumbents. The choice presented to current employees—undergo random drug testing or lose your job—is not comparable to that facing applicants. In Judge Friendly's words, "there is a human difference between losing what one has and not getting what one wants." Friendly, *Some Kind of Hearing*, 123 U.P.A.L.REV. 1267, 1296 (1975). The plurality opinion in *Wygant v. Jackson Board of Education*, 476 U.S. 267, 282-83, 106 S.Ct. 1842, 1851, 90 L.Ed.2d 260 (1986), recognized as much: "Denial of a future employment opportunity is not as intrusive as loss of an existing job." See *Harmon*, 878 F.2d at 489 n. 6.

We are mindful of the fact that the Customs Department employees in *Von Raab* became subject to drug testing only because they chose to apply for promotions. To that extent, they also had control over whether they would be tested and they had advance knowledge of the testing. The Supreme Court considered these factors among others that served to diminish their expectation of privacy. 109 S.Ct. at 1394 n.

2. We follow the same analysis. Rather than considering a factor separately to determine if it alone would be decisive, we must aggregate the factors on each side in order to strike the balance required by *Von Raab*. See *Hartness*, 919 F.2d at 172.

For applicants, still other factors further weaken their privacy expectations with respect to urine testing. As we have mentioned, in order to be considered for a position as an attorney at the Department of Justice, an applicant is required to undergo a thorough and exhaustive background investigation. The applicant is required to complete Standard Form 86 (SF-86), the government "Questionnaire for Sensitive Positions." The information requested includes the address of each of the applicant's residences during the past fifteen years; every job the applicant has held for the last fifteen years; and all organizations, domestic and foreign, with the exception of labor unions and political and religious organizations, of which the applicant has been a member during the last fifteen years. The applicant must also disclose all foreign countries he has visited. He must list all his immediate relatives and the names and addresses of four persons who know him well. The applicant is required to disclose any arrests, criminal charges, or convictions; he must reveal whether he, his spouse, or a company controlled by him has ever declared bankruptcy, been declared bankrupt, been subject to a lien, or had a judgment rendered against them for a debt. The applicant is also asked whether he has ever had a nervous breakdown or medical treatment for a mental condition.

The applicant must also provide information about his involvement with alcohol and illegal drugs. Specifically, the applicant is asked: "Do you now use or supply, or within the last 5 years have you used or supplied, marijuana, cocaine, narcotics, hallucinogenics, or other dangerous or illegal drugs?" The instructions accompanying the form remind the applicant that "knowingly falsifying or concealing a material fact is a felony which may result in fines of up to \$10,000, or 5 years imprisonment, or

both." The applicant must also sign a release authorizing,

any duly accredited representative of the Federal Government, including those from the U.S. Office of Personnel Management, the Federal Bureau of Investigation, and the Department of Defense, to obtain any information relating to my activities from schools, residential management agents, employers, criminal justice agencies, financial or lending institutions, credit bureaus, consumer reporting agencies, retail business establishments, medical institutions, hospitals or other repositories of medical records, or individuals. This information may include, but is not limited to, my academic, residential, achievement, performance, attendance, personal history, disciplinary, criminal history record, arrest, conviction, medical, psychiatric/psychological, and financial and credit information.

SF-86 at 10.

In addition, applicants for positions at the Justice Department are required to sign a form authorizing the release of their federal income tax returns for the last five years. Joint Appendix (J.A.) 202. The applicant is also fingerprinted for the purposes of checking criminal records. When SF-86 and the tax waiver form have been submitted, the Federal Bureau of Investigation conducts a background investigation. As described by the Executive Officer of the Antitrust Division of the Justice Department,

The background inquiry is thorough. At a minimum, the FBI will contact all references and close personal associates listed on the SF-86, as well as former spouses, employers and co-workers. The FBI will also conduct neighborhood checks on all residences, interviewing landlords and neighbors.... A regional credit bureau check is also conducted, covering all areas in which the applicant has lived. Military records and police records in all jurisdictions in which the applicant has resided are also examined.

Thus, as a general matter, applicants for Justice Department positions cannot reasonably expect to—and in fact do not—

shield their private lives from government scrutiny during the hiring process. The background investigation is an extraordinarily intrusive process designed to uncover a vast array of information about those applying for jobs in the Department of Justice. As the Supreme Court stated in *Von Raab*, 109 S.Ct. at 1397, this "especially" "may be expected to diminish their expectations of privacy in respect of a urinalysis test." See *American Federation of Government Employees*, 885 F.2d at 893; *National Federation of Federal Employees*, 884 F.2d at 612-13.

Common practice, in the government and in the private sector, is also a measure of the degree of privacy job applicants reasonably can expect. See *O'Connor v. Ortega*, 480 U.S. 709, 732, 107 S.Ct. 1492, 1505, 94 L.Ed.2d 714 (1987) (Scalia, J., concurring); *Transportation Institute v. U.S. Coast Guard*, 727 F.Supp. 648, 655 (D.D.C.1989). Plagued with increased absenteeism, lower productivity, and workplace disruption connected with employee drug use, private companies have increasingly turned to drug testing as a means of dealing with the problem. A recent study by the Bureau of Labor Statistics found that drug-testing programs have become fairly common in the nation's largest firms. The study showed that the larger the work force, the more likely the employer would have a drug-testing program. Almost 60 percent of private employers with 5,000 or more employees had such programs and another 11 percent were considering implementing one. Bureau of Labor Statistics, U.S. Department of Labor, Survey of Employer Anti-drug Programs, Report 760, at 6, table 1 (Jan.1989) (J.A. 174).

Overall, "[d]rug-testing programs are aimed more towards job applicants than employees." *Id.* at 5 (J.A. 173). More than 85 percent of employers with drug-testing programs tested job applicants; of those that tested job applicants, 83 percent tested all applicants while only 16 percent limited testing to selected occupations. *Id.* at 8, table 4 (J.A. 176). Some of the nation's largest employers, including American Telephone & Telegraph, DuPont, Exxon, Federal Express, Trans World Airlines, and

United Airlines, have drug-testing programs for job applicants. See Adams, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U.CHI.L.REV. 1335, 1337 (1987). Such testing has become more common in recent years. Between 1982 and 1985 the number of FORTUNE 500 corporations having drug-testing programs more than doubled. Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI-KENT L.REV. 683, 703 (1987).

These statistics are of course quite general. They say nothing, for example, about the hiring processes of large private law firms. It is also true that private employers, unconstrained by the Fourth Amendment, may engage in practices the government as employer cannot. Nonetheless, what is occurring generally outside government is some indication of what expectations of privacy "society is prepared to accept as 'reasonable'" when the government engages in the hiring process. *Katz v. United States*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). See *California v. Greenwood*, 486 U.S. 35, 40-41 & nn. 3, 4, 108 S.Ct. 1625, 1628-29 & nn. 3, 4, 100 L.Ed.2d 30 (1988), which relied on private practices to determine what was a "reasonable" expectation of privacy.

III

On the other side of the scale are the interests of the Justice Department. The purpose of weighing the government's interests against those of applicants is to determine whether it would be "impractical to require" that before testing a job applicant, the Justice Department obtain a warrant or suspect that the person is using drugs. *Von Raab*, 109 S.Ct. at 1390. Our focus is on the government in its role as an employer at the hiring stage. The Department of Justice, of course, is not just any employer. It has a legitimate interest in maintaining public confidence and trust. Drug use among its employees would undermine the Department's credibility as the nation's leading law enforcement agency. But it has other concerns. To the Justice

Department, like any other employer, an applicant is a stranger. The hiring process at the Department of Justice, particularly the interviews and background investigation, is designed to gather information so that a judgment may be made regarding the individual's suitability for employment. That too is the purpose of pre-employment drug testing. To require a warrant or individualized suspicion at the hiring stage would therefore all but defeat the purpose of testing applicants.

The Justice Department's interest with respect to applicants is thus not simply promoting a public image of integrity, which *Harmon* deemed insufficient by itself to overcome the interests of incumbents. 878 F.2d at 490. Any employer, including the Justice Department, makes a considerable investment in terms of time and money whenever it hires someone. The hiring process itself entails substantial costs. Those new to the job must be trained and ordinarily will require some period of time on the job before they reach full productivity. For economic reasons alone, the Department is therefore entitled to compile pertinent information about those who seek positions with it. That is the only sensible way to predict how an applicant would perform and it is why private employers, with increasing frequency, are drug testing applicants. If the practice became even more widespread, if the private sector almost invariably tested for drugs while the public sector did not, individuals with drug problems might tend to migrate toward government employment. Yet the government, no less than private employers, has a very substantial interest in preventing such individuals from entering its work force.

Recent empirical studies have shown that individuals who test positive in pre-employment drug tests have higher rates of absenteeism and involuntary separation. The United States Postal Service, in an ongoing study of the relationship between drug test results and job performance, has found that "[e]mployees who tested positive for drugs were found to have a 47% higher rate of involuntary separation than those who tested negative," and "the positive

group ha[d] a 59% higher absence rate than the negative group." U.S. Postal Service, *An Empirical Evaluation of Preemployment Drug Testing in the United States Postal Service—Second Interim Report of Findings*, at II (Sept.1989). Another, more limited study, "found that those with marijuana-positive urine samples have 55% more industrial accidents, 85% more injuries, and a 78% increase in absenteeism. For those with cocaine-positive urine samples, there was a 145% increase in absenteeism and an 85% increase in injuries." Zwerling, Ryan & Orav, *The Efficacy of Preemployment Drug Screening for Marijuana and Cocaine in Predicting Employment Outcome*, 264 J.A.M.A. 2639, 2643 (Nov. 28, 1990). These studies and others mentioned in the Postal Service report thus confirm what one would expect—an extremely high correlation between a positive result in a pre-employment drug test and subsequent employment problems. See also, R. DE-CRESCE, M. LIFSHITZ, A. MAZURA & J. TILSON, *DRUG TESTING IN THE WORKPLACE* (1989); M. DE BERNADO, *DRUG ABUSE IN THE WORKPLACE: AN EMPLOYER'S GUIDE FOR PREVENTION* (1987).

The government's interest in detecting drug use is substantial at the pre-employment stage because, as we have already mentioned, the applicant is an outsider. Background checks and information supplied by the applicant assist the government in making what can, at best, be only a prediction about the individual. The fact remains that the applicant is a person the government, as prospective employer, has had no opportunity to observe in the setting of the workplace. This too differentiates applicants from incumbents. In *Harmon* we noted that Justice Department "employees . . . work in 'traditional office environments,' in which drug use is, presumably, more easily detected by means other than urine testing." 878 F.2d at 489. In regard to incumbents, therefore, direct observation together with the reasonable suspicion test may uncover those employees who ought to be tested. That obviously is not true for applicants and is another factor to be weighed in favor of finding it "impractical" for the Justice Department to

obtain warrants or information leading it to suspect drug use before requiring candidates for employment to be tested. See *Von Raab*, 109 S.Ct. at 1397 ("In assessing the reasonableness of requiring tests of these employees, the court should also consider . . . the supervision to which these employees are already subject."). For these reasons, commentators otherwise opposed to drug testing of incumbents have concluded that the government, without violating the Fourth Amendment, may require job applicants to undergo urine testing. See 3 W. LAFAVE, *SEARCH AND SEIZURE* § 10.3, at 123-24 (Supp.1991); Note, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA.L.REV. 969, 991-92 (1988); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Theory of Legality Under the Fourth Amendment*, 48 U.PITT.L.REV. 201, 236-37 (1986).

IV

[8] Our conclusion is that for job applicants like Mr. Willner their privacy expectations in regard to the Justice Department's urine testing requirement are significantly diminished and are far less than those of incumbents. Unlike current employees, job applicants are routinely required to reveal considerable amounts of information about themselves, information the employer uses to make responsible hiring decisions. The urine testing procedure at the Justice Department minimizes the intrusion and the chemical analysis later performed on the urine sample reveals no information the applicant has a cognizable interest in keeping secret. An applicant may avoid even this minimal invasion of privacy by not seeking employment with the Justice Department. On the other hand, the Justice Department's interests, as an employer, in requiring applicants to undergo urinalysis are strong. Drug testing in the context of a job application is commonplace. Although an employer may monitor an incumbent's performance, and thus be required to have individualized suspicion before subjecting the employee to

urinalysis, such a requirement for testing applicants would be "impractical." *Von Raab*, 109 S.Ct. at 1390.

For these reasons we hold that urine tests of applicants for positions as attorneys at the Justice Department do not constitute "unreasonable searches" under the Fourth Amendment. The district court's injunction is therefore vacated.

So ordered.

HENDERSON, Circuit Judge,
dissenting:

In holding that the Department of Justice may require an applicant to submit to urinalysis as a precondition of employment in the Antitrust Division, the majority in my view impermissibly restricts the protection of the fourth amendment. Along the way, it gives inadequate weight to existing circuit authority, bases its opinion on a palpable logical inconsistency, improperly injects a new element into the fourth amendment equation and conducts its balancing test with a thumb firmly on the government's side of the scale.

It is well established in fourth amendment jurisprudence that, in order to compel an individual to submit to suspicionless drug testing, the government must establish that its interests in conducting the testing outweigh the individual's reasonable expectations of privacy. *See, e.g., Hartness v. Bush*, 919 F.2d 170, 172 (D.C. Cir.1990). The Supreme Court conducted this balancing test in two recent decisions, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), and *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) and we have applied the principles from these decisions in several recent opinions, including *Harmon v. Thornburgh*, 878 F.2d 484 (D.C.Cir.1989), *cert. denied*, — U.S. —, 110 S.Ct. 865, 107 L.Ed.2d 949 (1990). These three decisions provide the tools necessary to conduct the balancing inquiry here. I believe the majority, however, misuses those tools.

I.

The first, and to my mind the paramount, flaw in the majority's opinion is its failure to consider an element that, until today, has been central to the fourth amendment evaluation of all similar government drug testing programs. Courts that have considered the constitutionality of drug testing programs have examined the connection between an individual's duties and the harm the government seeks to avert through the program. Only when the government has established a sufficient nexus between the two has the program been upheld.

In *Skinner*, for example, the Court focused on the "safety-sensitive tasks" that railroad employees perform, 109 S.Ct. at 1414, and found testing justified because the covered employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Id.* at 1419. Analogizing the railroad workers to those with "routine access to dangerous nuclear power facilities," the Court noted that they "can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.*

Similarly, in *Von Raab*, the Court held that, in testing drug interdiction personnel, the government had a "compelling interest," 109 S.Ct. at 1393, that proceeded from at least two of the dangers that employee drug use created. First, the Court noted the "national interest in self protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." *Id.* Second, the Court recognized the special dangers present when a government employee carries a firearm: "We agree with the Government that the 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." *Id.*

In addition, this court has insisted that the nexus portion of the fourth amendment analysis be satisfied. In *Harmon*, we required a "clear, direct nexus ... between

the nature of the employee's duty and the nature of the feared violation" in order to uphold a mandatory urinalysis program aimed at protecting classified information. 878 F.2d at 490. Noting that, in *Von Raab*, the Supreme Court had found such a nexus to exist with respect to "truly sensitive information," 109 S.Ct. at 1396, we ruled that "the government may properly make testing a requirement for holding a top secret security clearance." 878 F.2d at 492.¹ Our decision in *Harmon* applied, however, only to the narrow class of Justice Department employees whose drug use, we held, could pose a sufficiently direct and immediate danger to warrant the intrusion of mandatory urinalysis. We emphasized that the requisite nexus does not exist for all Justice Department lawyers: "The government has . . . required that all employees who prosecute criminal cases must undergo random testing. We do not believe, however, that under *Von Raab* an attorney who prosecutes antitrust or securities fraud cases can plausibly be analogized to a customs agent whose job is drug interdiction." 878 F.2d at 491 (emphasis added; original emphasis omitted); see also *id.* at 498 (Silberman, J., concurring) (noting the constitutional difficulties posed by testing of employees who are "never involved with drug-related crime" and concurring in court's "refusal to authorize drug testing of employees (like those in the Antitrust or Civil Rights Division) who are not responsible for drug-related criminal investigations and prosecutions") (emphasis added; original emphasis omitted).

In its opinion, the majority fails even to consider the relationship between the duties of a Justice Department antitrust lawyer and the threat that lawyer could pose if drug-impaired. The omission may proceed from a recognition that the nexus

inquiry requires invalidation of the testing program in this case. That much is clear from our decision in *Harmon*:

Certainly a blunder by a Justice Department lawyer may lead, through a chain of ensuing circumstances, to a threat to public safety. That sort of indirect risk, however, is wholly different from the risk posed by a worker who carries a gun or operates a train. . . .

. . . *Von Raab* and *Skinner* focused on the immediacy of the threat. The point was that 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. *Von Raab* provides no basis for extending this principle to the Justice Department, where the chain of causation between misconduct and injury is considerably more attenuated.

878 F.2d at 491 (emphasis added; original emphasis omitted). Moreover, in *Harmon*, we explicitly declared that the requisite nexus does not exist with respect to Justice Department antitrust lawyers.

Nor can the majority's omission of the nexus requirement be justified by distinguishing Willner's status as an applicant from that of the incumbent employees in *Harmon* and *Skinner*.² The *Harmon* court characterized the threshold nexus requirement as demanding a close relationship between "the employee's duty and the nature of the feared violation." *Id.* at 490. The aim of the instant testing program is not to prevent some drug-related harm that Willner might cause *before* he secures employment at the Justice Department. It is only *after* he is hired that his potential drug use could threaten any harm the De-

1. We later followed the *Harmon* analysis in *Hartness v. Bush*, 919 F.2d at 173, where we upheld a program in the Executive Office of the President requiring testing of all employees with secret (as opposed to top secret) security clearances.

2. Although there may be differences between employees and applicants that are significant to the fourth amendment analysis, they affect pri-

vacy expectations and not the link required between an employee's duties and the dangers posed by his drug use. See *infra*, Part III; see also *Harmon*, 878 F.2d at 489 n. 6 (losing job is greater hardship than failing to obtain job; mandatory drug testing may therefore be more intrusive when result of individual's refusal to submit to testing is discharge rather than merely missing job opportunity).

partment as an employer has an interest in preventing. At that point, he is identical to the antitrust lawyers in *Harmon* who, according to this court, could not be constitutionally subjected to mandatory drug testing.

Taken to its logical end, the majority's reasoning sanctions a blanket testing requirement for all federal job applicants. In *Harmon*, however, we held that "federal employment alone is not a sufficient predicate for mandatory urinalysis." 878 F.2d at 490; see also *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 613 (D.C.Cir.1989), cert. denied, — U.S. —, 110 S.Ct. 864, 107 L.Ed.2d 948 (1990). Accordingly, I would hold that simply applying for federal employment is too slim a reed to support mandatory drug testing.

II.

My disagreement with the majority does not end with its failure to make the nexus inquiry. It identifies two governmental interests that favor the drug testing program: the "interest in maintaining public confidence and trust," maj. op. at 1192, and the high cost of hiring and training new employees. Maj. op. at 1192. The majority immediately acknowledges that this court has previously held the government's interest in "promoting a public image of integrity" to be "insufficient" to overcome employee privacy interests. Maj. op. at 1192-1193. Indeed, in *Harmon*, this court categorically announced that, even in conjunction with other asserted governmental interests, "the government's integrity interest cannot justify" a drug testing program covering all Justice Department lawyers who conduct grand jury proceedings or try criminal cases. *Harmon*, 878 F.2d at 490-91; see also *id.* at 498 (Silberman, J., con-

curring) (government's "powerful interest in preventing drug use" does not justify testing all Justice Department lawyers). This leaves "economic reasons," maj. op. at 1192, as the sole interest on the government's side of the scale.

I do not disagree with the majority that the government has a substantial interest in minimizing the expenses it incurs in the hiring and training of new Justice Department personnel. Nor do I dispute the majority's position that this interest permits the government to "compile pertinent information about those who seek positions" with the Justice Department in order to avoid the documented pernicious effects of employee drug use. Maj. op. at 1192. We do part company, however, where the majority concludes that the need to evaluate a potential employee's fitness justifies subjecting all applicants to the "needless indignity," *Von Raab*, 109 S.Ct. at 1400-01 (Scalia, J., dissenting), of urine testing.³

In concluding that mandatory urinalysis provides the government with the necessary means to investigate an applicant's fitness, the majority first considers in meticulous detail the sweep and effect of the FBI background investigation in relation to its impact on the applicant's privacy interests. Characterizing the investigation as "extraordinarily intrusive," maj. op. at 1191, and "thorough and exhaustive," maj. op. at 1190, the majority concludes that the background check, designed as it is to "uncover a vast array of information," maj. op. at 1191, about an applicant, significantly diminishes the reasonable privacy expectations of anyone applying to the Justice Department. But the majority at one time both runs with the foxes and hunts with the hounds. For when it turns to the government's interests supporting the test-

3. The fate of an applicant whose test is positive leaves open to some doubt the extent to which the Department's program effectively reduces its recruiting and training expenses. An applicant who has tested positive may reapply after six months and, if he then tests negative, may presumably be hired. Maj. op. at 1187. Thus, the Justice Department appears willing to employ individuals of whose drug use it has conclusive evidence if they can pass the drug test a second (or, theoretically, third or fourth) time. The

factor that qualifies an applicant for employment, then, appears to be not what past experience reveals about the likelihood that he will use illegal drugs but rather his ability to once test negative. This consideration makes the Department's program appear to be less a means to screen out applicants likely to use illegal drugs and more an "immolation of privacy and human dignity in symbolic opposition to drug use." *Von Raab*, 109 S.Ct. at 1398 (Scalia, J., dissenting).

ing program, the majority apparently concludes that the investigation it formerly found so complete now leaves the Justice Department with no insight whatsoever into an applicant's fitness. The Department may use drug testing in its hiring process, we are told, because an applicant is "an outsider," a "stranger," someone whom the government "has had no opportunity to observe in the setting of the workplace." Maj. op. at 1192, 1193.

Given this volte-face, one wonders which is the more accurate characterization of the FBI check: Is it "extraordinarily intrusive" and "thorough and exhaustive" or is it an inquiry that leaves its subject a "stranger?" From the majority's description, see maj. op. at 1190-1191, the investigation seems much more the former than the latter. If that is so, the crucial question then is whether the marginally greater information that drug testing reveals about an applicant justifies the substantially increased intrusion on the applicant's privacy. Cf. *Delaware v. Prouse*, 440 U.S. 648, 659-60, 99 S.Ct. 1391, 1399, 59 L.Ed.2d 660 (1979) (examining practice's "incremental contribution" to safety to determine whether it "qualif[ie]d as a reasonable law enforcement practice under the Fourth Amendment"). I have no difficulty answering this question in the negative. It is true that the FBI check does not conclusively establish that the applicant uses no illegal drugs; but even urinalysis cannot always do this. See *Von Raab*, 109 S.Ct. at 1396. The investigation does, however, make available to the Justice Department significant information from which it can evaluate the applicant's fitness and likely drug use.

Chief among this information is what the FBI learns from an applicant's former employers and co-workers. During the application process, an applicant must disclose all jobs he has held for the past fifteen

years and he must permit government officials to request of his former employers information relating to his "achievement, performance, attendance, personal history, [and] disciplinary ... history." Questionnaire for Sensitive Positions, Standard Form 86. The FBI also questions an applicant's present and former co-workers. Joint Appendix at 230. It ignores the nature of this inquiry to conclude, as the majority does, that the extensive information obtained provides no basis whatsoever to evaluate a prospective employee's likely drug use. The information the government receives from former employers and co-workers regarding the applicant's past professional conduct and work product is precisely the sort that will shed the most light on an applicant's tendency toward illegal drug use.

Furthermore, as a Justice Department antitrust lawyer, Willner will not be in a position analogous to those of the Customs Service field agents who the *Von Raab* Court held could be tested. There, the Court concluded that a mandatory urinalysis program complied with the fourth amendment in part because of the difficulty of monitoring an individual's fitness by subjecting his "work-product to the kind of day-to-day scrutiny that is the norm in more traditional office environments." 109 S.Ct. at 1395. Here, by contrast, Willner has accumulated and revealed to the government an extensive history of performance in traditional office environments.⁴ By the time he sought employment with the Justice Department, Willner had completed law school, two year-long federal appellate clerkships and over four years' practice at a large law firm. He had worked in just the sort of "traditional office environments" that the *Von Raab* Court noted allow a performance evaluation that may render mandatory drug testing an unreasonable search under the fourth amendment. Indeed, this court has

4. Lawyers apply to the Department of Justice in two different ways. The first group of applicants is composed of individuals, like Willner, who have gained professional experience after law school. Joint Appendix at 208. The Department also hires new lawyers through its Honor Program, "a highly competitive program

in which applicants are selected from among the most outstanding recent law school graduates and judicial law clerks." Declaration of Thomas King, Joint Appendix at 199. Willner falls into the first group of applicants—that composed of individuals who have gained professional experience.

recently stressed the significance of an office setting "in which drug use is, presumably, more easily detected by means other than urine testing." *Harmon*, 878 F.2d at 489. In light of the government's ability to gauge Willner's professional performance through its "exhaustive" background investigation and Willner's established work record, the majority seems to wink at reality when it concludes that the government's need for information weighs heavily in favor of mandatory pre-employment testing.

III.

In analyzing the applicant's reasonable expectations of privacy, I believe the majority also errs in the weight and effect it gives two different factors. First is that, as an applicant with notice of the testing requirement, he triggers the process himself. This factor, while relevant, see *National Fed'n of Fed. Employees v. Weinberger*, 818 F.2d 935, 943 (D.C.Cir.1987), does not merit the weight the majority gives it in concluding that an applicant's reasonable expectations of privacy are "significantly diminished." Maj. op. at 1193. The same factor was present in *Von Raab*,⁵ but the Court there attributed little, if any, significance to it, merely identifying it in a footnote, without elaboration, as affecting the employees' privacy expectations. See *Von Raab*, 109 S.Ct. at 1394 n. 2; see also *Harmon*, 878 F.2d at 489. As discussed above, the *Von Raab* decision turned on the efficacy of urinalysis in preventing particular harms, not on the privacy implications of advance warning of the

testing requirement. Accordingly, the majority's focus on the notice aspects of the challenged program inappropriately departs from the course of previous balancing tests in similar contexts.

More significantly, I fear that the majority's consideration of private industry drug-testing practices as part of its constitutional analysis is both improper and potentially dangerous. It is beyond question that mandatory urinalysis, both of applicants and incumbent employees, is common in private industry. Nevertheless, private employers' practices cannot, and until today have not, become the yardstick by which we measure the government's compliance with constitutional mandates. The government is unique in being subject to the dictates of the Constitution; private entities are bound by no such strictures. See *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984) (fourth amendment "is wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government") (internal quotation omitted); see also *Walter v. United States*, 447 U.S. 649, 656, 100 S.Ct. 2395, 2401, 65 L.Ed.2d 410 (1980); *Burdeau v. McDowell*, 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). It is therefore wholly inappropriate for the majority to import into a fourth amendment analysis consideration of private sector practice.⁶

The phenomenon of private industry's employee drug testing is not something

diminished the individual's expectations of privacy.

5. In *Von Raab*, only an employee who applied for transfer or promotion was subject to the testing program and the employee knew in advance of the urinalysis requirement. *Von Raab*, 109 S.Ct. at 1388. An individual who refused to submit to testing lost only the opportunity for a promotion; he did not risk losing a job. *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 173 (5th Cir.1987). He was therefore in a position identical to Willner's: by refusing to undergo testing, he did not lose anything he already had, but merely forewent an opportunity for advancement. Cf. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 282-83, 106 S.Ct. 1842, 1851, 90 L.Ed.2d 260 (1986) (plurality opinion) ("Denial of a future employment opportunity is not as intrusive as loss of an existing job"); maj. op. at 1190. The Court did not, however, treat this as a distinction that

6. While admittedly not conclusive, I find it significant that before today, the Supreme Court and other courts, including this one, have not considered the impact of private sector activity on an individual's reasonable expectations of privacy. This is true throughout the line of decisions leading up to *Skinner* and *Von Raab*. In *Camara v. Municipal Court*, 387 U.S. 523, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967), the Court applied the fourth amendment to a municipality's housing code inspection program. Nowhere did the Court consider the effect on a resident's privacy expectations of the fact that landlords might retain the right to enter and inspect their tenants' homes. In *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d

that has occurred so recently that this court is the first to have the opportunity to consider its fourth amendment implications. Similar conditions existed at the time *Von Raab* and *Skinner* were decided, as well as when we faced the issue in *Harmon*. See Bureau of Labor Statistics, U.S. Department of Labor, Survey of Employer Anti-drug Programs, Report 760, at 6 (Jan. 1989). In spite of the prevalence of mandatory urinalysis for private employees, however, neither this court nor the Supreme Court relied on the practice to justify such a government program. The reasons for this omission seemed obvious before today. The protections the Constitution provides against arbitrary government action will quickly evaporate if courts adopt, as the benchmark of fourth amendment reasonableness, the conduct of private entities.

IV.

I find myself unable to join in the majority's opinion today. In conducting its bal-

720 (1985), the Court first held that the fourth amendment restricted the actions of a public school official in his search of a student's purse. *Id.* at 333-34, 105 S.Ct. at 738. It then balanced the "individual's legitimate expectations of privacy and personal security" against the "government's need for effective methods to deal with breaches of the public order." *Id.* at 337, 105 S.Ct. at 740. In its analysis, the Court did not consider whether private school officials, who are unfettered by the fourth amendment, subject their students to searches. In *O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the plurality opinion omitted any examination of private industry conditions in analyzing the privacy expectations of an individual challenging a government employer's search of his office. See also *Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir.1990), *cert. denied*, — U.S. —, 111 S.Ct. 954, 112 L.Ed.2d 1042 (1991) (considering reasonableness of FAA-mandated urinalysis for airline employees, the court ignored impact on privacy expectations of airlines' privately implemented testing programs although such programs existed).

Neither of the decisions the majority relies on is to the contrary. In *Katz v. United States*, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the Court held that the government could not electronically eavesdrop on an individual's conversation from a public phone booth because it violated his reasonable expectations of privacy. In *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988), the Court held that an individual has no reasonable expecta-

ancing test, the majority dispenses with the requirement that the testing be reasonably calculated to avert some harm that a drug-impaired employee is likely to cause and it ignores the importance that its own opinion elsewhere attributes to the background check the FBI conducts on prospective employees. The majority attributes greater significance than ever before to the facts that an individual has notice of the testing requirement and that he triggers it himself by applying for employment. Most alarming, the majority inserts into the fourth amendment calculus the new element of private industry norms.

As the majority notes, the balancing test to be conducted under *Von Raab* is "imprecise," maj. op. at 1187, and "[r]ather than considering a factor separately to determine if it alone would be decisive, [the court] must aggregate the factors on each side in order to strike the balance." Maj. op. at 1190. The approach adopted by the majority, however, puts the scales in per-

tion of privacy in garbage left outside the curtilage of his property because "[w]hat a person knowingly exposes to the public ... is not a subject of Fourth Amendment protection." *Id.* at 41, 108 S.Ct. at 1629 (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. at 511). By deliberately placing their garbage where it was readily accessible to members of the public, the Court held, the *Greenwood* respondents had relinquished their expectations of privacy with respect to it. *Id.* at 40-41, 108 S.Ct. at 1628-29. By applying to the Justice Department, Willner has not relinquished his privacy expectations regarding the significantly more intrusive search here.

In order to come within the fourth amendment's protection, an individual's expectation of privacy must be "one that society is prepared to recognize as 'reasonable.'" *Katz v. United States*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). Contrary to the majority's reasoning, however, in order to be reasonable, this expectation of privacy does not have to be one that society recognizes between an individual and his private employer. Were there such a requirement, the court's task would be easy indeed since we would be constrained to permit the government to invade the privacy of its employees in the various ways available to a private employer. Until today, however, the fourth amendment has been construed to hold the government—even when acting as an employer—to a higher standard.

manent tilt. For this reason, I respectfully dissent.



**UNITED MINE WORKERS OF
AMERICA, INTERNATIONAL
UNION, Petitioner.**

v.

MINE SAFETY AND HEALTH ADMINISTRATION, United States Department of Labor and William J. Tattersall, Assistant Secretary of Labor for Mine Safety and Health, United States Department of Labor, Respondents,

**Southern Ohio Coal
Company, Intervenor.**

No. 90-1403.

United States Court of Appeals,
District of Columbia Circuit.

Argued March 11, 1991.

Decided April 2, 1991.

Mine workers' union petitioned for review of Mine Safety and Health Administration (MSHA) order exempting coal mine from regulation governing flow of air through mines. The Court of Appeals, Harry T. Edwards, Circuit Judge, held that Assistant Secretary of Labor for Mine Safety and Health failed in three respects to adequately justify his decision to grant coal company's petition for modification of airflow regulations on condition that company install carbon monoxide detectors to protect miners' safety.

Remanded.

Labor Relations ¶31

Assistant Secretary of Labor for Mine Safety and Health failed to adequately justify his decision to grant coal company's petition for modification of airflow regula-

tions for underground coal mine on condition that carbon monoxide detectors be installed to protect miners' safety and, on remand, would have to make additional and distinct finding that, considering both positive and negative effects of proposed alternative method modification would achieve net gain or at least equivalence in overall mine safety, to decide whether removal of "stoppings" separating belt from track entries was permissible modification of Mine Safety and Health Administration (MSHA) standard, and to clarify his citation to coal company's ongoing difficulties in attempting to comply with that standard. Federal Mine Safety and Health Act of 1977, § 101(c), 30 U.S.C.A. § 811(c).

Petition for Review of an Order of the Mine Safety and Health Administration.

Michael Dinnerstein, Washington, D.C., with whom Robert H. Stropp, Jr., Birmingham, Ala., was on the brief, for petitioner.

Jerald S. Feingold, Attorney, Dept. of Labor, with whom Dennis D. Clark, Washington, D.C., Counsel, Appellate Litigation, Dept. of Labor, was on the brief, for respondents.

W. Henry Lawrence, IV, with whom Brent O. Burton, Clarksburg, W.Va., was on the brief, for intervenor.

Before EDWARDS, WILLIAMS and RANDOLPH, Circuit Judges.

Opinion for the Court filed by Circuit Judge HARRY T. EDWARDS.

HARRY T. EDWARDS, Circuit Judge:

The petitioner, International Union, United Mine Workers of America ("UMWA" or "Union"), challenges an order of the respondent, Assistant Secretary of Labor for Mine Safety and Health ("Assistant Secretary"), exempting Southern Ohio Coal Company's "Martinka No. 1 Mine" from a regulation governing the flow of air through mines. This is another in a series of cases in which the Assistant Secretary has granted modifications of the air-flow regulation on the condition that the petitioning coal company install carbon monoxide detectors

violation of the Order. In addition, Operation Rescue participants shall be jointly and severally liable to pay any excess costs incurred by the City of New York as a result of Operation Rescues participants' failure to provide the City with twelve hours' advance notice of the location of their demonstrations. Furthermore, in view of defendants' stated intention to make the enforcement of this Court's orders as costly as possible to plaintiffs, any Operation Rescue participant who knowingly violates the Order shall be liable for all attorneys' fees and related costs incurred by plaintiffs in relation to enforcement of this Order. In the event these penalties too fail to secure compliance of the Court's order, more severe penalties will have to be considered.

CONCLUSION

For the reasons set forth above, defendants' motion to dismiss is denied. Plaintiffs' motion for summary judgment, joined by plaintiff-intervenor, is granted.

Permanent injunction issued January 10, 1989.



Charles FOWLER, Plaintiff,

v.

NEW YORK CITY DEPARTMENT OF SANITATION; Norman Steisel, individually and in his official capacity as Deputy Commissioner for Administration of the New York City Department of Sanitation; Robert C. Ross, individually and in his official capacity as Director of Personnel of the New York City Department of Sanitation, Defendants.

No. 86 Civ. 9138 (MBM).

United States District Court,
S.D. New York.

Jan. 30, 1989.

Former probationary employee in city department of sanitation brought civil

rights action against department and other defendants for defendants' alleged violation of Fourth Amendment rights in administration of urinalysis-drug test. On parties' motions for summary judgment, the District Court, Mukasey, J., held that: (1) preemployment testing of prospective government employee's urine to determine employee's fitness for job was not a "search" under the Fourth Amendment; (2) urinalysis test performed during employee's probationary employment, as follow-up to earlier tests, one of which registered positive for presence of opiates, did not violate employee's Fourth Amendment rights; and (3) probationary employee in city department of sanitation did not have "property interest" in continued employment in department, such as would allow him to maintain civil rights action for Department's two-week delay in notifying him of charges against him supporting termination of employment.

Plaintiff's motion denied; defendants' motion granted.

1. Searches and Seizures ¶14

Preemployment testing of prospective government employee's urine to determine employee's fitness for job is not a "search" under the Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Searches and Seizures ¶14

Whether a drug test qualifies as a "search" under the Fourth Amendment depends on the concrete facts surrounding test—specifically, the expectation of privacy that the person tested may hold both objectively and subjectively. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ¶78

Urinalysis test performed during civil rights plaintiff's probationary employment in city department of sanitation, as follow-up to other preemployment tests, one of

which registered positive for presence of opiates, did not violate plaintiff's Fourth Amendment rights, but were based upon "reasonable suspicion" of drug abuse arising from earlier test. U.S.C.A. Const. Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

4. Searches and Seizures $\Rightarrow$ 23

"Reasonableness" of search does not turn solely on whether government could have used less intrusive means to search. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures $\Rightarrow$ 78

In determining whether employee drug test constitutes "unreasonable" search prohibited by Fourth Amendment, court needs to balance intrusiveness of test against importance of governmental interest alleged to justify intrusion. U.S.C.A. Const. Amend. 4.

6. Constitutional Law $\Rightarrow$ 277(2)

Probationary employee in city department of sanitation did not have "property interest" in continued employment in department, such as would allow him to maintain due process claim for department's two-week delay in notifying him of charges against him supporting termination of employment. U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

7. Constitutional Law $\Rightarrow$ 278.4(3)

Municipal Corporations $\Rightarrow$ 218(3)

Dismissal of probationary public employee for violating agency's substance abuse policy did not deprive employee of any "liberty interest" in violation of due process rights, absent showing that agency had published or disseminated information regarding employee's substance abuse problem, or that there was threat that employee would be deprived of other employment opportunities as result of agency's public disclosure of information. U.S.C.A. Const. Amend. 14.

See publication Words and Phrases for other judicial constructions and definitions.

8. Civil Rights $\Rightarrow$ 9.16

Dismissal of probationary public employee for violating agency's substance abuse policy did not violate any rights to which employee was entitled under the Rehabilitation Act. Rehabilitation Act of 1973, § 504, 29 U.S.C.A. § 794.

9. Federal Courts $\Rightarrow$ 18

Civil rights plaintiff's state law claims would be dismissed for lack of pendent jurisdiction, where all of plaintiff's federal claims were without merit.

Minna J. Kotkin, Craig Saunders, Jason Turken, Legal Interns, BLS Legal Services Corp., Brooklyn, N.Y., for plaintiff.

George Gutwirth, Asst. Corp. Counsel, for City of New York, Peter L. Zimroth, Corp. Counsel, New York City, for defendants.

OPINION AND ORDER

MUKASEY, District Judge.

Concerned about a growing problem of substance abuse among its employees and the attendant danger to the public, the New York City Department of Sanitation (the "Department") introduced, on May 1, 1985, a "Substance Abuse Policy and Procedure" designed to "protect the health and safety of both the public and the Department's work force and to ensure that employees troubled by drug and alcohol abuse problems receive the help they need." The policy established new rules to deal with Department employees who use alcohol or illegal drugs and set up counseling procedures for employees found to be using these substances. Significantly, the Department stated that it did not intend to introduce random tests for substance abuse but would test only: 1) all potential employees as part of their pre-employment physical, and 2) all permanent workers receiving low job performance evaluations or involved in physical altercations, vehicle accidents or vandalism.

Plaintiff Charles Fowler, a probationary employee, was fired by the Department based on positive drug tests showing her-

oin use. He challenges, on various grounds, its policy for testing job applicants and probationary employees for substance abuse. Both parties have moved for summary judgment. For the reasons set forth below, plaintiff's motion is denied and defendants' motion is granted.

I.

At some point in 1973 or 1974 plaintiff took and passed a New York City Civil Service examination for employment with the Department, but was not hired because he moved his residence without leaving a forwarding address and the Department could not reach him. In 1985, after reading a newspaper article about the discontinuation of the old eligibility list for hiring by the Department, he called and was placed on an existing eligible list. Shortly thereafter the Department contacted him and told him to report for a compulsory pre-employment medical examination at its Medical Division.

According to the Department's employee manual, all candidates are required as part of their pre-employment physical to submit "supervised urine specimens for substance abuse testing" and "sign a statement acknowledging that specific substances found in their urine will disqualify them from employment and/or will lead to termination during their probationary period."

In accordance with this policy, the Department tested plaintiff on February 14, 1986, the day of his pre-employment physical examination. A female attendant escorted him to a bathroom where she watched him urinate into two specimen bottles. There is no evidence that he objected in any way at the time to this procedure. According to the manual's provision for chain of custody, after the two samples are taken, each bottle is labeled with the donor's name, the last four digits of his social

security number, the date, the letter "A" or "B," and the attendant's initials. The specimens are then placed into two separate locked refrigerators. The first sample is sent to a laboratory and tested. If the result is negative no further testing is done. If the result is positive, the second sample is then sent to the laboratory for another round of tests.

Plaintiff's first sample, sample A, was sent to the Laboratory for Chromatography, a private laboratory licensed by the New York State and City Health Departments to conduct toxicology examinations. The sample tested positive for opiates (morphine) on two Enzyme Multiplied Immunoassay Technique ("EMIT") tests. The positive sample was then confirmed for the presence of opiates by a process known as hydrolysis, a method by which the drug in the urine is broken up into its free form by action of acid and is then subsequently tested using the Thin Layer Chromatography method. The "A" sample also tested positive for marijuana. As a result of this positive report, the second sample was then forwarded to the laboratory for a confirming test. The second sample, the "B" portion, tested positive twice for opiates using the EMIT tests but was not reported as positive because hydrolysis could not confirm this result.

In the case of a split result, where only one specimen tests positive, Department policy provides that the employee be notified that there is a "suspicion" of substance abuse and that he will be called in for a randomly timed test.¹ If this test is negative, for both the "A" and "B" portions of the sample, the employee is not required to undergo further testing as he would be if the second test is positive. If both specimens are positive, however, the employee is disqualified from employment

1. The policy provides:

"Any employee who tests positive on only one specimen (e.g., "A" not "B"), or for whom only one specimen is valid or extant, will be hired and called in for counselling under PAP 85-05. The employee will be notified that there is a 'suspicion' of substance abuse based on the pre-

employment physical examination and that s/he will be called in for a random test. The purpose of this test will be to ascertain whether there is in fact a substance abuse problem. Should this test be negative (both "A" and "B") then the employee's involvement under PAP 85-05 will be ended...." (emphasis in original)

and no further tests are allowed.²

The Department tested plaintiff a second time on March 6, 1986. This time a male attendant watched while he provided the sample. Both samples tested negative.

The Department hired plaintiff on March 31, 1986. His training included classroom instruction and driver education in operating various trucks. Upon completion of training, the Department transferred him to sweeping duty. See Fowler Dep. at 112-119.

Because of the two contradictory tests, however, Medical Clinic personnel required follow-up tests.³ On April 28, 1986 plaintiff attended a mandatory counseling session at the Department's Medical Clinic. A counselor told him that he had tested positive for morphine and marijuana and that he would have to pass two further tests with negative results in order to continue in his position. Any positive test during his probationary period would result in termination. At the session, plaintiff signed a form indicating he understood the procedure. The form signed by plaintiff stated:

Employee counselled regarding the fact that her/his urine specimen was positive for marijuana (THC) on the pre-employment physical examination. PAP 85-05 explained and employee urged to be in compliance, as following today's session (s)he will require two (2) negative toxicology results, to have satisfactorily completed the probationary period as regards to compliance with PAP 85-05. Employee also informed that during the probationary period, a positive test for alcohol and/or toxicology will result in termination.

The purpose and availability of the Employees' Assistance Unit (EAU) dis-

cussed, and employee encouraged to become involved if necessary. However, (s)he is aware that if the test results are positive (s)he will be terminated, notwithstanding [sic] participation in EAU.... The above has been explained and it is understood by me.

On June 12, 1986 the Department tested plaintiff a third time, using both the EMIT and the Thin Layer Chromatography methods. Both the "A" and "B" samples tested positive for morphine and quinine.

Plaintiff went to the Medical Clinic on July 1, 1986 for counseling and was informed of the positive test results. Plaintiff admitted "dabbling" in drugs in the past, apparently because of stress caused by a family problem. See Fowler Dep. at 152 (5/8/87). Plaintiff submitted to his fourth and final test, the results of which were negative.

On July 28, 1986 the Department fired plaintiff. In a August 15, 1986 letter, the Department informed him that he was fired for violating the substance abuse policy.

In early 1987, however, plaintiff passed another civil service test and was placed on a second eligible list, from which he was called for employment. In his application, he claimed he was never discharged from employment. Because the Department allows employment to begin before it investigates the applicant, plaintiff again began working on March 23, 1987. Investigation revealed plaintiff's previous dismissal for substance abuse as well as a prior conviction in 1982 for possession of stolen property when he worked for the Human Resources Administration. In April, 1987 the New York City Department of Personnel brought charges against plaintiff, which

him or her to EAU [Employee Assistance Unit]. If EAU's evaluation of the employee's condition indicates that the employee should participate in a treatment program, EAU's judgment will take precedence over the test results. In these cases, the employee will not be allowed to resume normal job duties until he or she participates in treatment. The employee will not be allowed to return to regular duty status until evaluated and found fit by the Medical Director."

2. In this regard, the policy provides that "[a]ll candidates with a *positive substance abuse result* for any substance other than THC or methadone (for which specific medical guidelines apply), will be disqualified for employment." P.A.P. 85-05 Substance Abuse Manual at 2.

3. P.A.P. 85-05, 8.4 provides: "Because all positive tests will be confirmed using a different testing method, in some cases the second test may be negative. The results of both tests will be noted in the employee's medical record. The Clinic will evaluate the employee and will refer

resulted in a request for his termination no later than July 17, 1987. Plaintiff has appealed that decision to the New York City Civil Service Commission.

Plaintiff now asserts that the Department's testing policy constituted an unreasonable search and seizure in violation of the Fourth Amendment, applicable to state action through the Fourteenth Amendment and 42 U.S.C. § 1983 (1982), and Article I, section 12 of the New York State Constitution. Plaintiff asserts also that the Department deprived him of due process when it fired him without an opportunity to respond to the charges against him. Further, plaintiff claims his firing violated § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (Supp. IV 1986), and N.Y. Exec. Law § 296 *et seq* (McKinney 1986). Finally, he claims that the Department's failure to notify him fully of the test results and to follow internal procedures violated N.Y.Civ.Prac.L. & R. § 7803(3) (McKinney 1986).

Both sides now move for summary judgment. To grant a motion for summary judgment, a court must find that there is no genuine issue as to any material fact. *Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although plaintiff presents myriad claims, the bulk of his argument rests on the supposed violation of his Fourth Amendment rights.

II.

[1] The Fourth Amendment⁴ protects against unreasonable searches and seizures by government officials. *Carroll v. United States*, 267 U.S. 132, 147, 45 S.Ct. 280, 283, 69 L.Ed. 543 (1925). This right thus is not a constitutional absolute, but is defined by a standard of reasonableness.

The threshold issue is whether the urinalysis conducted here was a "search" as that term is known to Fourth Amendment case law. Judge Guy of the Sixth Circuit put it

4. The Fourth Amendment, applicable to the states through the Fourteenth Amendment, *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), provides that:

[t]he right of the people to be secure in their persons, houses, papers, and effects, against

succinctly, dissenting in *Lovvorn v. City of Chattanooga*, 846 F.2d 1539, 1555 (6th Cir. 1988): "[T]here are 'searches' and then again there are 'Fourth Amendment searches.'" Obviously, to the extent government officials here conducted no Fourth Amendment search, there is no occasion to consider whether what they did was "unreasonable." As Judge Guy has noted, this inquiry is to be handled with due care, and with awareness of Justice Harlan's warning in *Katz v. United States*, 389 U.S. 347, 350 n. 5, 88 S.Ct. 507, 510 n. 5, 19 L.Ed.2d 576 (1967), that "the Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' . . . Virtually every governmental action interferes with personal privacy to some degree. The question in each case is whether that interference violates a command of the United States Constitution."

In *Katz*, Justice Harlan described a two-step analysis for determining whether a governmental action constitutes a search for Fourth Amendment purposes: "[F]irst that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Katz*, 389 U.S. at 361, 88 S.Ct. at 516 (Harlan, J., concurring). The Court has cautioned that the objective element of the test should be "emphasized" over the subjective. *Hudson v. Palmer*, 468 U.S. 517, 525 n. 7, 104 S.Ct. 3194, 3199 n. 7, 82 L.Ed.2d 393 (1984). Moreover, the standard of "reasonableness" changes depending on the person involved and the particular circumstances in the case. See *O'Connor v. Ortega*, 480 U.S. 709, 718, 107 S.Ct. 1492, 1498, 94 L.Ed.2d 714 (1987) ("question of whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis"); *Committee for GI Rights v. Callaway*, 518 F.2d 466, 476 (D.C.Cir.1975) ("What is reason-

unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

able in one context may not be reasonable in another").

It is important that the question to be answered in this case not be framed too broadly. If what we are concerned with when we set out to detect the presence of a Fourth Amendment search is whether society will protect an expectation of privacy, then there can be little doubt that compulsory urinalysis in certain circumstances will qualify as a Fourth Amendment search. For example, in *Coppinger v. Metro-North Commuter R.R.*, 861 F.2d 33 (2d Cir.1988), the Second Circuit held that a Metro-North employee sent for immediate blood and urine analysis after supervisors discovered liquor where he and others were taking their lunch break, and subsequently fired when his urine tested positive for cocaine metabolites, opiates and marijuana, had been subjected to a search that was arguably unreasonable if his "employer's suspicion of wrongdoing is not supported by objective facts and those rational inferences that may be drawn from them." 861 F.2d at 35. As that Court pointed out, "A number of our sister circuits have held that compulsory urinalysis of public employees qualifies as a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* (citations omitted). Indeed, most courts that have considered the matter have found, on the facts they treated, that urinalysis is a search. See *Burka v. New York City Transit Auth.*, 680 F.Supp. 590, 604-5 n. 24 (S.D.N.Y.1988) (collecting cases); see generally Note, *Random Drug Testing of Government Employees: A Constitutional Procedure*, 54 U.Chi.L. Rev. 1335 (1987). Those courts, and their reasoning, may be divided into two groups. Some compare the test to the taking of an involuntary blood sample which the Supreme Court in *Schmerber v. California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1833, 16 L.Ed.2d 908 (1966) held to be a search. See, e.g., *Lovvorn*, 846 F.2d at 1542; *McDonnell v. Hunter*, 809 F.2d 1302, 1307 (8th Cir.1987); *Allen v. City of Marietta*, 601 F.Supp. 482, 488 (N.D.Ga.1985). Others cite the high degree of privacy our society accords to the act of urinating. *Nat'l Treasury Employees Union v. Von Raab*,

816 F.2d 170, 175 (5th Cir.1987), cert. granted, — U.S. —, 108 S.Ct. 1072, 99 L.Ed.2d 232 (1988). Indeed, one court has gone so far as to declare that "drug testing of ... bodily wastes is even more intrusive than a search of a home." *Nat'l Treasury Employees Union v. Von Raab*, 649 F.Supp. 380, 386 (E.D.La.1986), rev'd, 816 F.2d 170 (5th Cir.1987).

Because particular circumstances are so important in Fourth Amendment analysis, it can be counter-productive to rely on broad principles or to look far afield for analogies to resolve individual cases. The overbreadth of plaintiff's argumentative net is nowhere more apparent than in his objections to the way the urine specimen was taken, and to the very idea of urinalysis. Thus, plaintiff argues that, "[t]he interests of human dignity and privacy... are implicated with ... force when individuals are directed to urinate in the presence of a government agent." *Capua v. City of Plainfield*, 643 F.Supp. 1507, 1514 (D.N.J. 1986). But a government agent observing a prospective employee urinate violates no known "command of the United States Constitution." *Katz*, 389 U.S. at 350 n. 5, 88 S.Ct. at 510 n. 5. Plaintiff makes much of the fact that a female government employee watched him while he urinated. Bypassing plaintiff's own apparent failure to protest at the time, the courts have yet to articulate a constitutional right of "modesty," as Judge Guy notes in his *Lovvorn* dissent. *Lovvorn*, 846 F.2d at 1552.

As for the collection and testing of urine, although a search does not necessarily require a physical intrusion, "[w]hat a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Katz*, 389 U.S. at 351, 88 S.Ct. at 511. Based upon this language, courts have reasoned that the taking of voice and handwriting samples are not Fourth Amendment "searches." *United States v. Dionisio*, 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973) (voice); *United States v. Mara*, 410 U.S. 19, 21, 93 S.Ct. 774, 775, 35 L.Ed. 2d 99 (1973) (handwriting). More recently, the Supreme Court has held that citizens do

not have a reasonable expectation of privacy in garbage placed in opaque bags outside their home for collection. *California v. Greenwood*, — U.S. —, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). In that case, Justice White recognized that citizens may have a subjective expectation of privacy, but found specifically that such an expectation does not give rise to Fourth Amendment protection "unless society is prepared to accept that expectation as objectively reasonable." *Greenwood*, 108 S.Ct. at 1628.

[2] One might argue that, because urine is a waste product turned over to the municipal sewage system, there is no search. But again, I need not reach such a conclusion to find that testing the urine of an applicant for a position with the government does not constitute a search. Again, whether or not a drug test constitutes a Fourth Amendment search depends on the concrete facts surrounding it—specifically, the expectation of privacy that the person involved may hold both objectively and subjectively.

Further, plaintiff has argued that the taking of a urine specimen constitutes a search within the meaning of the Fourth Amendment because "urine can be analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came, including, but not limited to recent ingestion of alcohol or drugs." *Capua*, 643 F.Supp. at 1513. One court has ruled that an individual not only has an expectation of privacy in the process of urination but also in the information contained in the urine. *Von Raab*, 816 F.2d at 175-76. The court reasoned that examination of the urine sample would reveal other personal secrets that the government has no right to know. Urinalysis has the troublesome potential to disclose a broad range of information, but the Department's policy avoids realizing this potential by limiting use of such tests to disclosure of unprescribed or controlled substance abuse. See P.A.P. 85-05, 3.0.

Defendants argue, and I agree, that the provision of urine specimens as part of a physical examination to determine fitness

for employment does not constitute a Fourth Amendment search. The federal government requires employees in, or applicants for, positions with physical or medical standards to submit to physical examinations prior to appointment or selection, 5 C.F.R. § 339.301(a)(1) (1987). Courts have upheld such physicals as constitutional for both federal and state employees. See *Bratcher v. United States*, 149 F.2d 742, 745 (4th Cir.), cert. denied, 325 U.S. 885, 65 S.Ct. 1580, 89 L.Ed. 2000 (1945); *McDonnell v. Hunter*, 612 F.Supp. 1122, 1130 n. 6 (S.D.Iowa 1985), modified, 809 F.2d 1302 (1987); *Curry v. New York Transit Auth.*, 56 N.Y.2d 798, 437 N.E.2d 1158, 452 N.Y.S.2d 401 (1982). The federal government also conducts extensive field investigations into applicant's backgrounds for sensitive positions in the federal service. See Federal Personnel Manual, Chapter 733. Pre-employment physical examination, including urinalysis, is simply too familiar a feature of the job market on all levels to permit anyone to claim an objectively based expectation of privacy in what such analysis might disclose.

Coppinger, on its facts, involving post-employment blood and urine analysis as part of a disciplinary investigation, and other authority in this Circuit, does not preclude such a ruling here. See *Mack v. United States*, 814 F.2d 120, 125 n. 2 (2d Cir.1987) (noting Judge Higginbotham's concurring opinion in *Nat'l Treasury Employees Union v. Von Raab*, 808 F.2d 1057, 1060, 1062 (5th Cir.1987), which questions whether urinalysis is a search). See also *Burka*, 680 F.Supp. at 603 ("We note initially, without determining the issue, that this court has certain reservations as to whether mere production of a urine specimen, if done in conjunction with a routine medical exam or pre-employment physical, constitutes a search or seizure, since a urine sample typically is required in order to check for numerous problems such as diabetes. We recognize that there is considerable precedent to the contrary, but that precedent is outside this circuit.")

Nor does the evidence strengthen plaintiff's position with respect to his subjective

expectation. Defendants note that he was forewarned he would be tested as part of the pre-employment physical. The Department gave plaintiff a copy of P.A.P. 85-05 when he applied for a position. Citta Dep. at 78. See also Substance Abuse Policy and Procedure, 85-05, 8.2 Testing procedure, p. 12 ("The employee will sign a consent form indicating that he or she knew a [drug] test was being performed..."); Substance Abuse Manual for Use with PAP 85-05, p. 2 ("[A]ll candidates [for employment] ... [will] sign a statement acknowledging that specific substances found in their urine will disqualify them from employment and/or will lead to termination during their probationary period.") Plaintiff in his deposition does not remember seeing such a document, although he conceded, "I guess it [the test] might have been for substance abuse." Fowler Dep. at 93.

However, plaintiff's lesser expectation of privacy does not turn on consent. As I have shown, subjective expectation generated by a warning or other indicium of voluntary consent does not necessarily prevent government conduct from being considered a Fourth Amendment search.⁵ If it did, "the government could diminish each person's ... expectation of privacy merely

by announcing half-hourly on television that ... we were all forthwith being placed under comprehensive electronic surveillance." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn.L.Rev. 349, 384 (1974). Rather, dominant in the Katz inquiry of whether a search has taken place and critical for the holding here is the objective component: the fact that a reasonable applicant for a Sanitation Department job would understand that he would be required to take a physical examination, including urinalysis, not for any law enforcement purpose but simply to determine his fitness for employment. Accordingly, I find that the test conducted as part of plaintiff's pre-employment physical examination was not a search within the meaning of the Fourth Amendment.

III.

[3] Plaintiff argues that, even if the first test was constitutional, the later tests when he was a probationary employee violated the Fourth Amendment. The record supports an argument that as a probationary employee plaintiff had a diminished expectation of privacy such as to remove the later tests from the category of Fourth Amendment searches.⁶

5. Plaintiff also argues that consent would be impossible here because of the inherently coercive alternative of refusing to consent. Plaintiff in support cites department policy indicating that refusal to submit to a test may be used to infer drug use in any disciplinary action. Of course, the Supreme Court has generally held that government employers cannot require employees to consent to unreasonable searches as a condition of employment. *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568, 88 S.Ct. 1731, 1734, 20 L.Ed.2d 811 (1968). At least one court has held that consent to drug tests where the employee "legitimately fear[s] termination" is coercive. *American Fed'n of Gov't Employees v. Weinberger*, 651 F.Supp. 726, 736 (S.D.Ga.1986). Other courts, however, have found voluntary consent where individuals faced either a possible loss of economic livelihood or loss of government benefits. See *Zap v. United States*, 328 U.S. 624, 628, 66 S.Ct. 1277, 1279, 90 L.Ed.2d 1477 (1946) (court found voluntary consent although the only way to attain government business was to submit to a search); *judgment vacated on unrelated issues*, 330 U.S. 800, 67 S.Ct. 857, 91 L.Ed. 1259 (1947); *McMorris v. Alioto*, 567 F.2d 897, 901 (9th Cir.1978) (courthouse

search); *United States v. Doran*, 482 F.2d 929, 932 (9th Cir.1973) (airport search); *Wyman v. James*, 400 U.S. 309, 317, 91 S.Ct. 381, 385, 27 L.Ed.2d 408 (1971) (voluntary consent where the government makes public aid contingent on visits to the recipients' homes).

6. This distinction between probationary and permanent employees is highlighted in the civil service sector because of the property rights which attach when an employee attains permanent status. Describing the status of an employee during the one year period of probation, the Department's director of health and safety Anthony J. Citta stated in his deposition that "a probationary period, in a sense, is almost an extension of pre-employment. Medically you would be closely monitoring the employee's health care status.... During that period you are monitoring the employees very closely, in terms of their health care status, and if they develop a medical condition, or a substance abuse problem, or what have you, they can be terminated without a hearing, without a professional hearing." Citta dep. at 43-44. This distinction is reflected in P.A.P. 85-05: as a general rule, the policy regarding substance abuse for

But I need not and do not reach the issue of whether there is any meaningful distinction between the privacy expectations of an applicant and those of a probationary employee, because I find that the last three tests were founded on sufficient individualized suspicion to be reasonable under even an exacting test. See, e.g., *Capua*, 643 F.Supp. at 484. Use of only one EMIT test has been determined to have an accuracy rate of better than 95 percent. *Lovvorn*, 647 F.Supp. at 877; See also *Spence v. Farrier*, 807 F.2d 753, 756 (8th Cir.1986) (EMIT test, with a confirmatory second EMIT or other test, contains sufficient indicia of reliability to provide evidence of drug use); *Harmon v. Auger*, 768 F.2d 270, 276 (8th Cir.1985) (EMIT test results are "about 95% accurate" and form a sufficient basis for disciplinary action); *Wykoff v. Resig*, 613 F.Supp. 1504, 1512 (N.D.Ind. 1985) (a positive EMIT test confirmed by a second EMIT test or its equivalent satisfies due process); *Jensen v. Lick*, 589 F.Supp. 35 (D.N.D.1984) (unconfirmed EMIT test results satisfy due process). The EMIT tests have also been held by Judge Sand of this court to have an accuracy of at least 98% when combined with a subsequent EMIT confirming test. *Peranzo v. Coughlin*, 675 F.Supp. 102, 105 (S.D.N.Y.1987), *aff'd*, 850 F.2d 125, 126 (2d Cir.1988). This high level of accuracy was sufficient for Judge Sand to conclude that the use of the results as evidence, even as the only evidence, in a prisoner disciplinary hearing does not offend due process. *Peranzo*, 675 F.Supp. at 105. Prisoner disciplinary action must be based on "some evidence" to be constitutional. *Superintendent, Mass. Correctional Inst. v. Hill*, 472 U.S. 445, 454, 105 S.Ct. 2768, 2773, 86 L.Ed.2d 356 (1985) (loss of good time credits). "Some evidence" is certainly greater than "reasonable suspicion," which has been defined as that quantum of evidence sufficient to support a belief that the individual used drugs. *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). Moreover, 98% accuracy far surpasses the level of proof required for reasonable suspicion; indeed, following

permanent employees is more treatment-oriented than for probationary employees, although

Judge Weinstein's assignment of percentages to various standards of proof, a 98% accuracy rating amply meets the percentage (95%) required for proof beyond a reasonable doubt. *United States v. Fatico*, 458 F.Supp. 388, 403-6 (E.D.N.Y.1978), *aff'd*, 603 F.2d 1053 (2d Cir.1979), *cert. denied*, 444 U.S. 1073, 100 S.Ct. 1018, 62 L.Ed.2d 755 (1980). Defendants' testing procedure is also more extensive than the prison tests because it requires two different kinds of tests (an initial EMIT test and a subsequent hydrolysis test) for two samples. Here, plaintiff's sample A in the first procedure was positive for both EMIT and hydrolysis, thus providing sufficient evidence to constitute reasonable suspicion. That the second sample's results were split has no bearing because the second sample itself was an extra procedure beyond the requirements necessary to establish reasonable suspicion.

Coppinger, 861 F.2d at 35, may be read as endorsing a "reasonable suspicion" standard for post-employment drug testing, thus supporting the holding here that plaintiff's later tests were constitutional because they were based on reasonable suspicion. However, because the Supreme Court has counselled that an employee's reasonable expectation of privacy should be addressed on a "case-by-case" basis, *O'Connor*, 480 U.S. at 718, 107 S.Ct. at 1498, I must balance plaintiff's privacy interest against the government's interests in the later searches before I can find that the urinalysis during the probationary period, which I have assumed *arguendo* to be searches, were reasonable under the Fourth Amendment.

Determining the standard of reasonableness applicable requires "balanc[ing] the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of governmental interests alleged to justify the intrusion." *United States v. Place*, 462 U.S. 696, 703, 103 S.Ct. 2637, 2642, 77 L.Ed.2d 110 (1983). Accordingly I must balance the plaintiff's "reasonable expectation of privacy," that

treatment is nevertheless encouraged for them as well.

expectation which society is "prepared to recognize as legitimate," *New Jersey v. T.L.O.*, 469 U.S. 325, 338, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985) (quoting *Hudson v. Palmer*, 468 U.S. 517, 526, 104 S.Ct. 3194, 3200, 82 L.Ed.2d 393 (1984)), against "[t]he governmental interest [in] the efficient and proper operation of the workplace." *O'Connor*, 480 U.S. at 723, 107 S.Ct. at 1501.

[4] "Reasonableness" does not turn solely on whether the government could have used less intrusive means to search. *Wilkinson v. Forst*, 832 F.2d 1330, 1340 n. 13 (2d Cir.1987), *cert. denied sub nom. Kelly v. Wilkinson*, — U.S. —, 108 S.Ct. 1593, 99 L.Ed.2d 907 (1988). Rather, a court must direct its attention to the actual means employed by the government. Urinalysis is difficult to classify because, while the actual physical intrusion is slight, the "embarrassment" factor has been perceived by some to be high. Urinalysis is certainly less intrusive than a blood test. It does not involve a physical intrusion into the skin, but merely the collection of a naturally and frequently voided waste product. As one court has written, "[t]he collection of a urine sample has little in common with stomach pumping or body cavities' searches (or even with the taking of a blood sample, which requires the infliction of an injury, albeit a small one). It is even less intrusive than a fingerprint, which requires that one's fingers be smeared with grease and pressed against paper." *Mack*, 653 F.Supp. at 75.

[5] Intrusiveness is also measured by the manner in which the test is conducted. In *Schmerber*, 384 U.S. at 771, 86 S.Ct. at 1836, the Supreme Court set out guidelines for determining whether the testing procedure itself is reasonable. First, the test must be reasonably accurate. As I have demonstrated, the Department's testing procedures provide for a high degree of accuracy. Second, the procedure must be routine or "commonplace" such that it involves "virtually no risk, trauma or pain." *Schmerber*, 384 U.S. at 771, 86 S.Ct. at 1836. Most individuals have frequently provided their doctors with urine speci-

mens. Giving a urine sample is thus a routine occurrence which involves no risk of trauma or pain, especially when given in private. Finally, according to *Schmerber*, medical personnel should perform the test "according to accepted medical practices." 384 U.S. at 771, 86 S.Ct. at 1836. In this case, the test was conducted at a private laboratory by trained professionals.

Although observation of the act of urination could arguably come within the Supreme Court's definition of "trauma," any damage would be slight, involving nothing more than momentary bashfulness. See also *American Fed'n of Gov't Employees*, 651 F.Supp. at 734 (lack of observation does not appreciably decrease the intrusiveness of the search). In short, I conclude that the intrusiveness of the search was slight.

On the other side of the scale, the Department has several weighty interests at stake in continuing to test an employee about whom it has an individualized suspicion of drug use, as was the case here.

Foremost is public safety. Plaintiff concedes that, as a sanitation worker, he would be required to drive sanitation trucks in busy city streets and to operate heavy machinery. According to the uncontested affidavit of Christopher Beemer, Deputy Commissioner for Administration and Financial Management in the Department, approximately 75% of sanitation workers drive a vehicle every day; 95% of them drive a vehicle in the course of a year. The collection vehicles weigh up to 13 tons and range in length from 30½ to 33 feet. Beemer describes other safety hazards:

The mechanical sweeper used for street cleaning operations requires some skill in balancing, therefore sanitation workers driving such equipment have to be in an alert, fit state. Other . . . heavy mechanical equipment—which is driven in snow removal operations in which virtually all . . . sanitation workers participate—include the salt spreader, having a length of 28½ feet, and the snow plow. Snow removal operations are obviously conducted during inclement weather and under difficult street conditions. . . . Apart

from the need to drive safely and to load the truck on heavily travelled streets, the collection mechanism on the truck can cause physical injury if not safely operated.

Beemer Aff. at 3. The prospect of a drug-impaired employee at the wheel of such vehicles on New York streets is "fraught with imminent and grave consequences to public safety." *Palchogue-Medford Congress of Teachers v. Bd. of Educ.*, 119 A.D.2d 35, 505 N.Y.S.2d 888, 891 (2d Dep't 1986), *aff'd*, 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

The Department has documented a significant problem of drug use by employees which markedly affects their performance. In 1987, 359 vehicle accidents warranted breathalyzer and/or urinalysis testing of the drivers. Of those drivers, 18% tested positive for drug or alcohol use. Beemer Aff. at 4. More than 30% of the drivers referred to a corrective defensive driving program in 1986 tested positive for drug or alcohol use. Finally, of 173 workers in 1987 whose poor performance warranted substance abuse testing, 37% tested positive for drug or alcohol use. Plaintiff argues that these statistics are irrelevant because they fail to differentiate between drug and alcohol use. Even if only a third of the positive tests were for drug abuse, however, these numbers still show a substantial correlation between poor job performance and drug use.

Numerous cases have cited public safety concerns in upholding mandatory drug testing of workers involved in hazardous activities or those who perform functions which involve the safety and welfare of large numbers of people. See, e.g., *Transport Workers Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transp. Auth.*, 863 F.2d 1110, 1124 (3d Cir.1988) (railroad workers); *Rushton v. Nebraska Pub. Power Dist.*, 844 F.2d 562 (8th Cir.1988); *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir.1987) (school bus attendant and other transportation department employees); *Division 241, Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.) (*per curiam*), *cert. denied*, 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed.2d 632 (1976)

(bus drivers and other transportation workers); *Allen v. City of Marietta*, 601 F.Supp. 482 (N.D.Ga.1985) (electrical workers); but see *Railway Executives Ass'n v. Burnley*, 839 F.2d 575 (9th Cir.), *cert. granted*, — U.S. —, 108 S.Ct. 2033, 100 L.Ed.2d 618 (1988) (invalidating post-accident drug testing of railroad employees).

Plaintiff distinguishes these cases by arguing that "all of the decisions dealt with organizations affirmatively responsible for the safety and security of the public." Pltf.'s Memorandum of Law at 13. To read the cases that narrowly is to miss their point. It is not responsibility for public safety, perceptible *a priori* in every aspect of a job, that rationalizes the outcome of those cases, but rather the possible consequences of drug-induced error. Those consequences provide the measure of the government's interest. If those consequences could produce significant harm—as they could if the driver at the controls of a 30-foot, 13-ton Sanitation Department truck navigates in a drug-induced haze—then the interests of the government activated by reasonable suspicion may override the interests of the individual in avoiding a urine test.

Moreover, courts have held that "the government has the same right as any private employer to oversee its employees and investigate potential misconduct relevant to the employee's performance of his duties." *Allen*, 601 F.Supp. at 491. And, as the Supreme Court said in *O'Connor*, "[p]ublic employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement or other work-related misfeasance of its employees." 480 U.S. at 724, 107 S.Ct. at 1502.

Studies demonstrate that drug abusers operate at only 50 to 67 percent of their capability. See Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 Chi-Kent L.Rev. 683, 688 (1987). Employees who abuse drugs have an absenteeism

rate 16 times higher than employees who do not use drugs. See Imwinkelreid, *Some Preliminary Thoughts on the Wisdom of Governmental Prohibition or Regulation of Employee Urinalysis Testing*, 11 Nova L.Rev. 563, 565 (1987). While an employee's drug use is occasionally discoverable through evidence of absences, tardiness or errors, supervisors in most situations are unable to detect the nuances in employee behavior indicative of drug abuse. See *Mulholland v. Dep't of Army*, 660 F.Supp. 1565, 1569 (E.D.Va.1987) (direct observation provides little basis to assess an individual's possible use of drugs; tests are more conclusive). In an affidavit submitted in connection with another pending drug testing case and supplied to this court by defendants, Dr. Robert DuPont explains that drug use is far harder for lay people to detect than, say, alcohol use. See DuPont Aff. at ¶¶ 14-27 ("As a psychiatrist who has worked with drug users for 20 years, I would not treat a drug abuser without conducting regular urine tests simply because, even sitting in a room talking with a known drug abuser for 50 minutes in psychotherapy, I cannot reliably tell whether the person is or is not under the influence of drugs.") This detection problem becomes more acute because drugs affect individuals long after ingestion. Serious skill impairment has been measured 24 hours after smoking a single marijuana cigarette. Yesavage, Leirer, Denari, and Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 American Journal of Psychiatry 1325-29 (November 1985). This evidence refutes the argument that the government should not be able to examine employee behavior outside work hours. Obviously, the government has a very real interest in preventing drug abuse outside work hours because of the direct and deleterious impact on performance during work hours.

Moreover, at a minimum, a small decrease in productivity among even a small percentage of public employees can lead to a massive waste of taxpayer's money. Here, the Department has shown that nearly 10% of samples from applicants test

positive for drugs. Beemer Aff. at 5-6. Moreover, 46.55% of all probationary terminations result from positive substance abuse tests. Beemer Aff. at 6. This figure includes both alcohol and drug tests. Nevertheless, even assuming that only a third were for positive drug tests, drug use still constitutes a substantial percentage (16%) of terminations. A 25% reduction in the performance of 10% of its employees could cost the government a substantial amount. The National Institute on Drug Abuse estimates the current cost of drug use by workers at \$100 billion per year. National Institute on Drug Abuse: *Drugs in the Workplace*, NIDA Capsules, March 1986. It does not require much extrapolation to appreciate the financial burden placed on public employers. Further, a court may find the government liable for acts committed by a government employee while under the influence of drugs. *Ira S. Bushey & Sons, Inc. v. United States*, 398 F.2d 167 (2d Cir.1968). Given the liability crisis facing municipalities across the country, the Department has a strong financial interest in taking affirmative measures designed to reduce the risk of accidents and related injuries.

Plaintiff taxes the Department with failure to apply its own procedures correctly, and seeks thereby to enhance his own alleged subjective expectation of privacy and to attack the Department's conduct. Thus, plaintiff contends that the Department had violated its notification policy by not telling plaintiff of his split test until April 28, 1986 and then falsely stating it was positive. Plaintiff states that he was never told the June test could lead to termination. Finally, plaintiff claims a greater expectation of privacy for the third test because the Department violated its own policy for split result situations.

Plaintiff, however, signed a statement on April 28 indicating he fully understood that future testing (at least two) would be required and that a positive test during the probationary period would result in termination. Even assuming that the Department's policy was violated, any impression plaintiff gleaned from perusing the Depart-

ment's procedural manuals that only one test would be administered was more than offset by a statement he signed which specifically warned him of future tests and the possibility of termination.

In short, plaintiff knew full well that he would be tested in the future. Any deviation from established procedures—if there was any—cannot change that fact. To the extent that plaintiff is arguing that the Department acted unconstitutionally by violating its own policy guidelines in testing him after receiving a negative result on the second test, he is incorrect. Even I were persuaded that the Department violated its own policy, plaintiff has still not shown how this could rise to the level of a Fourth Amendment violation. Those guidelines define the Department's internal procedures, not plaintiff's constitutional rights. *Cf. Crocker v. Hakes*, 616 F.2d 237, 239 n. 2 (5th Cir.1980) ("The violation of a state statute does not automatically give rise to a violation of rights secured by the Constitution.")

Most importantly, none of plaintiff's arguments convincingly elevates his own interest in avoiding urinalysis above the public's interest, described above, in preventing the wasteful and potentially disastrous consequences of permitting a Sanitation Department probationary employee as to whom there is reasonable and individualized suspicion of drug use to continue to work.

To recapitulate, I find the first test, conducted in connection with the pre-employment physical examination, was not a search within the meaning of the Fourth Amendment, and that subsequent tests at a minimum were based on reasonable suspicion and accordingly were reasonable under the Fourth Amendment.

IV.

[6] Plaintiff's remaining arguments do not warrant extended consideration. He claims a violation of the due process clause of the Fourteenth Amendment because he was terminated without notice of the charges against him and an opportunity to be heard. Although the letter of termi-

nation dated July 28, 1986 did not state any reasons, an August 15, 1986 letter from Christopher Beemer, Deputy Commissioner for Administration, clearly notified plaintiff he was fired for violating the Department's rules against use of controlled substances. Two weeks is not an unreasonable delay in giving notice. Moreover, in order to make out a due process claim, plaintiff must demonstrate a property interest in his position derived from reliance induced on the state's express agreement or implied promise. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985). As a probationary employee, plaintiff certainly has no such right under New York law.

[7] Plaintiff's alternative argument, that he was deprived of a liberty interest without due process because the charges of drug abuse tarnished his reputation, is also without merit. The substance abuse manual for PAP 85-05 provides that, "all records for employee's involved under the regulations of PAP 85-05 shall be treated as confidential. No information regarding an employee's substance abuse problem may be released to an outside agency without the employee's express authorization." Substance Abuse Manual at 1. Plaintiff has failed to demonstrate a necessary element that defendants published or disseminated false defamatory information to the public, *Loudermill*, 470 U.S. at 547 n. 13, 105 S.Ct. at 1496; see also *Clements v. County of Nassau*, 835 F.2d 1000, 1006 (2d Cir.1987), or that there is a threat he will be deprived of other employment opportunities as a result of defendant's public disclosure of his substance abuse. *Walentas v. Lipper*, 862 F.2d 414, 420-421 (2d Cir. 1988). Accordingly, summary judgment is granted on this claim as well.

[8] Plaintiff's complaint also asserts a claim for violation of § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. Plaintiff, however, has failed to provide any argument to buttress this claim. Moreover, in a case involving termination of transit workers whose drug tests were positive, Judge Goettel, in a thorough opinion, found no violation of the Act and dismissed

such a claim. *Burka*, 680 F.Supp. at 596-601. I similarly conclude that plaintiff's claim based on that statute is without merit.

[9] Finally, because all of the federal claims are without merit, I find the state law claims should be dismissed for lack of pendent jurisdiction. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966).

In sum, defendants' motion is granted; plaintiff's motion is denied. The complaint is dismissed.

SO ORDERED.



The FLYING TIGER LINE, INC.,
et al., Plaintiffs,

v.

CENTRAL STATES, SOUTHEAST AND
SOUTHWEST AREAS PENSION
FUND, et al., Defendants.

Civ. A. No. 86-304-CMW.

United States District Court,
D. Delaware.

Feb. 6, 1989.

Holding company filed declaratory judgment action seeking declaration that it was not liable for any withdrawal liability that might be owed to pension funds by former subsidiary, and sought order enjoining pension funds from asserting claims for such liability against it, and one pension fund filed counterclaim alleging that holding company was liable for former subsidiary's withdrawal liability. Holding company moved for partial summary judgment on its liability to one pension fund, and that pension fund also moved for partial summary judgment. The District Court, Caleb M. Wright, Senior District Judge, held that: (1) pension fund's demand letter sufficient-

ly notified holding company of plan's theories of liability; (2) claims asserted by pension fund were arbitrable; (3) holding company was required to make interim payments pending resolution of withdrawal liability claims; and (4) holding company was not entitled to preliminary review on merits prior to assessment of interim payments.

Holding company's motion denied; pension fund's motion granted.

1. Pensions ⇐103

For purposes of Multiemployer Pension Plan Amendments Act, "withdrawal liability" is amount determined to be allocable share of unfunded vested benefits at time of employer's termination or reduction of contributions to pension plan, subject to certain adjustments. Employee Retirement Income Security Act of 1974, §§ 4201-4402, as amended, 29 U.S.C.A. §§ 1381-1461.

See publication Words and Phrases for other judicial constructions and definitions.

2. Pensions ⇐103

For purpose of determining withdrawal liability, pursuant to Multiemployer Pension Plan Amendments Act, of employer that terminates or reduces its contributions to pension plan, "unfunded vested benefits" are calculated as difference between present value of vested benefits and current value of plan's assets. Employee Retirement Income Security Act of 1974, §§ 4201-4402, as amended, 29 U.S.C.A. §§ 1381-1461.

See publication Words and Phrases for other judicial constructions and definitions.

3. Pensions ⇐105

Pension fund's withdrawal liability demand letter to alleged employer complied with Multiemployer Pension Plan Amendments Act and was sufficient to put alleged employer on notice that pension fund was asserting at least both accrual theory and evade-or-avoid claim, although evade-or-avoid theory of liability was not explicitly stated in demand letter, where letter did cite to statutory section of evade-or-avoid provision, and evade-or-avoid dispute had

Vestals contend our decision conflicts with *Diamond v. Commissioner*, 492 F.2d 286 (7th Cir. 1974), affirming 56 T.C. 530 (1971). Although *Diamond* was not cited to us previously, we do not find that decision inconsistent with our holding in *Vestal*.

In *Diamond*, the taxpayer was a mortgage broker who, along with a third party who held a contract to purchase an office building, agreed in 1961 to purchase and operate the building as a joint venture. They consummated the purchase in February, 1962, and shortly thereafter *Diamond* sold his interest for \$40,000, and sought to account for these proceeds as a short term capital gain on his 1962 income tax return. The Seventh Circuit, in agreement with the Tax Court, rejected the plaintiff's contention and held the sum to be ordinary income. The Seventh Circuit also stated that even if capital gain treatment were appropriate, no gain had occurred for, as the Tax Court determined, the value of *Diamond's* partnership interest as received on February 18, 1962, and as sold a few weeks later, amounted to \$40,000.

Aside from certain aspects of partnership tax law, not present in the *Vestal* case, the determination that *Diamond* received ordinary income in the tax year of 1962 and the court's statement that "the receipt of a profit-share with determinable market value is income," 492 F.2d at 291, is consistent with our holding in *Vestal*. In *Diamond*, the taxable event occurred in 1962, when the parties actually acquired the building to be held as a joint venture, not in the prior year when the preliminary contract was made. Similarly, in *Vestal*, we hold that the taxable event occurred upon acquisition of the actual joint venture interest by *Vestal*, not in an earlier year upon execution of the initial contract between *Vestal* and the El Dorado investors.

Accordingly, the petition for rehearing is denied.

UNITED STATES of America,
Appellee,

v.

Cynthia EDWARDS, Appellant.
No. 575, Docket 73-2488.

United States Court of Appeals,
Second Circuit.

Argued Dec. 20, 1973.

Decided May 29, 1974.

Defendant was convicted before the United States District Court for the Eastern District of New York, Joseph C. Zavatt, J., 359 F.Supp. 764, of possession of heroin with intent to distribute, and she appealed. The Court of Appeals, Friendly, Circuit Judge, held that warrantless search of accused's beach bag after accused activated magnetometer at airport was not unreasonable, that accused had been given sufficient indication that she was free to step out of line of passengers if she did not want her baggage searched and that removal of pair of slacks from around package within beach bag and opening of such package, which contained heroin, did not render search too extensive.

Affirmed.

Oakes, Circuit Judge, concurred in result and filed opinion.

1. Searches and Seizures — 7(1)

Airport search does not violate Fourth Amendment for failure to precisely fit into certain categories for dispensing with search warrant, but only if search is unreasonable on the facts. U. S.C.A. Const. Amend. 4.

2. Searches and Seizures — 7(1)

When the risk is jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger alone meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and

with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇨7(1)

Reasonableness of a warrantless search depends on balancing need for a search against offensiveness of the intrusion. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇨7(10)

Warrantless search of shuttle flight airline passenger's beach bag after passenger activated magnetometer was not unreasonable. U.S.C.A.Const. Amend. 4.

5. Searches and Seizures ⇨5

If search is proper, it is of no moment that object found was not what officer was looking for. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇨3.3

Where signs situated near entrance to airline's boarding gate for shuttle flight stated that "PASSENGERS AND BAGGAGE SUBJECT TO SEARCH" and where announcement was made over loudspeakers that it was only "passengers" whose baggage was subject to search, sufficient indication had been given that accused was free to step out of line of passengers if she did not want her baggage searched, though she had not been expressly informed that search could be avoided by not proceeding to designated area. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇨7(10)

To bring itself within test of reasonableness applicable to airport searches, Government must give citizen fair warning, before he enters area of

search, that he is at liberty to proceed no further. U.S.C.A.Const. Amend. 4.

8. Drugs and Narcotics ⇨184

Removal of pair of slacks from around package within beach bag of shuttle flight airline passenger, who had activated magnetometer, and opening of such package, which contained heroin, did not render search too extensive. U.S.C.A.Const. Amend. 4.

J. Jeffrey Weisenfeld, New York City (Goldberger, Asness, Feldman & Breitbart, New York City, of counsel), for appellant.

David DePetris, Asst. U. S. Atty. (Edward John Boyd, V, Acting U. S. Atty., E. D. New York, and L. Kevin Sheridan, Asst. U. S. Atty., of counsel), for appellee.

Before FRIENDLY, HAYS and OAKES, Circuit Judges.

FRIENDLY, Circuit Judge:

[1] This appeal from a conviction following a non-jury trial for possession of heroin with intent to distribute in violation of 21 U.S.C. § 841(a)(1) is another in the growing list of cases relating to the validity of airport searches.¹ Problems have multiplied as practical considerations have required that the "profile" method, on the basis of which this court first upheld the validity of an airport search, *United States v. Bell*, 464 F.2d 667 (2 Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972), should be relegated to a supplementary role² and that primary reliance should be placed on passage through a magnetometer³ and the search of carry-

1. Footnote 1 to Judge Oakes' opinion in *United States v. Albarado*, 495 F.2d 799, at 801 n. 1 (2 Cir. 1974), lists 18 decisions by courts of appeals on this subject since the initial one in *United States v. Lindsey*, 451 F.2d 701 (3 Cir. 1971), cert. denied, 405 U.S. 995, 92 S.Ct. 1270, 31 L.Ed.2d 463 (1972). Three more can now be added, *United States v. Crain*, 485 F.2d 297 (9 Cir. 1973); *United States v. Ogden*, 485 F.2d

536 (9 Cir. 1973); and *United States v. Palazzo*, 488 F.2d 942 (5 Cir. 1974).

2. Within a few days after the decision in *United States v. Bell*, there occurred the first hijacking of a shuttle flight—for which the profile method is totally inapplicable.

3. Magnetometers have become increasingly sophisticated and are being used at a growing number of airports. Even where magne-

on luggage.⁴ Although no one could reconcile all the views expressed in the opinions of the various circuits or, indeed, of this circuit alone, a consensus does seem to be emerging that an airport search is not to be condemned as violating the Fourth Amendment simply because it does not precisely fit into one of the previously recognized categories for dispensing with a search warrant,⁵ but only if the search is "unreasonable" on the facts. This is altogether in line with the command of the first clause of the Amendment, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" Surprise has been expressed that "the Amendment nowhere connects the two clauses; it nowhere says in terms that one might expect it to say: that all searches without a warrant issued in compliance with the condition specified in the second clause are *eo ipso* unreasonable under the first." Trial Manual for the Defense of Criminal

Cases (Preliminary Draft No. 1, Sept. 29, 1966), Joint Committee on Legal Education of the A.L.I. and A.B.A., 28. But, as Professor Telford Taylor demonstrated in a brilliant lecture, Search, Seizure and Surveillance, this was not a lapse by the draftsmen. Rather "our constitutional fathers were not concerned about warrantless searches, but about overreaching warrants." ⁶ While the heavy judicial gloss that a warrantless search is invalid unless within an appropriate "exception" is surely here to stay, recognition of the historical background of the Amendment, with its stress on the seizure of books and papers on political affairs and the search of homes for illegally imported goods, helps to determine when an exception is justified. Nothing in the history of the Amendment remotely suggests that the framers would have wished to prohibit reasonable measures to prevent the boarding of vessels by passengers intent on piracy.

tometers are in use, however, there is considerable variation in the procedures when a passenger has activated the device, see *United States v. Albarado*, *supra*, 495 F.2d at 802 n. 3.

4. We are not here required to and do not consider what circumstances may justify the search of checked baggage, a procedure routinely followed by at least some airlines on international flights from the United States. Compare *United States v. Garay*, 477 F.2d 1306 (5 Cir. 1973), and *United States v. Palazzo*, *supra*, with *United States v. Cyzewski*, 484 F.2d 509 (5 Cir. 1973), relating to more particularized searches of checked baggage.

5. An analogy has been found in the border search, see *United States v. Moreno*, 475 F.2d 44, 51 (5 Cir.), cert. denied, 414 U.S. 840, 94 S.Ct. 94, 38 L.Ed.2d 76 (1973); *United States v. Skipwith*, 482 F.2d 1272, 1275 (5 Cir. 1973). However, the principle that seems most nearly applicable to the airport search is that recognized in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 76, 90 S.Ct. 774, 25 L.Ed.2d 60 (1970), and applied in *United States v. Biswell*, 406 U.S. 311, 314-317, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972), sustaining warrantless searches of records maintained or products held by

regulated industries. Such "administrative searches," conducted pursuant to a general regulatory scheme rather than an investigation to secure evidence of a crime, have regularly been upheld where the statutory procedures have been deemed reasonable. Cf. *Wyman v. James*, 400 U.S. 309, 318, 324-325, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971); *Downing v. Kunzig*, 454 F.2d 1230 (6 Cir. 1972); *United States v. Schafer*, 461 F.2d 856, 858 (9 Cir.), cert. denied, 409 U.S. 881, 93 S.Ct. 211, 34 L.Ed.2d 136 (1972); *United States v. Miles*, 480 F.2d 1217, 1218-1219 (9 Cir.) cert. denied, 414 U.S. 1008, 94 S.Ct. 369, 38 L.Ed.2d 245 (Nov. 5, 1973). But since an attempt to fold airport searches under the rubric of this type of administrative search would entail the question of reasonableness, as well as the need for dealing with language in *Almeida-Sanchez v. United States*, 413 U.S. 266, 271, 93 S.Ct. 2535, 37 L.Ed.2d 596 (1973), the issue of reasonableness may as well be faced directly.

6. Taylor, Two Studies in Constitutional Interpretation 41 (1969). Although the lecture was delivered early in 1967, unhappily it did not become available until 1969, and then under an unilluminating title. It is finally getting the attention it deserves, see *United States v. Edwards*, 415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771.

I.

The facts are stated in Judge Zavatt's opinion, 359 F.Supp. 764 (E.D.N.Y. 1973), and we shall limit ourselves to the essentials. Defendant Cynthia Edwards arrived at La Guardia Airport in New York City on the evening of August 23, 1972, to take an Eastern Air Lines "shuttle" flight to Boston. The relevant regulations of the Federal Aviation Administration then in effect with respect to nonreservation flights such as the shuttle required that:

1. Where metal detectors are available

A. Each certificate holder shall prevent the carriage aboard its aircraft of baggage on or about the person of passengers unless that baggage has been examined by a responsible representative of the certificate holder or a law enforcement officer and,

B. The certificate holder shall require each passenger to clear through a metal detector without indication of unaccounted for metal on his person prior to boarding.⁷

Near the entrance to the boarding gate were two large printed signs, plainly warning, among other things,

PASSENGERS AND BAGGAGE
SUBJECT TO SEARCH.

When an Eastern employee announced over a loudspeaker that the flight could be boarded, he also announced that all carry-on luggage would be searched.

At this time Miss Edwards was in the line of boarding passengers, carrying a pocketbook and what she described as a

"beach bag." She activated the magnetometer—for what reason the record does not disclose.⁸ The Deputy United States Marshal who examined the beach bag found that it contained, among other things, a pair of slacks wrapped around a package. In answer to the Marshal, Miss Edwards said the package was a box of Tampax. Removing the slacks, the Marshal found that in fact the package contained a large number of glassine envelopes, each containing a white powder. He later found other such envelopes in three pockets in the beach bag, bringing the total to 1,664. Miss Edwards testified she knew that there were about 1,600 envelopes in the bag and that the white powder was heroin. The alleged illegality of the search is thus the sole ground of the appeal.

Because of the simplicity of the facts, the appeal presents, in clear and uncomplicated form, the basic question whether the FAA regulations with respect to the search of carry-on baggage in force in August, 1972, violated the Fourth Amendment. There were here no make-weights, such as suspicious behavior, false identification, meeting of the "profile," and the like,⁹ that have assisted the Government in cases such as *United States v. Bell*, *supra*, 464 F.2d 667; *United States v. Riggs*, 474 F.2d 699 (2 Cir.), cert. denied, 414 U.S. 820, 94 S.Ct. 115, 38 L.Ed.2d 53 (1973); *United States v. Moreno*, *supra*, 475 F.2d 44; and *United States v. Skipwith*, *supra*, 482 F.2d 1272. On the other hand, the search was strictly in accordance with the regulations; there was no removal of Miss Edwards to another area as in

7. Department of Transportation Press Release No. 103-72, dated December 5, 1972, extended these requirements to all flights. Where metal detectors were not available, the directive required that "each passenger [submit] to a consent search prior to boarding," 37 Fed.Reg. 25934 (1972).

8. Contrary to what is now the usual procedure, Miss Edwards was carrying her pocketbook and the beach bag when she passed through the magnetometer. Her pocketbook contained keys, coins and perfume containers with metal caps which could well have been

responsible for activation. The marshal searched the pocketbook without finding weapons or contraband before searching the beach bag.

9. While the activation of the magnetometer would be a suspicious circumstance with respect to Miss Edwards' person and the pocketbook she was carrying, its pertinence to the beach bag had been attenuated to the point of exhaustion by the discovery that the pocketbook contained innocent objects capable of causing activation and no dangerous ones, see fn. 8.

United States v. Ruiz-Estrella, 481 F.2d 723, 724 (2 Cir. 1973); and the case presents no such questions concerning a search of her person as were considered in *Albarado*. There is likewise no suggestion that the marshal was acting in response to any tip that Miss Edwards was transporting narcotics rather than in a good faith effort to carry out the regulations.

[2] In my concurring opinion in *United States v. Bell*, *supra*, 464 F.2d at 675, I wrote concerning searches designed to prevent airplane hijacking:

When the risk is the jeopardy to hundreds of human lives and millions of dollars of property inherent in the pirating or blowing up of a large airplane, the danger *alone* meets the test of reasonableness, so long as the search is conducted in good faith for the purpose of preventing hijacking or like damage and with reasonable scope and the passenger has been given advance notice of his liability to such a search so that he can avoid it by choosing not to travel by air.

While that view was not accepted by a majority, neither was it rejected. Judge Mulligan, who wrote for the court, had no occasion to consider the question; while Judge Mansfield expressed some misgivings, the facts did not require him to consider the special problem of the conceded inapplicability of the "profile" method to shuttle flights. *United States v. Ruiz-Estrella*, *supra*, left the question open in this circuit since the majority there refused to infer on the basis of the record that the posters had apprised the defendant of his ability to avoid search by not boarding the flight, 481 F.2d at 728-729. Approving references to the view expressed in the concurring opinion in *Bell* have been made

in *United States v. Doran*, 482 F.2d 929, 932 (9 Cir. 1973), and *United States v. Skipwith*, *supra*, 482 F.2d at 1276.¹⁰ We apply it on the facts here.¹¹

[3-5] The reasonableness of a warrantless search depends, as many of the airport search opinions have stated, on balancing the need for a search against the offensiveness of the intrusion. We need not labor the point with respect to need; the success of the FAA's anti-hijacking program should not obscure the enormous dangers to life and property from terrorists, ordinary criminals, or the demented. The search of carry-on baggage, applied to everyone, involves not the slightest stigma, see *United States v. Albarado*, *supra*, 495 F.2d at 807. More than a million Americans subject themselves to it daily; all but a handful do this cheerfully, even eagerly, knowing it is essential for their protection. To brand such a search as unreasonable would go beyond any fair interpretation of the Fourth Amendment. If experience should demonstrate that the Government is abusing its authority and is using the airport search not for the purpose intended but as a general means for enforcing the criminal laws, a means for limitation can be found in the suggestion in Judge Aldrich's dissenting opinion in *United States v. Skipwith*, *supra*, 482 F.2d at 1280-1281. See also *United States v. Davis*, *supra*, 482 F.2d at 909-910 & n. 44. But unless and until there should be evidence of abuse, we hold to the traditional rule that if the search is proper, it is of no moment that the object found was not what the officer was looking for, *Abel v. United States*, 362 U.S. 217, 238, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960).

[6] The factual element of knowledge of the ability to withdraw that was

10. In addition, Judge Browning reached essentially the same conclusion in his thorough opinion for the court in *United States v. Davis*, 482 F.2d 893, 910-912 (9 Cir. 1973).

11. Although our decision here is limited to shuttle flights, since that is the sole issue before us, we do not wish to be understood

as intimating that we would decide otherwise with respect to reservation flights. When such a case arises, the Government would be well advised to make a factual presentation why the FAA extended the magnetometer-search regulations to such flights, see fn. 7, rather than continuing to rely on the "profile."

Cite as 408 F.2d 490 (1974)

held to be wanting by the majority in *Ruiz-Estrella* was clearly present here, as the district judge found, 359 F.Supp. at 767. Whereas in *Ruiz-Estrella* the Government for tactical reasons, see 481 F.2d at 728 n. 4, did not rely on the signs, here it does.¹² To be sure, while the signs state "PASSENGERS AND BAGGAGE SUBJECT TO SEARCH," they do not say *in ipsissimis verbis* that search can be avoided by not proceeding to the designated area. But the signs and the announcement made over the loudspeakers did say that it was only "passengers" whose baggage was subject to search. Although we cannot understand why, rather than permit continued argument on this point, the Government has not taken the simple step of adding to the signs language with respect to withdrawal so plain that he who runs may read, it would outrage common sense to suppose that an intelligent woman, neither blind nor deaf nor ignorant of the language, was not aware as the district judge found "that she was as free to step out of the line of passengers (as she had been to enter that line) if she did not want her baggage to be searched," 359 F.Supp. at 767. Miss Edwards simply miscalculated the odds.

[7] We thus have no occasion to consider the correctness of the district court's further finding of consent. While we do not necessarily agree with everything said on this subject in *Albarado*, *supra*, 495 F.2d at 806-807, the *Bell* concurring opinion does not rely on consent of the sort that would validate an otherwise unlawful search, see *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). The point is rather that in order to bring itself with-

in the test of reasonableness applicable to airport searches, the Government must give the citizen fair warning, before he enters the area of search, that he is at liberty to proceed no further.

[8] The only point requiring further discussion is whether the marshal's search of the beach bag was too extensive. Our prior decisions settle that issue in favor of the Government. As Judge Mulligan wrote in *Bell*, *supra*, 464 F.2d at 674:

[T]he weapon of the skyjacker is not limited to the conventional weaponry of the bank robber or the burglar. His arsenal may well include explosives. . . . [The object found] could have been gunpowder or some other explosive or deleterious substance which a hijacker might well use to cow the crew and passengers. . . . The fact that the object was not metal should not have concluded the inquiry.

See also *United States v. Albarado*, *supra*, 495 F.2d at 809.

Affirmed.

OAKES, Circuit Judge (concurring in the result):

I concur in affirmance but on grounds different from Judge Friendly. Judge Friendly's concurrence in *United States v. Bell*, 464 F.2d 667, 674 (2d Cir.), cert. denied, 409 U.S. 991, 93 S.Ct. 335, 34 L.Ed.2d 258 (1972), and his decision here rest upon the proposition that "the danger alone" of possible hijackings makes airport searches reasonable so long as they are made in good faith, with reasonable scope, and the passenger has prior notice of the search so as to be able to avoid air travel.¹ This proposition, however, while perhaps not explic-

12. This case is further distinguishable from *Ruiz-Estrella* in that there the search of the carry-on baggage did not take place in the course of and as a necessary incident to boarding the flight.

1. Judge Friendly says that prior notice of "fair warning" goes to "reasonableness." He does not claim that consent is implied by proceeding through the airport search when warned of its existence. In *United States v.*

Albarado, 495 F.2d 799, 806-807 (2d Cir. 1974), this court held that if air travel were conditioned on submission to a search, the potential air traveler's submission would be the product of coercion and hence would not constitute implied consent. It was noted, however, that the warning of the search made the search less intrusive thereby, as compared, for instance, with a *Terry* search with its element of surprise and actual physical coercion. *Id.* at 807. Judge Friendly

itly rejected, certainly has not been adopted by *this* circuit. Rather, as suggested by Judge Mansfield in his concurrence in *Bell*, 464 F.2d at 675-676, the proposition seems inconsistent with the Supreme Court decisions on search and seizure and basic fourth amendment principles. See McGinley & Downs, Airport Searches and Seizures—A Reasonable Approach, 41 Fordham L.Rev. 293, 315-16 (1972). Cf. Note, Airport Security Searches and the Fourth Amendment, 71 Colum.L.Rev. 1039, 1049-50 (1971).

Today airports, tomorrow some other forms of search, which may be "applied to everyone" in the words of Judge Friendly's majority opinion. It is all too easy to permit encroachments upon personal liberty whenever there surfaces "a barbarism hidden behind the superficial amenities of life." See R. Heilbroner, An Inquiry into the Human Prospect 15 (1974). Airplane hijacking is not the only "barbarism" which may result in calls for new means of investigation and detection "applied to everyone." Whether it be a wave of political kidnappings, as are so common in South America but not yet common in this country; racial murders of random victims, which in San Francisco resulted in the stop and search of persons solely on the basis of race, see *Bazile v. Alioto*, C 74 0867 ACW (N.D.Cal. Apr. 25, 1974) (preliminarily enjoining such searches); organized civil disobedience on a grand scale, such as occurred in Washington, D. C., in 1971 resulting in the unlawful arrests of literally thousands of persons, see *Sullivan v. Murphy*, 478 F.2d 938 (D.C. Cir.) (on rehearing), cert. denied,

414 U.S. 880, 94 S.Ct. 162, 38 L.Ed.2d 125 (1973); or the publication of classified defense information which was thought by some governmental officials to justify warrantless wiretaps or even the hiring of an extra-legal staff to burglarize a doctor's office,

[h]istory reveals that the initial steps in the erosion of individual rights are usually excused on the basis of an "emergency" or threat to the public. But the ultimate strength of our constitutional guarantees lies in their unhesitating application in times of crisis and tranquility alike.

United States v. Bell, 464 F.2d at 676 (Mansfield, J., concurring). See also *Fifth Avenue Peace Parade Committee v. Gray*, 480 F.2d 326, 333-335 (2d Cir. 1973) (Oakes, J., dissenting; cert. denied, 415 U.S. 948, 94 S.Ct. 1469, 39 L.Ed.2d 563 (1974)).

In acknowledging that the general airport search does not seem to fall within the recognized exceptions to the warrant requirement, the majority opinion seems to me all too unconcerned with the Supreme Court command that "except in certain carefully defined classes of cases, a search . . . without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Cady v. Dombrowski*, 413 U.S. 433, 439, 93 S.Ct. 2523, 2527, 37 L.Ed.2d 706 (1973), quoting *Camara v. Municipal Court*, 387 U.S. 523, 528-529, 87 S.Ct. 1727, 18 L.Ed.2d 930 (1967). Whether this statement be "judicial gloss" (the Supreme Court referred to it as "one governing principle, justified by history and current experience," *Camara v. Municipal Court*, 387 U.S. at 528)² or

does not "necessarily agree with everything said on [consent] in *Albarado*," but that portion of the *Albarado* decision dealing with consent was not dictum, since to find the evidence unlawfully seized it was necessary to refute the claim that appellant had impliedly consented to the search.

2. The meaning of the Constitution must be considered to change or adapt to meet

changing times, with the course of history. The entire content of the concept of a Right to Privacy, while it has many fourth amendment antecedents, is basically a product of the 20th Century. One supposes that our fourth amendment protections may have themselves expanded to meet the threat of governmental encroachment on civil liberties exemplified by the totalitarian countries in the 1930's. See *Jackson*, J., dissenting in

Cite as 498 F.2d 496 (1974)

the Framers' intention based on common law experience, it recognizes the proper reluctance of courts to authorize searches without probable cause found by an independent magistrate.

As to the Framers' intention, Professor Taylor's enlightening lecture, *Search, Seizure and Surveillance*, may stand for the majority's proposition that our constitutional fathers were more concerned about "overreaching warrants" than "warrantless searches." If so, however, this is because there is no indication that warrantless searches were, or could be, conducted of any person other than a *suspected felon* and then only incident to an arrest. T. Taylor, *Two Studies in Constitutional Interpretation* 28, 39 (1969). As Taylor says, "The only victims of such searches were those who, as probable felons, were the objects of hue and cry, hot pursuit, or an arrest warrant." *Id.* at 39. Indeed, Professor Taylor refers to Pollock and Maitland, who in turn speak of the fact that historically "in general the only persons whom it is safe to arrest are felons, and that a man leaves himself open to an action, or even an appeal, of false imprisonment if he takes as a felon one *who has done no felony*." F. Pollock & F. Maitland, *The History of English Law* 582-83 (2d ed. 1909) (emphasis added). In other words, under the common law ordinary persons were protected from warrantless searches by an action for false arrest. It was such effective protection that overreaching constables resorted to general warrants rather than risk search without any warrant at all, hence in part the Framers' concern with "overreaching warrants" rather than "warrantless searches." Today, and for some time, however, a suit for false arrest has provided

no practical protection against a warrantless search, and the fourth amendment has required probable cause for a warrant. In the absence of the common law protection against warrantless searches and the difficulty in avoiding the probable cause requirement in obtaining warrants, the number of warrantless searches and their threat to individual liberties have increased greatly. The response of the Supreme Court has been to equate the reasonableness of a search with the presence of a warrant and to limit strictly exceptions from this rule.

Professor Taylor's contribution to the treatment of warrantless searches has been directed at recognizing the broad scope of a *search, incident to arrest*, see *United States v. Edwards*, 415 U.S. 800, 804 n. 6, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974); *United States v. Robinson*, 414 U.S. 218, 233 n. 3, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973); that is, as I have said, the focus of his attention in the applicable portions of his lecture. Nor is his conclusion inconsistent with a strict interpretation of other exceptions from the warrant requirement:

searches incident to arrest are permissible, and in exceptional cases, *if authorized by warrant* [or allowable because they fall within the recognized exceptions to the warrant requirement, e.g., "stop-and-frisk"] searches independent of arrest may be carried out.

T. Taylor, *supra*, at 49 (emphasis original) (footnote omitted).

In *United States v. Albarado*, 495 F.2d 799 (2d Cir. 1974), this court engaged in a very careful weighing of the privacy invaded and the danger involved in allowing that a particular, strictly

Brinegar v. United States, 338 U.S. 160, 180-181, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949):

Among deprivations of rights, none is so effective in cowering a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of

every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police.

limited and supervised airport search would be "reasonable" as a new "carefully defined" and jealously guarded exception to the warrant requirement. In so doing, this court attempted to give guidance and direction to law enforcement officials as to the permissible limits of the airport search and to make clear that cries of "danger" from those whose primary concern is "security" would be strictly scrutinized and critically examined when made to justify hitherto unknown searches. This, I feel, is the critical omission from Judge Friendly's opinion, which through its broad phraseology does not provide guidance to officials, but instead implies that those cries of "danger" will be accepted at face value and that determinations of reasonableness by those entrusted with providing security will be accorded some sort of weight. Such an approach tends to abandon the responsibility of courts to make those very determinations entrusted to them and to relegate our individual liberties to the discretion of security officials.³

But this does not mean that there may not be an affirmative answer in this case to the question, one left unanswered in our recent decision in *United States v. Albarado*, *supra*: whether a search of all carry-on luggage of air travelers absent any suspicious or other special circumstances violates the fourth amendment.

In *Albarado* the panel noted that forcing one to waive a constitutional right by submitting to a search in order to utilize air travel is a form of coercion, and therefore that any waiver so obtained would not be free and voluntary. *Id.* at 807 & n. 14. See also *United States v. Kroll*, 481 F.2d 884, 886 (8th Cir. 1973); Note, *supra*, 71 Colum.L. Rev. at 1049-50. Here, however, there was no such coercion. All baggage is

not generally subject to search according to the FAA's directives; rather, only carry-on baggage is generally subject to search.⁴ Thus, one is not forced to choose between flying to one's destination and having one's baggage searched. Rather one may merely consign any baggage he does not want searched to the baggage compartment. The only imposition upon the passenger then is not having the bag during the flight and, perhaps, a little wait at the destination for his luggage. Clearly this is not the same case involved when the only way to avoid search is to forego flying. The conclusion, therefore, must be that a carry-on luggage search, unlike the personal search, may be justified on a consent basis.

If, however, appellant did not know she could avoid the search by checking her bag, she would not know she could withhold her consent to a baggage search and still fly. Her consent, therefore, would not be knowing. In *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), the Court was concerned with a somewhat analogous situation where the court of appeals had reversed a district court conviction because there was no evidence that the defendant had known he could withhold consent. In reversing the court of appeals in turn, the Court stated that voluntariness of consent "is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. It added that "knowledge of the right to refuse consent is one factor to be taken into account," but it is not "the *sine qua non* of an effective consent." *Id.* Thus, in *Schneckloth* the Court found that upon all the facts there had been an adequate showing of voluntariness, even absent a showing of actual knowledge of the right to refuse consent. The Supreme Court's opinion seemed to turn on whether there was

3. The comments in Judge Friendly's footnote 5 of the instant opinion I do not answer here as he recognizes that note as purely dictum.

4. See *United States v. Palazzo*, 488 F.2d 942 (5th Cir. 1974); *United States v. Ogden*, 485 F.2d 536, 538 (9th Cir. 1973). Compare *United States v. Czerwinski*, 484 F.2d 500 (5th Cir. 1973).

any evidence of coercion either applied by the authorities or felt by the defendant. As discussed above, the FAA system, as presently practiced, does not coerce passengers into having their luggage searched. There is no evidence, moreover, that appellant here felt any coercion. Indeed, there was evidence to the contrary: the marshal asked if he could search her bag, and, according to the marshal, appellant responded affirmatively.

Beyond this, in the suppression hearing appellant, who took the stand, made no claim and gave no indication that she felt coerced either directly or indirectly. In this situation, there was no custody and no inherently coercive situation. Here appellant gave all the outward indications of consenting voluntarily. Thus I have no hesitation in concluding that appellant consented to the search of her bag. That conclusion, suggested by the district court, is that appellant gave her consent, knowing there was heroin in her bag, in the belief that it would not in any case be found.

Finding implied consent as I do, and as the district court did, it is reasonable to suppose that appellant's implied consent was limited to that search of her luggage necessary to insure that she was not carrying weapons or explosives. Were this not so, there might be some question whether the marshal here went beyond the bounds of that consent. In *Terry v. Ohio*, 392 U.S. 1, 19, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889 (1968), the Court said, "The scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Thus, in the search of carry-on luggage, the right to search, even when based on consent, is not general, but one limited to the search for weapons or explosives. The marshal is not given a license to search for drugs among all airline passengers. Nevertheless, his search must be thorough, for "if we are authorizing anything, we are authorizing what is necessary to get the job done." *United States v. Albarado*, *supra*, at 807. The

limit of the marshal's search of carry-on luggage or of containers therein ought to be what was indicated in *United States v. Kroll*, 481 F.2d at 886, and quoted approvingly by this court in *Albarado* at 809. A search would be permissible "of that which may reasonably be deemed to conceal a weapon or explosives. Reasonableness, in this context, is a matter of probabilities."

In the case before us the marshal upon opening appellant's beach bag found two pairs of slacks, one of which was wrapped around a package. The marshal asked what it was, and appellant replied it was a box of Tampax. This answer was apparently inconsistent with the feel of the package. Moreover, the package was apparently wrapped in the slacks so as to conceal it. The size of the package, in any case, which contained 1,664 glassine envelopes of heroin, was sufficient at least to conceal explosives, if not a small pistol. In these circumstances it was reasonable for the marshal to remove the slacks and look within the exposed brown paper bag, thereby discovering the heroin.

I concur in the judgment affirming the conviction.



Sherrill Gary BRINKLEY, Appellant,

v.

UNITED STATES of America,
Appellee.

Nos. 73-1444, 73-1445.

United States Court of Appeals,
Eighth Circuit.

Submitted Dec. 11, 1973.

Decided April 9, 1974.

Rehearing Denied May 14, 1974.

Rehearing En Banc Denied July 12, 1974.

Defendant was convicted in the United States District Court for the Eastern District of Arkansas, J. Smith

VERNONIA SCHOOL DISTRICT 47J, Petitioner

v

WAYNE ACTON, et ux., Guardians ad Litem for JAMES ACTON

515 US —, 132 L Ed 2d 564, 115 S Ct —

[No. 94-590]

Argued March 28, 1995. Decided June 26, 1995.

Decision: School district's policy authorizing urinalysis drug testing of students who participated in district's athletics programs held not to violate Federal Constitution's Fourth Amendment.

SUMMARY

Teachers and administrators in an Oregon public school district observed a sharp increase in student drug use and disciplinary problems. Because drug use increases the risk of sports-related injuries, the school district was particularly concerned with the fact that student athletes were leaders of the drug culture. After a parent "input night" at which the parents in attendance gave their unanimous approval to a proposed urinalysis drug testing policy for student athletes, the district's school board implemented the policy, under which (1) all students wishing to participate in interscholastic athletics had to sign a form consenting to the testing and had to obtain their parents' written consent to the testing, (2) athletes were tested at the beginning of the season for their sport, and (3) random testing of 10 percent of the athletes was done weekly during the season. A seventh grade student was denied participation in the district's football program because the student and his parents refused to sign the testing consent forms. The student and his parents filed a suit seeking declaratory and injunctive relief from enforcement of the drug testing policy on the grounds that the policy violated the Federal Constitution's Fourth Amendment and a provision of the Oregon Constitution. After the United States District Court for the District of Oregon dismissed the suit (796 F Supp 1354), the United States Court of Appeals for the Ninth Circuit, expressing the view that the policy violated the Fourth Amendment and the Oregon constitutional provision, reversed the District Court's judgment (23 F3d 1514).

On certiorari, the United States Supreme Court vacated and remanded. In an opinion by SCALIA, J., joined by REHNQUIST, Ch. J., and KENNEDY, THOMAS, GINSBURG, and BREYER, JJ., it was held that the drug testing policy

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did not violate the student's right, under the Fourth Amendment, to be free from unreasonable searches—where the District Court had found that student drug problems in the school district, particularly with respect to students involved in interscholastic athletics, were severe enough to demonstrate a need to address such problems—because the policy was reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students, particularly student athletes, (2) the relative unobtrusiveness of the search, and (3) the severity of the need met by the search.

GINSBURG, J., concurring, expressed the view that the court's opinion reserved the question whether the school district, on no more than the showing made in the instant case, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports but on all students required to attend school.

O'CONNOR, J., joined by STEVENS, and SOUTER, JJ, dissenting, expressed the view that (1) suspicionless drug testing was not justified on the facts, since (a) exceptions to the general view that mass suspicionless searches are per se unreasonable within the meaning of the Fourth Amendment had been allowed by the Supreme Court only where it was clear that a suspicion-based regime would be ineffectual, and (b) such was not the circumstance in this case; and (2) the drug testing policy had two other flaws, in that (a) there was virtually no evidence in the record of a drug problem at the grade school that the student attended when the litigation began, and (b) even as to the school district's high school, the choice of student athletes as the class to subject to suspicionless testing was unreasonable.

HEADNOTES

Classified to United States Supreme Court Digest, Lawyers' Edition

Search and Seizure § 15 — urinalysis drug testing — student athletes

1a-1d. A public school district's urinalysis drug testing policy implemented by the school board for student athletes, under which policy all students wishing to participate in interscholastic athletics are tested at the beginning of the season for their sport and random testing of 10 percent of the athletes is done weekly during the season, does not violate the right, of a seventh grader who wishes to participate in the school district's football program, to be free, under the Federal Constitution's Fourth Amendment, from unreason-

able searches—where the record shows no objection to the policy by any parents other than the parents of the student in question, even though a public meeting has been held to obtain parents' views, and where a Federal District Court has found that student drug problems in the school district, particularly with respect to students involved in interscholastic athletics, were severe enough to demonstrate a need to address such problems—because the policy is reasonable under the circumstances, taking into account (1) the decreased expectation of privacy with regard to students, particularly student athletes, (2) the relative

unobtrusiveness of the search, and (3) the severity of the need met by the search. (O'Connor, Stevens, and Souter, JJ., dissented from this holding.)

Search and Seizure § 5.7 — reasonableness standard

2. Under the Federal Constitution's Fourth Amendment, the ultimate measure of the constitutionality of a governmental search is reasonableness; at least in a case involving the type of search for which there was no clear practice, either approving or disapproving the type of search, at the time the Fourth Amendment was adopted, whether a particular search meets the reasonableness standard is judged by balancing the search's intrusion on the individual's Fourth Amendment interests against the search's promotion of legitimate governmental interests.

Search and Seizure §§ 5, 25 — necessity of warrant — probable cause

3. Under the Federal Constitution's Fourth Amendment, a warrant is not required to establish the reasonableness of all government searches, and when a warrant is not required—and the Fourth Amendment's warrant clause requiring probable cause for the issuance of a warrant therefore is not applicable—probable cause is not invariably required either.

Search and Seizure § 5 — construction of Fourth Amendment

4. The Federal Constitution's Fourth Amendment imposes no irreducible requirement of individualized suspicion to justify a search by the government.

Search and Seizure §§ 5, 6, 8 — expectations of privacy — location

5. The Federal Constitution's Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate; what expectations are legitimate varies with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park; in addition, the legitimacy of certain privacy expectations in relation to the state may depend upon the individual's legal relationship with the state.

Infants § 1 — rights

6. Unemancipated minors lack some of the most fundamental rights of self-determination, including even the right of liberty in its narrow sense, that is, the right to come and go at will; they are subject, even as to their physical freedom, to the control of their parents or guardians.

Schools § 12 — private schools

7. When parents place minor children in private schools for the children's education, the teachers and administrators of those schools stand in loco parentis over the children entrusted to them; a child's tutor or schoolmaster who stands in loco parentis over the child has such a portion of the power of the child's parent concerning restraint or correction as may be necessary to answer the purposes for which the tutor or schoolmaster is employed.

Schools § 9 — students

8. The parental power exercised by schools over their students is not subject to federal constitutional constraints.

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Schools § 9 — pupils' constitutional rights

9a, 9b. Although children do not shed their federal constitutional rights at the schoolhouse gate, the nature of those rights is what is appropriate for children in school; the Federal Constitution's Fourth Amendment rights, no less than the Constitution's First and Fourteenth Amendment rights, are different in public schools than elsewhere.

Search and Seizure § 6 — expectation of privacy — student athletes

10. For purposes of determining the reasonableness of a search under the Federal Constitution's Fourth Amendment, public school students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy; the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children; particularly with regard to medical examinations and procedures, students within the school environment have a lesser expectation of privacy than members of the population generally; legitimate privacy expectations are even less with regard to student athletes, who, by choosing to go out for a team, voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.

Search and Seizure §§ 15, 18 — urinalysis drug testing — student athletes — furnishing information to officials

11a-11c. For purposes of determining whether a public school district's policy authorizing urinalysis drug testing of students who participate in the district's athletics programs authorizes unreasonable searches in

violation of the Federal Constitution's Fourth Amendment, the invasion of privacy under the policy is not significant, because (1) the privacy interests compromised by the process of obtaining the urine samples is negligible, where (a) male students produce samples at a urinal along a wall, remain fully clothed, and are observed only from behind, if at all, (b) female students produce samples in an enclosed stall, with a female monitor standing outside listening for only sounds of tampering, and (c) these conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily; and (2) with respect to the information disclosed concerning the state of the subject's body and the material that the subject has ingested, (a) the tests at issue look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic, (b) the drugs for which the samples are screened are standard and do not vary according to the identity of the student, (c) the test results are disclosed to only a limited class of school personnel who have a need to know, and the results are not turned over to law enforcement authorities or used for any internal disciplinary function, and (d) as to the requirement that, to avoid sanctions for a falsely positive test, students must identify in advance the prescription medications that the students are taking, (i) the United States Supreme Court has never indicated that requiring advance disclosure of medications is per se unreasonable, and (ii) the drug testing policy does not require that medication information be given to school officials, rather than, for example, being delivered in a sealed envelope to the testing lab.

Search and Seizure § 5 — probable cause

12a, 12b. Under the Federal Constitution's Fourteenth Amendment, searches for evidence of criminal wrongdoing generally require probable cause.

Search and Seizure § 5.7 — compelling state interest

13. In the context of the prohibition, under the Federal Constitution's Fourteenth Amendment, of unreasonable searches, the phrase "compelling state interest" does not describe a fixed minimum quantum of governmental concern; rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.

Search and Seizure § 15 — urinalysis drug testing — student athletes — governmental concern

14a, 14b. For purposes of determining whether a public school district's policy authorizing urinalysis drug testing of students who participate in the district's athletics programs authorizes unreasonable searches in violation of the Federal Constitution's Fourth Amendment, the nature and immediacy of the governmental concern, as well as the efficacy of the means of meeting such concern, support a finding of reasonableness, because (1) the nature of the concern for deterring drug use by the nation's school children is important and perhaps compelling, since (a) school years are a time when the physical, psychological, and addictive effects of drugs are most severe, (b) the effects of a drug-infested school are visited upon the

entire student body and faculty, as the educational process is disrupted, (c) the evil is being visited upon children for whom the state has taken a special responsibility of care and direction, and (d) the risk of immediate physical harm to a drug-using athlete or to those with whom the athlete is playing the athlete's sport is particularly high; (2) as for the immediacy of the school district's concerns, the United States Supreme Court cannot find clearly erroneous a Federal District Court's conclusions that (a) a large segment of the student body, particularly those involved in interscholastic athletics, is in a state of rebellion, (b) disciplinary actions have reached epidemic proportions, and (c) the rebellion is being fueled by alcohol and drug abuse as well as by the students' misperceptions about the drug culture; and (3) as to the efficacy of the means for addressing the problem, (a) it seems self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs, and (b) with respect to the argument that a less intrusive means—drug testing on suspicion of drug use—is available, (i) the Supreme Court has repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment, and (ii) in many respects, testing based on suspicion of drug use would not be better but worse.

Search and Seizure § 7 — role of government

15. Just as when the government conducts a search in its capacity as an employer—for example, a warrantless search of an absent employ-

ee's desk to obtain an urgently needed file—the relevant question, as to the reasonableness of a search under the Federal Constitution's Fourth Amendment, is whether that intrusion upon privacy is one that a reasonable employer might engage in, so also when the government acts as a guardian and a tutor, the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.

Appeal § 1692.3 — remand — misconception as to law

16. On certiorari to review a Federal Court of Appeals' decision holding that a public school district's urinalysis drug testing policy for student athletes violates the Federal

Constitution's Fourth Amendment, the United States Supreme Court will vacate the judgment of the Court of Appeals and will remand the case to the Court of Appeals for further proceedings—where the Court of Appeals holds that the policy not only violates the Fourth Amendment but also, by reason of that violation, contravenes a particular provision of the constitution of the state in which the school district is located—because the Supreme Court's conclusion that the holding concerning the Fourth Amendment is in error means that the holding concerning the state constitution rests on a flawed premise.

RESEARCH REFERENCES

- 25 Am Jur 2d, Drugs, Narcotics, and Poisons § 92; 68 Am Jur 2d, Schools §§ 252, 259; 68 Am Jur 2d, Searches and Seizures §§ 11, 17, 193
- 22 Am Jur Pl & Pr Forms (Rev), Searches and Seizures, Form 121
- 26 Am Jur Proof of Fact 2d 465, Consent to Search Given Under Coercive Circumstances
- USCS, Constitution, Amendment 4
- L Ed Digest, Search and Seizure § 15
- L Ed Index, Drugs and Narcotics; Schools and Education; Urinalysis
- ALR Index, Drugs and Narcotics; Privacy; Schools and Education; Search and Seizure; Urine Test

Annotations:

- Supreme Court's views as to the federal legal aspects of the right of privacy. 43 L Ed 2d 871.
- Validity, under Federal Constitution, of regulations, rules, or statutes allowing drug testing of students. 87 ALR Fed 148.
- Propriety of search involving removal of natural substance or foreign object from body by actual or threatened force. 66 ALR Fed 119.
- Search conducted by school official or teacher as violation of Fourth Amendment or equivalent state constitutional provision. 31 ALR5th 229.
- Search and seizure: reasonable expectation of privacy in public restroom. 74 ALR4th 508.

Auto-Cite®: Cases and annotations referred to herein can be further researched through the Auto-Cite® computer-assisted research service. Use Auto-Cite to check citations for form, parallel references, prior and later history, and annotation references.

APPEARANCES OF COUNSEL

Timothy R. Volpert argued the cause for petitioner.

Richard H. Seamon argued the cause for the United States, as amicus curiae, by special leave of court.

Thomas M. Christ argued the cause for respondents.

SYLLABUS BY REPORTER OF DECISIONS

Motivated by the discovery that athletes were leaders in the student drug culture and concern that drug use increases the risk of sports-related injury, petitioner school district (District) adopted the Student Athlete Drug Policy (Policy), which authorizes random urinalysis drug testing of students who participate in its athletics programs. Respondent Acton was denied participation in his school's football program when he and his parents (also respondents) refused to consent to the testing. They then filed this suit, seeking declaratory and injunctive relief on the grounds that the Policy violated the Fourth and Fourteenth Amendments and the Oregon Constitution. The District Court denied the claims, but the Court of Appeals reversed, holding that the Policy violated both the Federal and State Constitutions.

Held: The Policy is constitutional under the Fourth and Fourteenth Amendments.

(a) State-compelled collection and testing of urine constitutes a "search" under the Fourth Amendment. *Skinner v Railway Labor Executives' Assn.*, 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402. Where there was no clear practice, either approving or disapproving the type

of search at issue, at the time the constitutional provision was enacted, the "reasonableness" of a search is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental interests.

(b) The first factor to be considered in determining reasonableness is the nature of the privacy interest on which the search intrudes. Here, the subjects of the Policy are children who have been committed to the temporary custody of the State as schoolmaster; in that capacity, the State may exercise a degree of supervision and control greater than it could exercise over free adults. The requirements that public school children submit to physical examinations and be vaccinated indicate that they have a lesser privacy expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct.

(c) The privacy interests compromised by the process of obtaining urine samples under the Policy are

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negligible, since the conditions of collection are nearly identical to those typically encountered in public restrooms. In addition, the tests look only for standard drugs, not medical conditions, and the results are released to a limited group.

(d) The nature and immediacy of the governmental concern at issue, and the efficacy of this means for meeting it, also favor a finding of reasonableness. The importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover, the Policy is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high. The District Court's conclusion that the District's concerns were immediate is not clearly erroneous, and it is self-evident that a

drug problem largely caused by athletes, and of particular danger to athletes, is effectively addressed by ensuring that athletes do not use drugs. The Fourth Amendment does not require that the "least intrusive" search be conducted, so respondents' argument that the drug testing could be based on suspicion of drug use, if true, would not be fatal; and that alternative entails its own substantial difficulties.

23 F3d 1514, vacated and remanded.

Scalia, J., delivered the opinion of the Court, in which Rehnquist, C. J., and Kennedy, Thomas, Ginsburg, and Breyer, JJ., joined. Ginsburg, J., filed a concurring opinion. O'Connor, J., filed a dissenting opinion, in which Stevens and Souter, JJ., joined.

OPINION OF THE COURT

Justice Scalia delivered the opinion of the Court.

[1a] The Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorizes random urinalysis drug testing of students who participate in the District's school athletics programs. We granted certiorari to decide whether this violates the Fourth and Fourteenth Amendments to the United States Constitution.

I
A

Petitioner Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and

student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but, as the District Court found, athletes were the leaders of the drug culture.

796 F Supp 1354, 1357 (D Or 1992). This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury. Expert testimony at the trial confirmed the deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance. The high school football and wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted. According to the District Court:

"[T]he administration was at its wits end and . . . a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached 'epidemic proportions.' The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misperceptions about the drug culture." *Ibid.*

At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete

Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

B

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is

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produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is

eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

C

In the fall of 1991, respondent James Acton, then a seventh-grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms. The Actons filed suit, seeking declaratory and injunctive relief from enforcement of the Policy on the grounds that it violated the Fourth and Fourteenth Amendments to the United States Constitution and Article I, § 9, of the Oregon Constitution. After a bench trial, the District Court entered an order denying the claims on the merits and dismissing the action. 796 F Supp, at 1355. The United States Court of Appeals for the Ninth Circuit reversed, holding that the Policy violated both the Fourth and Fourteenth Amendments and Article I, § 9, of the Oregon Constitution. 23 F3d 1514 (1994). We granted certiorari. 513 US —, 130 L Ed 2d 488, 115 S Ct 571 (1994).

II

The Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, ..." We have held that the Fourteenth Amendment extends this constitutional guarantee to searches and seizures by state officers, *Elkins v United States*, 364 US 206, 213, 4 L

Ed 2d 1669, 80 S Ct 1437 (1960), including public school officials, *New Jersey v T. L. O.*, 469 US 325, 336-337, 83 L Ed 2d 720, 105 S Ct 733 (1985). In *Skinner v Railway Labor Executives' Assn.*, 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402 (1989), we held that state-compelled collection and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a "search" subject to the demands of the Fourth Amendment. See also *Treasury Employees v Von Raab*, 489 US 656, 665, 103 L Ed 2d 685, 109 S Ct 1384 (1989).

[2, 3] As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness." At least in a case such as this, where there was no clear practice, either approving or disapproving the type of search at issue, at the time the constitutional provision was enacted,¹ whether a particular search meets the reasonableness standard "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner, supra*, at 619, 103 L Ed 2d 639, 109 S Ct 1402 (quoting *Delaware v Prouse*, 440 US 648, 654, 59 L Ed 2d 660, 99 S Ct 1391 (1979)). Where a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing, this Court has said that reasonableness generally requires the obtaining of a judicial warrant, *Skinner, supra*, at 619, 103 L Ed 2d 639, 109 S Ct 1402. War-

rants cannot be issued, of course, without the showing of probable cause required by the Warrant Clause. But a warrant is not required to establish the reasonableness of *all* government searches; and when a warrant is not required (and the Warrant Clause therefore not applicable), probable cause is not invariably required either. A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Griffin v Wisconsin*, 483 US 868, 873, 97 L Ed 2d 709, 107 S Ct 3164 (1987) (internal quotation marks omitted).

[4] We have found such "special needs" to exist in the public-school context. There, the warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed," and "strict adherence to the requirement that searches be based upon probable cause" would undercut "the substantial need of teachers and administrators for freedom to maintain order in the schools." *T. L. O., supra*, at 340, 341, 83 L Ed 2d 720, 105 S Ct 733. The school search we approved in *T. L. O.*, while not based on probable cause, *was* based on individualized *suspicion* of wrongdoing. As we explicitly acknowledged, however, "the Fourth Amendment imposes no irreducible requirement of such suspicion," *id.*, at 342, n 8, 83 L Ed 2d 720, 105 S Ct 733 (quoting *United States v Martinez-Fuerte*, 428 US

1. Not until 1852 did Massachusetts, the pioneer in the "common school" movement, enact a compulsory school-attendance law, and as late as the 1870's only 14 States had such laws. R. Butts, *Public Education in the United States From Revolution to Reform* 102-103 (1978); 1 *Children and Youth in America* 467-468 (R. Bremner ed 1970). The drug problem, and the technology of drug testing, are of course even more recent.

543, 560-561, 49 L Ed 2d 1116, 96 S Ct 3074 (1976)). We have upheld suspicionless searches and seizures to conduct drug testing of railroad personnel involved in train accidents, see *Skinner, supra*; to conduct random drug testing of federal customs officers who carry arms or are involved in drug interdiction, see *Von Raab, supra*; and to maintain automobile checkpoints looking for illegal immigrants and contraband, *Martinez-Fuerte, supra*, and drunk drivers, *Michigan Dept. of State Police v Sitz*, 496 US 444, 110 L Ed 2d 412, 110 S Ct 2481 (1990).

III

[5] The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes. The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." *T. L. O.*, 469 US, at 338, 83 L Ed 2d 720, 105 S Ct 733. What expectations are legitimate varies, of course, with context, *id.*, at 337, 83 L Ed 2d 720, 105 S Ct 733, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-à-vis the State may depend upon the individual's legal relationship with the State. For example, in *Griffin, supra*, we held that, although a "probationer's home, like anyone else's, is protected by the Fourth Amendment[t]," the supervisory relationship between probationer and State justifies "a degree of impingement upon [a probationer's] privacy that would not be constitutional if applied to the public at large." 483 US, at 873, 875, 97 L Ed 2d 709, 107 S Ct 3164. Central, in our view, to

the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.

[6, 7] Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination—including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. See 59 Am Jur 2d, Parent and Child § 10 (1987). When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status. As Blackstone describes it, a parent "may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed." 1 W. Blackstone, Commentaries on the Laws of England 441 (1769).

[8, 9a] In *T. L. O.* we rejected the notion that public schools, like private schools, exercise only parental power over their students, which of course is not subject to constitutional constraints. *T. L. O.*, 469 US, at 336, 83 L Ed 2d 720, 105 S Ct 733. Such a view of things, we said, "is not entirely 'consonant with compulsory education laws,'" *ibid.* (quoting *Ingraham v Wright*, 430 US 651, 662, 51 L Ed 2d 711, 97 S Ct 1401 (1977)), and is inconsistent with our prior de-

cisions treating school officials as state actors for purposes of the Due Process and Free Speech Clauses, *T. L. O.*, *supra*, at 336, 83 L Ed 2d 720, 105 S Ct 733. But while denying that the State's power over schoolchildren is formally no more than the delegated power of their parents, *T. L. O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults. "[A] proper educational environment requires close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." 469 US, at 339, 83 L Ed 2d 720, 105 S Ct 733. While we do not, of course, suggest that public schools as a general matter have such a degree of control over children as to give rise to a constitutional "duty to protect," see *DeShaney v Winnebago County Dept. of Social Servs.*, 489 US 189, 200, 103 L Ed 2d 249, 109 S Ct 998 (1989), we have acknowledged that for many purposes "school authorities act[] *in loco parentis*," *Bethel School Dist. No. 403 v Fraser*, 478 US 675, 684, 92 L Ed 2d 549, 106 S Ct 3159 (1986), with the power and indeed the duty to "inculcate the habits and manners of civility," *id.*, at 681, 92 L Ed 2d 549, 106 S Ct 3159 (internal quotation marks omitted). Thus, while children assuredly do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v Des Moines Independent Community School Dist.*, 393 US 503, 506, 21 L Ed 2d 731, 89 S Ct 733 (1969), the nature of those rights is what is appropriate for children in school. See, e.g., *Goss v Lopez*, 419 US 565, 581-582, 42 L Ed 2d 725, 95 S Ct 729

(1975) (due process for a student challenging disciplinary suspension requires only that the teacher "informally discuss the alleged misconduct with the student minutes after it has occurred"); *Fraser*, *supra*, at 683, 92 L Ed 2d 549, 106 S Ct 3159 ("[I]t is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse"); *Hazlewood School Dist. v Kuhlmeier*, 484 US 260, 273, 98 L Ed 2d 592, 108 S Ct 562 (1988) (public school authorities may censor school-sponsored publications, so long as the censorship is "reasonably related to legitimate pedagogical concerns"); *Ingraham*, *supra*, at 682, 51 L Ed 2d 711, 97 S Ct 1401 ("[I]mposing additional administrative safeguards [upon corporal punishment] . . . would . . . entail a significant intrusion into an area of primary educational responsibility").

[9b, 10] Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, *School Health: A Guide for Health Professionals* 2 (1987). In the 1991-1992 school year, all 50 States required public-school stu-

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dents to be vaccinated against diphtheria, measles, rubella, and polio. US Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p 1. Particularly with regard to medical examinations and procedures, therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally." *T. L. O.*, 469 US, at 348, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring).

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation," *Schall by Kross v Tippecanoe County School Corp.*, 864 F2d 1309, 1318 (1988).

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App 17), they must acquire adequate insur-

ance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any "rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval." Record, Exh. 2, p 30, ¶ 8. Somewhat like adults who choose to participate in a "closely regulated industry," students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See *Skinner*, 489 US, at 627, 103 L Ed 2d 639, 109 S Ct 1402; *United States v Biswell*, 406 US 311, 316, 32 L Ed 2d 87, 92 S Ct 1593 (1972).

IV

[11a] Having considered the scope of the legitimate expectation of privacy at issue here, we turn next to the character of the intrusion that is complained of. We recognized in *Skinner* that collecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy." *Skinner*, 489 US, at 626, 103 L Ed 2d 639, 109 S Ct 1402. We noted, however, that the degree of intrusion depends upon the manner in which production of the urine sample is monitored. *Ibid.* Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compro-

misled by the process of obtaining the urine sample are in our view negligible.

[11b, 12a] The other privacy-invasive aspect of urinalysis is, of course, the information it discloses concerning the state of the subject's body, and the materials he has ingested. In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. See *Skinner*, *supra*, at 617, 103 L Ed 2d 639, 109 S Ct 1402. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function. 796 F Supp, at 1364; see also 23 F3d, at 1521.²

[11c] Respondents argue, however, that the District's Policy is in fact more intrusive than this suggests, because it requires the students, if they are to avoid sanctions for a falsely positive test, to identify *in advance* prescription medications they are taking. We agree that this raises some cause for concern. In

Von Raab, we flagged as one of the salutary features of the Customs Service drug-testing program the fact that employees were not required to disclose medical information unless they tested positive, and, even then, the information was supplied to a licensed physician rather than to the Government employer. See *Von Raab*, 489 US, at 672-673, n 2, 103 L Ed 2d 685, 109 S Ct 1384. On the other hand, we have never indicated that requiring advance disclosure of medications is *per se* unreasonable. Indeed, in *Skinner* we held that it was not "a significant invasion of privacy." *Skinner*, 489 US, at 626, n 7, 103 L Ed 2d 639, 109 S Ct 1402. It can be argued that, in *Skinner*, the disclosure went only to the medical personnel taking the sample, and the Government personnel analyzing it, see *id.*, at 609, 103 L Ed 2d 639, 109 S Ct 1402, *but see id.*, at 610, 103 L Ed 2d 639, 109 S Ct 1402 (railroad personnel responsible for forwarding the sample, and presumably accompanying information, to the Government's testing lab); and that disclosure to teachers and coaches—to persons who personally *know* the student—is a greater invasion of privacy. Assuming for the sake of argument that both those propositions are true, we do not believe they

2. [12b] Despite the fact that, like routine school physicals and vaccinations—which the dissent apparently finds unobjectionable even though they "are both blanket searches of a sort," *post*, at —, 132 L Ed 2d, at 593—the search here is undertaken for prophylactic and distinctly nonpunitive purposes (protecting student athletes from injury, and deterring drug use in the student population), see 796 F Supp, at 1363, the dissent would nonetheless lump this search together with "evidentiary" searches, which generally require probable cause, see *supra*, at —, 132 L Ed 2d, at 586, because, from the student's perspective, the test may be "regarded" or "understood" as punishment, *post*, at —, 132 L Ed 2d, at 594. In light of the District Court's findings regarding the purposes and consequences of the testing, any such perception is by definition an irrational one, which is protected nowhere else in the law. In any event, our point is not, as the dissent apparently believes, *post*, at —, 132 L Ed 2d, at 593, that *since* student vaccinations and physical exams are constitutionally reasonable, student drug testing must be so as well; but rather that, by reason of those prevalent practices, public schoolchildren in general, and student athletes in particular, have a diminished expectation of privacy. See *supra*, at —, 132 L Ed 2d, at 577.

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establish a difference that respondents are entitled to rely on here.

The General Authorization Form that respondents refused to sign, which refusal was the basis for James's exclusion from the sports program, said only (in relevant part): "I . . . authorize the Vernonia School District to conduct a test on a urine specimen which I provide to test for drugs and/or alcohol use. I also authorize the release of information concerning the results of such a test to the Vernonia School District and to the parents and/or guardians of the student." App 10-11. While the practice of the District seems to have been to have a school official take medication information from the student at the time of the test, see App 29, 42, that practice is not set forth in, or required by, the Policy, which says simply: "Student athletes who . . . are or have been taking prescription medication must provide verification (either by a copy of the prescription or by doctor's authorization) prior to being tested." App 8. It may well be that, if and when James was selected for random testing at a time that he was taking medication, the School District would have permitted him to provide the requested information in a confidential manner—for example, in a sealed envelope delivered to the testing lab. Nothing in the Policy contradicts that, and when respondents choose, in effect, to challenge the Policy on its face, we will not assume the worst. Accordingly, we reach the same conclusion as in *Skinner*: that the invasion of privacy was not significant.

V

[13, 14a] Finally, we turn to consider the nature and immediacy of

the governmental concern at issue here, and the efficacy of this means for meeting it. In both *Skinner* and *Von Raab*, we characterized the government interest motivating the search as "compelling." *Skinner*, *supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402 (interest in preventing railway accidents); *Von Raab*, *supra*, at 670, 103 L Ed 2d 685, 109 S Ct 1384 (interest in insuring fitness of customs officials to interdict drugs and handle firearms). Relying on these cases, the District Court held that because the District's program also called for drug testing in the absence of individualized suspicion, the District "must demonstrate a 'compelling need' for the program." 796 F Supp, at 1363. The Court of Appeals appears to have agreed with this view. See 23 F3d, at 1526. It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here? Rather, the phrase describes an interest which appears *important enough* to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met.

[14b] That the nature of the concern is important—indeed, perhaps compelling—can hardly be doubted. Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs, which was

the governmental concern in *Von Raab, supra*, at 668, 103 L Ed 2d 685, 109 S Ct 1384, or deterring drug use by engineers and trainmen, which was the governmental concern in *Skinner, supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402. School years are the time when the physical, psychological, and addictive effects of drugs are most severe. "Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound"; "children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor." Hawley, *The Bumpy Road to Drug-Free Schools*, 72 Phi Delta Kappan 310, 314 (1990). See also Estroff, Schwartz, & Hoffmann, *Adolescent Cocaine Abuse: Addictive Potential, Behavioral and Psychiatric Effects*, 28 *Clinical Pediatrics* 550 (Dec. 1989); Kandel, Davies, Karus, & Yamaguchi, *The Consequences in Young Adulthood of Adolescent Drug Involvement*, 43 *Arch Gen Psychiatry* 746 (Aug. 1986). And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction. Finally, it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high. Apart from psychological effects, which

include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an "artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response," making them a "very dangerous drug when used during exercise of any type." Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance*, in H. Appenzeller, *Managing Sports and Risk Management Strategies* 90, 90-91 (1993). Marijuana causes "[i]rregular blood pressure responses during changes in body position," "[r]eduction in the oxygen-carrying capacity of the blood," and "[i]nhibition of the normal sweating responses resulting in increased body temperature." *Id.*, at 94. Cocaine produces "[v]asoconstriction[,] [e]levated blood pressure," and "[p]ossible coronary artery spasms and myocardial infarction." *Ibid.*

As for the immediacy of the District's concerns: We are not inclined to question—indeed, we could not possibly find clearly erroneous—the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached 'epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture." 796 F Supp, at 1357. That is an immediate crisis of greater proportions than existed in *Skinner*, where we upheld the Government's drug testing program based on find-

ings of drug use by railroad employees nationwide, without proof that a problem existed on the particular railroads whose employees were subject to the test. See *Skinner*, 489 US, at 607, 103 L Ed 2d 639, 109 S Ct 1402. And of much greater proportions than existed in *Von Raab*, where there was no documented history of drug use by any customs officials. See *Von Raab*, 489 US, at 673, 103 L Ed 2d 685, 109 S Ct 1384; *id.*, at 683, 103 L Ed 2d 685, 109 S Ct 1384 (Scalia, J., dissenting).

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs. Respondents argue that a "less intrusive means to the same end" was available, namely, "drug testing on suspicion of drug use." Brief for Respondents 45-46. We have repeatedly refused to declare that only the "least intrusive" search practicable can be reasonable under the Fourth Amendment. *Skinner*, *supra*, at 629, n 9, 103 L Ed 2d 639, 109 S Ct 1402 (collecting cases). Respondents' alternative entails substantial difficulties—if it is indeed practicable at all. It may be impracticable, for one thing, simply because the parents

who are willing to accept random drug testing for athletes are not willing to accept accusatory drug testing for all students, which transforms the process into a badge of shame. Respondents' proposal brings the risk that teachers will impose testing arbitrarily upon troublesome but not drug-likely students. It generates the expense of defending lawsuits that charge such arbitrary imposition, or that simply demand greater process before accusatory drug testing is imposed. And not least of all, it adds to the ever-expanding diversionary duties of schoolteachers the new function of spotting and bringing to account drug abuse, a task for which they are ill prepared, and which is not readily compatible with their vocation. Cf. *Skinner*, *supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402 (quoting 50 Fed Reg 31526 (1985)) (a drug impaired individual "will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physician.'"); *Goss*, 419 US, at 594, 42 L Ed 2d 725, 95 S Ct 729 (Powell, J., dissenting) ("There is an ongoing relationship, one in which the teacher must occupy many roles—educator, adviser, friend, and, at times, parent-substitute. It is rarely adversary in nature . . .") (footnote omitted). In many respects, we think, testing based on "suspicion" of drug use would not be better, but worse.³

3. There is no basis for the dissent's insinuation that in upholding the District's Policy we are equating the Fourth Amendment status of schoolchildren and prisoners, who, the dissent asserts, may have what it calls the "categorical protection" of "a strong preference for an individualized suspicion requirement," *post*, at —, 132 L Ed 2d, at 592. The case on which it relies for that proposition, *Bell v Wolfish*, 441 US 520, 60 L Ed 2d 447, 99 S Ct 1861 (1979), displays no stronger a preference for individualized suspicion than we do today. It reiterates the proposition on which we rely, that "'elaborate less-restrictive-alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers.'" *Wolfish*, *supra*, at 559, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (quoting *United States v Martinez-Fuerte*, 428 US 543, 556-557, n 12, 49 L Ed 2d 1116, 96 S Ct 3074 (1976)). Even *Wolfish's* *arguendo* "assum[ption]" that the existence of less intrusive alternatives is relevant to the determination of

[1b] Taking into account all the factors we have considered above—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude Vernonia's Policy is reasonable and hence constitutional.

[1c, 15] We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.⁴ Just as when the government conducts a search in its capacity as employer (a warrantless search of an absent employee's desk to obtain an urgently needed file, for example), the relevant question is whether that intrusion upon privacy is one that a reasonable employer might engage in, see *O'Connor v Ortega*, 480 US 709, 94 L Ed 2d 714, 107 S Ct 1492 (1987); so also when the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the find-

ings of need made by the District Court, we conclude that in the present case it is.

[1d] We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this district-wide program by any parents other than the couple before us here—even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

* * *

[16] The Ninth Circuit held that Vernonia's Policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, § 9 of the Oregon Constitution. Our conclusion that the former holding was in error means that the latter holding rested on a flawed premise. We therefore vacate the judgment, and remand the case to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

the reasonableness of the particular search method at issue," *id.*, does not support the dissent, for the opinion ultimately rejected the hypothesized alternative (as we do) on the ground that it would impair other policies important to the institution. See *id.*, at 560, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (monitoring of visits instead of conducting body searches would destroy "the confidentiality and intimacy that these visits are intended to afford").

4. The dissent devotes a few meager paragraphs of its 21 pages to this central aspect of the testing program, see *post*, at —, 132 L Ed 2d, at 592, in the course of which it shows none of the interest in the original meaning of the Fourth Amendment displayed elsewhere in the opinion, see *post*, at —, 132 L Ed 2d, at 584-586. Of course at the time of the framing, as well as at the time of the adoption of the Fourteenth Amendment, children had substantially fewer "rights" than legislatures and courts confer upon them today. See 1 D. Kramer, *Legal Rights of Children* § 1.02, p 9 (2d ed 1994); Wald, *Children's Rights: A Framework for Analysis*, 12 U C D L Rev 255, 256 (1979).

SEPARATE OPINIONS

Justice Ginsburg, concurring.

The Court constantly observes that the School District's drug-testing policy applies only to students who voluntarily participate in interscholastic athletics. *Ante*, at —, — - —, 132 L Ed 2d, at 572, 577 (reduced privacy expectation and closer school regulation of student athletes), — - —, 132 L Ed 2d, at 579-580 (drug use by athletes risks immediate physical harm to users and those with whom they play). Correspondingly, the most severe sanction allowed under the District's policy is suspension from extracurricular athletic programs. *Ante*, at —, 132 L Ed 2d, at 573. I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. Cf. *United States v Edwards*, 498 F2d 496, 500 (CA2 1974) (Friendly, J.) (in contrast to search without notice and opportunity to avoid examination, airport search of passengers and luggage is avoidable "by choosing not to travel by air").

Justice O'Connor, with whom Justice Stevens and Justice Souter join, dissenting.

The population of our Nation's public schools, grades 7 through 12, numbers around 18 million. See US Dept of Education, National Center for Education Statistics, Digest of Education Statistics 58 (1994) (Table 43). By the reasoning of today's decision, the millions of these students

who participate in interscholastic sports, an overwhelming majority of whom have given school officials no reason whatsoever to suspect they use drugs at school, are open to an intrusive bodily search.

In justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds. First, it explains that precisely because *every* student athlete is being tested, there is no concern that school officials might act arbitrarily in choosing who to test. Second, a broad-based search regime, the Court reasons, dilutes the accusatory nature of the search. In making these policy arguments, of course, the Court sidesteps powerful, countervailing privacy concerns. Blanket searches, because they can involve "thousands or millions" of searches, "pos[e] a greater threat to liberty" than do suspicion-based ones, which "affect one person at a time," *Illinois v Krull*, 480 US 340, 365, 94 L Ed 2d 364, 107 S Ct 1160 (1987) (O'Connor, J., dissenting). Searches based on individualized suspicion also afford potential targets considerable control over whether they will, in fact, be searched because a person can avoid such a search by not acting in an objectively suspicious way. And given that the surest way to avoid acting suspiciously is to avoid the underlying wrongdoing, the costs of such a regime, one would think, are minimal.

But whether a blanket search is "better," *ante*, at —, 132 L Ed 2d, at 581, than a regime based on individualized suspicion is not a debate in which we should engage. In my view, it is not open to judges or government officials to decide on policy

grounds which is better and which is worse. For most of our constitutional history, mass, suspicionless searches have been generally considered *per se* unreasonable within the meaning of the Fourth Amendment. And we have allowed exceptions in recent years only where it has been clear that a suspicion-based regime would be ineffectual. Because that is not the case here, I dissent.

I

A

In *Carroll v United States*, 267 US 132, 69 L Ed 543, 45 S Ct 280, 39 ALR 790 (1925), the Court explained that "[t]he Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable." *Id.*, at 147, 69 L Ed 543, 45 S Ct 280, 39 ALR 790. Applying this standard, the Court first held that a search of a car was not unreasonable merely because it was warrantless; because obtaining a warrant is impractical for an easily movable object such as a car, the Court explained, a warrant is not required. The Court also held, however, that a warrantless car search *was* unreasonable unless supported by some level of individualized suspicion, namely probable cause. Significantly, the Court did not base its conclusion on the *express* probable cause requirement contained in the Warrant Clause, which, as just noted, the Court found inapplicable. Rather, the Court rested its views on "what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted" and "[what] will conserve public interests as well as the interests and rights of individual citizens." *Id.*, at 149, 69 L Ed 543, 45 S Ct 280, 39 ALR 790. With respect to the "rights of indi-

vidual citizens," the Court eventually offered the simple yet powerful intuition that "those lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise." *Id.*, at 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790.

More important for the purposes of this case, the Court clearly indicated that evenhanded treatment was no substitute for the individualized suspicion requirement:

"It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search." *Id.*, at 153-154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790.

The *Carroll* Court's view that blanket searches are "intolerable and unreasonable" is well-grounded in history. As recently confirmed in one of the most exhaustive analyses of the original meaning of the Fourth Amendment ever undertaken, see W. Cuddihy, *The Fourth Amendment: Origins and Original Meaning* (1990) (PhD Dissertation at Claremont Graduate School) (hereinafter *Cuddihy*), what the Framers of the Fourth Amendment most strongly opposed, with limited exceptions wholly inapplicable here, were general searches—that is, searches by general warrant, by writ of assistance, by broad statute, or by any other similar authority. See *id.*, at 1402, 1499, 1555; see also Clancy,

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The Role of Individualized Suspicion in Assessing the Reasonableness of Searches and Seizures, 25 Mem St U L Rev 483, 528 (1994); Maclin, When the Cure for the Fourth Amendment Is Worse Than the Disease, 68 S Cal L Rev 1, 9-12 (1994); L. Levy, Original Intent and the Framers' Constitution 221-246 (1988). Although, ironically, such warrants, writs, and statutes typically required individualized suspicion, see, e.g., Cuddihy 1140 ("Typical of the American warrants of 1761-76 was Starke's 'tobacco' warrant, which commanded its bearer to 'enter any *suspected Houses*' ") (emphasis added), such requirements were subjective and largely unenforceable. Accordingly, these various forms of authority led in practice to "virtually unrestrained," and hence "general," searches. J. Landynski, Search and Seizure and the Supreme Court 20 (1966). To be sure, the Fourth Amendment, in the Warrant Clause, prohibits by name only searches by general warrants. But that was only because the abuses of the general warrant were particularly vivid in the minds of the Framers' generation, Cuddihy 1554-1560, and not because the Framers viewed other kinds of general searches as any less unreasonable. "Prohibition of the general warrant was part of a larger scheme to extinguish general searches categorically." *Id.*, at 1499.

More important, there is no indication in the historical materials that the Framers' opposition to general searches stemmed solely from the fact that they allowed officials to single out individuals for arbitrary reasons, and thus that officials could render them reasonable simply by making sure to extend their search to *every* house in a given area or to

every person in a given group. See *Delaware v Prouse*, 440 US 648, 664, 59 L Ed 2d 660, 99 S Ct 1391 (1979) (Rehnquist, J., dissenting) (referring to this as the "'misery loves company'" theory of the Fourth Amendment). On the contrary, although general searches were typically arbitrary, they were not invariably so. Some general searches, for example, were of the arguably evenhanded "door-to-door" kind. Cuddihy 1091; see also *id.*, at 377, 1502, 1557. Indeed, Cuddihy's descriptions of a few blanket searches suggests they may have been considered *more* worrisome than the typical general search. See *id.*, at 575 ("One type of warrant [between 1700 and 1760] went beyond a general search, in which the searcher entered and inspected suspicious places, by requiring him to search entire categories of places whether he suspected them or not"); *id.*, at 478 ("During the exigencies of Queen Anne's War, two colonies even authorized searches in 1706 that extended to entire geographic areas, not just to suspicious houses in a district, as conventional general warrants allowed").

Perhaps most telling of all, as reflected in the text of the Warrant Clause, the particular way the Framers chose to curb the abuses of general warrants—and by implication, *all* general searches—was not to impose a novel "evenhandedness" requirement; it was to retain the individualized suspicion requirement contained in the typical general warrant, but to make that requirement meaningful and enforceable, for instance, by raising the required level of individualized suspicion to objective probable cause. See US Const, Amdt 4. So, for example, when the same Congress that proposed the

Fourth Amendment authorized duty collectors to search for concealed goods subject to import duties, specific warrants were required for searches on land; but even for searches at sea, where warrants were impractical and thus not required, Congress nonetheless limited officials to searching only those ships and vessels "in which [a collector] *shall have reason to suspect* any goods, wares or merchandise subject to duty shall be concealed." The Collection Act of July 31, 1789, § 24, 1 Stat 43 (emphasis added); see also Cuddihy 1490-1491 ("The Collection Act of 1789 was [the] most significant [of all early search statutes], for it identified the techniques of search and seizure that the framers of the amendment believed reasonable while they were framing it"). Not surprisingly, the *Carroll* Court relied on this statute and other subsequent ones like it in arriving at its views. See *Carroll*, 267 US, at 150-151, 154, 69 L Ed 543, 45 S Ct 280, 39 ALR 790; cf. Clancy, *supra*, at 489 ("While the plain language of the Amendment does not mandate individualized suspicion as a necessary component of all searches and seizures, the historical record demonstrates that the framers believed that individualized suspicion was an inherent quality of reasonable searches and seizures").

True, not all searches around the time the Fourth Amendment was adopted required individualized suspicion—although most did. A search incident to arrest was an obvious example of one that did not, see Cuddihy 1518, but even those searches shared the essential characteristics that distinguish suspicion-based searches from abusive general searches: they only "affect" one per-

son at a time," *Krull*, 480 US, at 365, 94 L Ed 2d 364, 107 S Ct 1160 (O'Connor, J., dissenting), and they are generally avoidable by refraining from wrongdoing. See *supra*, at ———, 132 L Ed 2d, at 583. Protection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.

The view that mass, suspicionless searches, however evenhanded, are generally unreasonable remains inviolate in the criminal law enforcement context, see *Ybarra v Illinois*, 444 US 85, 62 L Ed 2d 238, 100 S Ct 338 (1979) (invalidating evenhanded, nonaccusatory patdown for weapons of all patrons in a tavern in which there was probable cause to think drug dealing was going on), at least where the search is more than minimally intrusive, see *Michigan Dept. of State Police v Sitz*, 496 US 444, 110 L Ed 2d 412, 110 S Ct 2481 (1990) (upholding the brief and easily avoidable detention, for purposes of observing signs of intoxication, of all motorists approaching a roadblock). It is worth noting in this regard that state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches, see, e.g., *Bell v Wolfish*, 441 US 520, 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (1979) (visual body cavity searches), is still "particularly destructive of privacy and offensive to personal dignity." *Treasury Employees v Von Raab*, 489 US 656, 680, 103 L Ed 2d 685, 109 S Ct 1384 (1989) (Scalia, J., dissenting); see also *ante*, at ———, 132 L Ed 2d, at 577; *Skinner v Railway Labor Executives' Assn.*, 489 US 602, 617, 103 L Ed 2d 639, 109 S Ct 1402 (1989). We have not hesitated to treat monitored bowel movements as highly intrusive

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(even in the special border search context), compare *United States v Martinez-Fuerte*, 428 US 543, 49 L Ed 2d 1116, 96 S Ct 3074 (1976) (brief interrogative stops of all motorists crossing certain border checkpoint reasonable without individualized suspicion), with *United States v Montoya de Hernandez*, 473 US 531, 87 L Ed 2d 381, 105 S Ct 3304 (1985) (monitored bowel movement of border crossers reasonable only upon reasonable suspicion of alimentary canal smuggling), and it is not easy to draw a distinction. See Fried, *Privacy*, 77 Yale L J 475, 487 (1968) ("[I]n our culture the excretory functions are shielded by more or less absolute privacy"). And certainly monitored urination combined with urine testing is more intrusive than some personal searches we have said trigger Fourth Amendment protections in the past. See, e.g., *Cupp v Murphy*, 412 US 291, 295, 36 L Ed 2d 900, 93 S Ct 2000 (1973) (Stewart, J.) (characterizing the scraping of dirt from under a person's fingernails as a "'severe, though brief, intrusion upon cherished personal security'"). Finally, the collection and testing of urine is, of course, a search of a person, one of only four categories of suspect searches the Constitution mentions by name. See US Const, Amdt 4 (listing "persons, houses, papers, and effects"); cf. *Cuddihy* 835, 1518, 1552, n 394 (indicating long history of outrage at personal searches before 1789).

Thus, it remains the law that the police cannot, say, subject to drug testing every person entering or leaving a certain drug-ridden neighborhood in order to find evidence of crime. 3 W. LaFave, *Search and Seizure* § 9.5(b), pp 551-553 (2d ed 1987) (hereinafter LaFave). And this is

true even though it is hard to think of a more compelling government interest than the need to fight the scourge of drugs on our streets and in our neighborhoods. Nor could it be otherwise, for if being evenhanded were enough to justify evaluating a search regime under an open-ended balancing test, the Warrant Clause, which presupposes that there is some category of searches for which individualized suspicion is non-negotiable, see 2 LaFave § 4.1, at 118, would be a dead letter.

Outside the criminal context, however, in response to the exigencies of modern life, our cases have upheld several evenhanded blanket searches, including some that are more than minimally intrusive, after balancing the invasion of privacy against the government's strong need. Most of these cases, of course, are distinguishable insofar as they involved searches either not of a personally intrusive nature, such as searches of closely regulated businesses, see, e.g., *New York v Burger*, 482 US 691, 699-703, 96 L Ed 2d 601, 107 S Ct 2636 (1987); cf. *Cuddihy* 1501 ("Even the states with the strongest constitutional restrictions on general searches had long exposed commercial establishments to warrantless inspection"), or arising in unique contexts such as prisons, see, e.g., *Wolfish, supra*, at 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (visual body cavity searches of prisoners following contact visits); cf. *Cuddihy* 1516-1519, 1552-1553 (indicating that searches incident to arrest and prisoner searches were the only common personal searches at time of founding). This certainly explains why Justice Scalia, in his dissent in our recent *Von Raab* decision, found it significant that "[u]ntil today this

Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment." *Von Raab, supra*, at 680, 103 L Ed 2d 685, 109 S Ct 1384 (citation omitted).

In any event, in many of the cases that can be distinguished on the grounds suggested above and, more important, in *all* of the cases that cannot, see, e.g., *Skinner, supra* (blanket drug testing scheme); *Von Raab, supra* (same); cf. *Camara v Municipal Court of San Francisco*, 387 US 523, 18 L Ed 2d 930, 87 S Ct 1727 (1967) (area-wide searches of private residences), we upheld the suspicionless search only after first recognizing the Fourth Amendment's longstanding preference for a suspicion-based search regime, and then pointing to sound reasons why such a regime would likely be ineffectual under the unusual circumstances presented. In *Skinner*, for example, we stated outright that "'some quantum of individualized suspicion'" is "usually required" under the Fourth Amendment, *Skinner, supra*, at 624, 103 L Ed 2d 639, 109 S Ct 1402, quoting *Martinez-Fuerte*, 428 US, at 560, 49 L Ed 2d 1116, 96 S Ct 3074, and we built the requirement into the test we announced: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion *would be placed in jeopardy by a requirement of individualized suspicion*, a search may be reasonable despite the absence of such suspicion." *Ibid.* (emphasis added). The obvious negative implication of this reasoning is that, if such an

individualized suspicion requirement would *not* place the government's objectives in jeopardy, the requirement should not be forsaken. See also *Von Raab, supra*, at 665-666, 103 L Ed 2d 685, 109 S Ct 1384.

Accordingly, we upheld the suspicionless regime at issue in *Skinner* on the firm understanding that a requirement of individualized suspicion for testing train operators for drug or alcohol impairment following serious train accidents would be unworkable because "the scene of a serious rail accident is chaotic." *Skinner*, 489 US, at 631, 103 L Ed 2d 639, 109 S Ct 1402. (Of course, it could be plausibly argued that the fact that testing occurred only *after* train operators were involved in serious train accidents amounted to an individualized suspicion requirement in all but name, in light of the record evidence of a strong link between serious train accidents and drug and alcohol use.) We have performed a similar inquiry in the other cases as well. See *Von Raab, supra*, at 674, 103 L Ed 2d 685, 109 S Ct 1384 (suspicion requirement for searches of customs officials for drug impairment impractical because "not feasible to subject [such] employees and their work product to the kind of day-to-day scrutiny that is the norm in more traditional office environments"); *Camara, supra*, at 537, 18 L Ed 2d 930, 87 S Ct 1727 (suspicion requirement for searches of homes for safety code violations impractical because conditions such as "faulty wiring" not observable from outside of house); see also *Wolfish*, 441 US, at 559, n 40, 60 L Ed 2d 447, 99 S Ct 1861 (suspicion requirement for searches of prisoners for smuggling following contact visits impractical because observation necessary to

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gain suspicion would cause "obvious disruption of the confidentiality and intimacy that these visits are intended to afford"); *Martinez-Fuerte, supra*, at 557, 49 L Ed 2d 1116, 96 S Ct 3074 ("A requirement that stops on major routes inland always be based on reasonable suspicion would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens"); *United States v Edwards*, 498 F2d 496, 500 (CA2 1974) (Friendly, J.) (suspicion-based searches of airport passengers' carry-on luggage impractical because of the great number of plane travelers and "conceded inapplicability" of the profile method of detecting hijackers).

Moreover, an individualized suspicion requirement was often impractical in these cases because they involved situations in which even one undetected instance of wrongdoing could have injurious consequences for a great number of people. See, e.g., *Camara, supra*, at 535, 18 L Ed 2d 930, 87 S Ct 1727 (even one safety code violation can cause "fires and epidemics [that] ravage large urban areas"); *Skinner, supra*, at 628, 103 L Ed 2d 639, 109 S Ct 1402 (even one drug- or alcohol-impaired train operator can lead to the "disastrous consequences" of a train wreck, such as "great human loss"); *Von Raab, supra*, at 670, 674, 677, 103 L Ed 2d 685, 109 S Ct 1384 (even one customs official caught up in drugs can, by virtue of impairment, susceptibility to bribes, or indifference, result in the noninterdiction of a "sizable drug shipment[t]," which eventually injures the lives of thousands, or to a breach of "national security");

Edwards, supra, at 500 (even one hijacked airplane can destroy "hundreds of human lives and millions of dollars of property").

B

The instant case stands in marked contrast. One searches today's majority opinion in vain for recognition that history and precedent establish that individualized suspicion is "usually required" under the Fourth Amendment (regardless of whether a warrant and probable cause are also required) and that, in the area of intrusive personal searches, the only recognized exception is for situations in which a suspicion-based scheme would be likely ineffectual. See *supra*, at ———, 132 L Ed 2d, at 588-589. Far from acknowledging anything special about individualized suspicion, the Court treats a suspicion-based regime as if it were just any run-of-the-mill, less intrusive alternative—that is, an alternative that officials may bypass if the lesser intrusion, in their reasonable estimation, is outweighed by policy concerns unrelated to practicability.

As an initial matter, I have serious doubts whether the Court is right that the District reasonably found that the lesser intrusion of a suspicion-based testing program outweighed its genuine concerns for the adversarial nature of such a program, and for its abuses. See *ante*, at ———, 132 L Ed 2d, at 581. For one thing, there are significant safeguards against abuses. The fear that a suspicion-based regime will lead to the testing of "troublesome but not drug-likely" students, *id.*, at ———, 132 L Ed 2d, at 581, for example, ignores that the required level of suspicion in the school context is objectively *reason-*

able suspicion. In this respect, the facts of our decision in *New Jersey v T. L. O.*, 469 US 325, 83 L Ed 2d 720, 105 S Ct 733 (1985), should be reassuring. There, we found reasonable suspicion to search a ninth-grade girl's purse for cigarettes after a teacher caught the girl smoking in the bathroom with a companion who admitted it. See *id.*, at 328, 345-346, 83 L Ed 2d 720, 105 S Ct 733. Moreover, any distress arising from what turns out to be a false accusation can be minimized by keeping the entire process confidential.

For another thing, the District's concern for the adversarial nature of a suspicion-based regime (which appears to extend even to those who are *rightly* accused) seems to ignore the fact that such a regime would not exist in a vacuum. Schools already have adversarial, disciplinary schemes that require teachers and administrators in many areas besides drug use to investigate student wrongdoing (often by means of accusatory searches); to make determinations about whether the wrongdoing occurred; and to impose punishment. To such a scheme, suspicion-based drug testing would be only a minor addition. The District's own elaborate disciplinary scheme is reflected in its handbook, which, among other things, lists the following disciplinary "problem areas" carrying serious sanctions: "DEFIANCE OF AUTHORITY," "DISORDERLY OR DISRUPTIVE CONDUCT INCLUDING FOUL LANGUAGE," "AUTOMOBILE USE OR MISUSE," "FORGERY OR LYING," "GAMBLING," "THEFT," "TOBACCO," "MISCHIEF," "VANDALISM," "RECKLESSLY ENDANGERING," "MENACING OR HARASSMENT," "ASSAULT," "FIGHTING," "WEAP-

ONS," "EXTORTION," "EXPLOSIVE DEVICES," and "ARSON." Record, Exh. 2, p 11; see also *id.*, at 20-21 (listing rules regulating dress and grooming, public displays of affection, and the wearing of hats inside); cf. *id.*, at 8 ("RESPONSIBILITIES OF SCHOOLS" include "To develop and distribute to parents and students reasonable rules and regulations governing student behavior and attendance" and "To provide fair and reasonable standards of conduct and to enforce those standards through appropriate disciplinary action"). The high number of disciplinary referrals in the record in this case illustrates the District's robust scheme in action.

In addition to overstating its concerns with a suspicion-based program, the District seems to have *understated* the extent to which such a program is less intrusive of students' privacy. By invading the privacy of a few students rather than many (nationwide, of thousands rather than millions), and by giving potential search targets substantial control over whether they will, in fact, be searched, a suspicion-based scheme is *significantly* less intrusive.

In any event, whether the Court is right that the District reasonably weighed the lesser intrusion of a suspicion-based scheme against its policy concerns is beside the point. As stated, a suspicion-based search regime is not just any less intrusive alternative; the individualized suspicion requirement has a legal pedigree as old as the Fourth Amendment itself, and it may not be easily cast aside in the name of policy concerns. It may only be forsaken, our cases in the personal search context

have established, if a suspicion-based regime would likely be ineffectual.

But having misconstrued the fundamental role of the individualized suspicion requirement in Fourth Amendment analysis, the Court never seriously engages the practicality of such a requirement in the instant case. And that failure is crucial because nowhere is it *less* clear that an individualized suspicion requirement would be ineffectual than in the school context. In most schools, the entire pool of potential search targets—students—is under constant supervision by teachers and administrators and coaches, be it in classrooms, hallways, or locker rooms. See *T. L. O.*, 469 US, at 339, 83 L Ed 2d 720, 105 S Ct 733 (“[A] proper educational environment requires close supervision of schoolchildren”).

The record here indicates that the Vernonia schools are no exception. The great irony of this case is that most (though not all) of the evidence the District introduced to justify its suspicionless drug-testing program consisted of first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use—and thus that would have justified a drug-related search under our *T. L. O.* decision. See *id.*, at 340-342, 83 L Ed 2d 720, 105 S Ct 733 (warrant and probable cause not required for school searches; reasonable suspicion sufficient). Small groups of students, for example, were observed by a teacher “passing joints back and forth” across the street at a restaurant before school and during school hours. Tr 67 (Apr. 29, 1992). Another group was caught skipping school and using drugs at one of the stu-

dents’ houses. See *id.*, at 93-94. Several students actually *admitted* their drug use to school officials (some of them being caught with marijuana pipes). See *id.*, at 24. One student presented himself to his teacher as “clearly obviously inebriated” and had to be sent home. *Id.*, at 68. Still another was observed dancing and singing at the top of his voice in the back of the classroom; when the teacher asked what was going on, he replied, “Well, I’m just high on life.” *Id.*, at 89-90. To take a final example, on a certain road trip, the school wrestling coach smelled marijuana smoke in a hotel room occupied by four wrestlers, see *id.*, at 110-112, an observation that (after some questioning) would probably have given him reasonable suspicion to test one or all of them. Cf. 4 LaFave § 10.11(b), at 169 (“[I]n most instances the evidence of wrongdoing prompting teachers or principals to conduct searches is sufficiently detailed and specific to meet the traditional probable cause test”).

In light of all this evidence of drug use by particular students, there is a substantial basis for concluding that a vigorous regime of suspicion-based testing (for which the District appears already to have rules in place, see Record, Exh. 2, at 14, 17) would have gone a long way toward solving Vernonia’s school drug problem while preserving the Fourth Amendment rights of James Acton and others like him. And were there any doubt about such a conclusion, it is removed by indications in the record that suspicion-based testing could have been supplemented by an equally vigorous campaign to have Vernonia’s parents encourage their children to submit to the District’s *voluntary* drug testing program. See

id., at 32 (describing the voluntary program); *ante*, at —, 132 L Ed 2d, at 582 (noting widespread parental support for drug testing). In these circumstances, the Fourth Amendment dictates that a mass, suspicionless search regime is categorically unreasonable.

I recognize that a suspicion-based scheme, even where reasonably effective in controlling in-school drug use, may not be as effective as a mass, suspicionless testing regime. In one sense, that is obviously true—just as it is obviously true that suspicion-based law enforcement is not as effective as mass, suspicionless enforcement might be. "But there is nothing new in the realization" that Fourth Amendment protections come with a price. *Arizona v Hicks*, 480 US 321, 329, 94 L Ed 2d 347, 107 S Ct 1149 (1987). Indeed, the price we pay is higher in the criminal context, given that police do not closely observe the entire class of potential search targets (all citizens in the area) and must ordinarily adhere to the rigid requirements of a warrant and probable cause.

The principal counterargument to all this, central to the Court's opinion, is that the Fourth Amendment is more lenient with respect to school searches. That is no doubt correct, for, as the Court explains, *ante*, at —, 132 L Ed 2d, at 575-576, schools have traditionally had special guardian-like responsibilities for children that necessitate a degree of constitutional leeway. This principle explains the considerable Fourth Amendment leeway we gave school officials in *T. L. O.* In that case, we held that children at school do not

enjoy two of the Fourth Amendment's traditional categorical protections against unreasonable searches and seizures: the warrant requirement and the probable cause requirement. See *T. L. O.*, 469 US, at 337-343, 83 L Ed 2d 720, 105 S Ct 733. And this was true even though the same children enjoy such protections "in a nonschool setting." *Id.*, at 348, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring).

The instant case, however, asks whether the Fourth Amendment is even more lenient than that, *i.e.*, whether it is so lenient that students may be deprived of the Fourth Amendment's only remaining, and most basic, categorical protection: its strong preference for an individualized suspicion requirement, with its accompanying antipathy toward personally intrusive, blanket searches of mostly innocent people. It is not at all clear that people in prison lack this categorical protection, see *Wolfish*, 441 US, at 558-560, 60 L Ed 2d 447, 99 S Ct 1861 (upholding certain suspicionless searches of prison inmates); but cf. *supra*, at —, 132 L Ed 2d, at 588 (indicating why suspicion requirement was impractical in *Wolfish*), and we have said "we are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *T. L. O.*, *supra*, at 338-339, 83 L Ed 2d 720, 105 S Ct 733. Thus, if we are to mean what we often proclaim—that students do not "shed their constitutional rights . . . at the schoolhouse gate," *Tinker v Des Moines Independent Community School Dist.*, 393 US 503, 506, 21 L Ed 2d 731, 89 S Ct 733 (1969)—the answer must plainly be no.¹

1. The Court says I pay short shrift to the original meaning of the Fourth Amendment as it relates to searches of public school children. See *ante*, at —, n 4, 132 L Ed 2d, at 582. As an

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For the contrary position, the Court relies on cases such as *T. L. O., Ingraham v Wright*, 430 US 651, 51 L Ed 2d 711, 97 S Ct 1401 (1977), and *Goss v Lopez*, 419 US 565, 42 L Ed 2d 725, 95 S Ct 729 (1975). See *ante*, at ———, 132 L Ed 2d, at 575-577. But I find the Court's reliance on these cases ironic. If anything, they affirm that schools have substantial constitutional leeway in carrying out their traditional mission of responding to *particularized* wrongdoing. See *T. L. O., supra* (leeway in investigating particularized wrongdoing); *Ingraham, supra* (leeway in punishing particularized wrongdoing); *Goss, supra* (leeway in choosing procedures by which particularized wrongdoing is punished).

By contrast, intrusive, blanket searches of school children, most of whom are innocent, for evidence of serious wrongdoing are not part of any traditional school function of which I am aware. Indeed, many schools, like many parents, prefer to trust their children unless given reason to do otherwise. As James Acton's father said on the witness stand, "[suspicionless testing] sends a message to children that are trying to be responsible citizens . . . that they have to prove that they're innocent . . . , and I think that kind

of sets a bad tone for citizenship." Tr 9 (Apr. 29, 1992).

I find unpersuasive the Court's reliance, *ante*, at ———, 132 L Ed 2d, at 576-577, on the widespread practice of physical examinations and vaccinations, which are both blanket searches of a sort. Of course, for these practices to have *any* Fourth Amendment significance, the Court has to assume that these physical exams and vaccinations are typically "required" to a similar extent that urine testing and collection is required in the instant case, *i.e.*, that they are required regardless of parental objection and that some meaningful sanction attaches to the failure to submit. In any event, without forming any particular view of such searches, it is worth noting that a suspicion requirement for vaccinations is not merely impractical; it is nonsensical, for vaccinations are not searches *for anything in particular* and so there is nothing about which to be suspicious. Nor is this saying anything new; it is the same theory on which, in part, we have repeatedly upheld certain inventory searches. See, *e.g.*, *South Dakota v Opperman*, 428 US 364, 370, n 5, 49 L Ed 2d 1000, 96 S Ct 3092 (1976) ("The probable-cause approach is unhelpful when analysis centers

initial matter, the historical materials on what the Framers thought of official searches of children, let alone of public school children (the concept of which did not exist at the time, see *id.*, at ———, n 1, 132 L Ed 2d, at 574), are extremely scarce. Perhaps because of this, the Court does not itself offer an account of the original meaning, but rather resorts to the general proposition that children had fewer recognized rights at the time of the framing than they do today. But that proposition seems uniquely unhelpful in the present case, for although children may have had fewer rights against the private schoolmaster at the time of the framing than they have against public school officials today, *parents* plainly had *greater* rights then than now. At the time of the framing, for example, the fact that a child's parents refused to authorize a private schoolmaster's search of the child would probably have rendered any such search unlawful; after all, at common law, the source of the schoolmaster's authority over a child was a delegation of the parent's authority. See *id.*, at ———, 132 L Ed 2d, at 575. Today, of course, the fact that a child's parents refuse to authorize a public school search of the child—as James Acton's parents refused here—is of little constitutional moment. Cf. *Ingraham v Wright*, 430 US 651, 662, n. 22, 51 L Ed 2d 711, 97 S Ct 1401 (1977) ("parental approval of corporal punishment is not constitutionally required").

upon the reasonableness of routine administrative caretaking functions"). As for physical examinations, the practicability of a suspicion requirement is highly doubtful because the conditions for which these physical exams ordinarily search, such as latent heart conditions, do not manifest themselves in observable behavior the way school drug use does. See *supra*, at —, 132 L Ed 2d, at 591.

It might also be noted that physical exams (and of course vaccinations) are not searches for conditions that reflect wrongdoing on the part of the student, and so are *wholly* nonaccusatory and have no consequences that can be regarded as punitive. These facts may explain the absence of Fourth Amendment challenges to such searches. By contrast, although I agree with the Court that the accusatory nature of the District's testing program is *diluted* by making it a blanket one, any testing program that searches for conditions plainly reflecting serious wrongdoing can never be made wholly nonaccusatory from the student's perspective, the motives for the program notwithstanding; and for the same reason, the substantial consequences that can flow from a positive test, such as suspension from sports, are invariably—and quite reasonably—understood as punishment. The best proof that the District's testing program is to *some* extent accusatory can be found in James Acton's own explanation on the witness stand as to why he did not want to submit to drug testing: "Because I feel that they have no reason to think I was

taking drugs." Tr 13 (Apr. 29, 1992). It is hard to think of a manner of explanation that resonates more intensely in our Fourth Amendment tradition than this.

II

I do not believe that suspicionless drug testing is justified on these facts. But even if I agreed that some such testing were reasonable here, I see two other Fourth Amendment flaws in the District's program.² First, and most serious, there is virtually no evidence in the record of a drug problem at the Washington Grade School, which includes the 7th and 8th grades, and which Acton attended when this litigation began. This is not surprising, given that, of the four witnesses who testified to drug-related incidents, three were teachers and/or coaches at the high school, see Tr 65; *id.*, at 86; *id.*, at 99, and the fourth, though the principal of the grade school at the time of the litigation, had been employed as principal of the high school during the years leading up to (and beyond) the implementation of the drug testing policy. See *id.*, at 17. The only evidence of a grade school drug problem that my review of the record uncovered is a "guarantee" by the late-arriving grade school principal that "our problems we've had in '88 and '89 didn't start at the high school level. They started in the elementary school." *Id.*, at 43. But I would hope that a single assertion of this sort would not serve as an adequate basis on which to uphold mass, suspicionless drug testing of two entire grades of student-athletes—in Vernonia

2. Because I agree with the Court that we may assume the District's program allows students to confine the advanced disclosure of highly personal prescription medications to the testing lab, see *ante*, at —, 132 L Ed 2d, at 579, I also agree that *Skinner* controls this aspect of the case, and so do not count the disclosure requirement among the program's flaws.

and, by the Court's reasoning, in other school districts as well. Perhaps there is a drug problem at the grade school, but one would not know it from this record. At the least, then, I would insist that the parties and the District Court address this issue on remand.

Second, even as to the high school, I find unreasonable the school's choice of student athletes as the class to subject to suspicionless testing—a choice that appears to have been driven more by a belief in what would pass constitutional muster, see *id.*, at 45-47 (indicating that the original program was targeted at students involved in any extracurricular activity), than by a belief in what was required to meet the District's principal disciplinary concern. Reading the full record in this case, as well as the District Court's authoritative summary of it, 796 F Supp 1354, 1356-1357 (Or 1992), it seems quite obvious that the true driving force behind the District's adoption of its drug testing program was the need to combat the rise in drug-related disorder and disruption in its classrooms and around campus. I mean no criticism of the strength of that interest. On the contrary, where the record demonstrates the existence of such a problem, that interest seems self-evidently compelling. "Without first establishing discipline and maintaining order, teachers cannot begin to educate their students." *T. L. O.*, 469 US, at 350, 83 L Ed 2d 720, 105 S Ct 733 (Powell, J., concurring). And the record in this case surely demonstrates there was a drug-related discipline problem in Vernonia of "'epidemic proportions.'" 796 F Supp, at 1357. The evidence of a drug-related sports injury

problem at Vernonia, by contrast, was considerably weaker.

On this record, then, it seems to me that the far more reasonable choice would have been to focus on the class of students found to have violated published school rules against severe disruption in class and around campus, see Record, Exh. 2, at 9, 11—disruption that had a strong nexus to drug use, as the District established at trial. Such a choice would share two of the virtues of a suspicion-based regime: testing dramatically fewer students, tens as against hundreds, and giving students control, through their behavior, over the likelihood that they would be tested. Moreover, there would be a reduced concern for the accusatory nature of the search, because the Court's feared "badge of shame," *ante*, at —, 132 L Ed 2d, at 581, would already exist, due to the antecedent accusation and finding of severe disruption. In a lesser known aspect of *Skinner*, we upheld an analogous testing scheme with little hesitation. See *Skinner*, 489 US, at 611, 103 L Ed 2d 639, 109 S Ct 1402 (describing "'Authorization to Test for Cause'" scheme, according to which train operators would be tested "in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding").

III

It cannot be too often stated that the greatest threats to our constitutional freedoms come in times of crisis. But we must also stay mindful that not all government responses to such times are hysterical overreactions; some crises are quite real, and when they are, they serve precisely as the compelling state interest that

we have said may justify a measured intrusion on constitutional rights. The only way for judges to mediate these conflicting impulses is to do what they should do anyway: stay close to the record in each case that appears before them, and make their judgments based on that alone. Hav-

ing reviewed the record here, I cannot avoid the conclusion that the District's suspicionless policy of testing all student-athletes sweeps too broadly, and too imprecisely, to be reasonable under the Fourth Amendment.

tional Standard Ins. Co., 615 P.2d 291, 294 (Okla.1980) (delineating "[t]he criteria for the awarding of a reasonable attorney's fee in the absence of a contract or a statute fixing the amount").

REVERSED and REMANDED.



Walker L. CHANDLER; Sharon T. Harris; James D. Walker,
Plaintiffs-Appellants,

v.

Zell D. MILLER, Governor; Lewis A. Massey, Secretary of State of Georgia; James G. Ledbetter, Commissioner, Department of Human Resources, State of Georgia, Defendants-Appellees.

No. 95-8230.

United States Court of Appeals,
Eleventh Circuit.

Jan. 22, 1996.

Candidates for high office in Georgia brought action challenging constitutionality of drug-testing statute requiring candidates to submit to and pass drug test to qualify for state office. The United States District Court for the Northern District of Georgia, No. 1:94-cv-1298-ODE, Orinda D. Evans, J., denied relief, and candidates appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) drug testing statute did not violate Fourth Amendment; (2) drug testing statute did not violate equal protection clause; and (3) drug testing statute did not violate First Amendment.

Affirmed.

Barkett, Circuit Judge, filed dissenting opinion.

1. Searches and Seizures ⇨14

Drug tests required under Georgia law for candidates for state high office were "searches" within meaning of Fourth Amendment. U.S.C.A. Const.Amend. 4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Searches and Seizures ⇨78

To determine whether Georgia drug-testing law for candidates for state high office violated Fourth Amendment, court had to balance individual's privacy expectations against state's interest to determine whether it was impractical to require warrant or some level of individualized suspicion in particular context. U.S.C.A. Const.Amend. 4.

3. Searches and Seizures ⇨78

States ⇨47

Georgia law requiring candidates to submit to and pass drug test to qualify for state high office did not violate Fourth Amendment, in view of fundamental incompatibility of drug use with high offices that were charged with making public policy and frequently supervising state drug interdiction efforts and that demanded highest levels of honesty, clear-insightfulness, and clear-thinking, and limits placed on an intrusion of privacy interests by available testing procedures, restrictions on dissemination of test results, and candidates' diminished privacy expectations. U.S.C.A. Const.Amend. 4; O.C.G.A. § 21-2-140.

4. States ⇨4.16(1)

It is essential to independence of states, and to their peace and tranquility, that the power to prescribe qualifications of their own officers should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

5. Searches and Seizures ⇨78

Under Fourth Amendment, state's interest in suspicionless drug testing is calculated mainly by reference to two factors: level of documented evidence of past problem and fundamental inconsistency of drug use with demands of position. U.S.C.A. Const. Amend. 4.

6. Federal Courts ⇐812

Decision not to exercise supplemental jurisdiction is reviewed for abuse of discretion. 28 U.S.C.A. § 1367.

7. Federal Courts ⇐43

In suit challenging constitutionality of Georgia's drug-testing law for candidates for high office, district court properly declined to exercise supplemental jurisdiction over state constitutional issues presented, in view of complexity of those issues and interests of comity in sensitive area of federal-state relations. 28 U.S.C.A. § 1367.

8. Constitutional Law ⇐238.5

States ⇐47

Georgia law requiring candidates for state high office to submit to and pass drug test was rationally related to state's interest in mental, emotional, and physical health of its high officials and, thus, did not violate equal protection rights of candidates and voters by barring from ballot class of persons who refused to take drug tests. U.S.C.A. Const.Amend. 14; O.C.G.A. § 21-2-140.

9. Constitutional Law ⇐82(11)

States ⇐47

Georgia drug-testing statute did not violate First Amendment rights of candidates for state high office by conditioning their ballot access on submitting to and passing drug tests; drug-testing statute was generally within power of state to prescribe qualifications for its elected officials, it furthered substantial governmental interests in assuring that its officials were appreciative of perils of drug use and were honest and clear-minded, state's purpose was not suppression of free expression, and statute was no more restrictive of free expression than was necessary. U.S.C.A. Const.Amend. 1; O.C.G.A. § 21-2-140.

10. Statutes ⇐216

Academic law journal's summary of postenactment telephone interview, not conducted under oath, with single legislator,

1. O.C.G.A. § 21-2-140 provides:

At the time a candidate for state office qualifies for nomination or election, each such candidate shall file a certificate . . . stating that such candidate has been tested for illegal drugs . . .

even if one of the sponsors of bill, was not competent legislative history.

Walker Lawrence Chandler, Office of Walker Lawrence Chandler, Zebulon, GA, for appellants.

Patricia Guilday, Office of State Attorney General, Atlanta, GA, for appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before EDMONDSON, DUBINA and BARKETT, Circuit Judges.

EDMONDSON, Circuit Judge:

This case requires us to determine the constitutionality of a Georgia statute requiring drug testing of political candidates and nominees for state offices. We hold that Georgia's rule violates no federal constitutional provision and affirm the district court's judgment.

I.

In 1990, the Georgia legislature enacted O.C.G.A. § 21-2-140.¹ The offices to which the statute applies include, among others, those of the Governor, Lieutenant Governor, Secretary of State, Attorney General, the heads of several agencies, all state judges in courts of general jurisdiction, and all state legislators. *Id.* § 21-2-140(a)(4). Plaintiff-appellants are members of the Libertarian Party seeking the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the House of Representatives.

As the language quoted in the margin indicates, anyone who declines to take the test, or who tests positive, is basically barred from holding office. Additional aspects of the drug-testing scheme were outlined by the district court: testing may, at the option of the candidate, be performed either at an approved medical testing laboratory or at the

and that the results of such test are negative. . . . No candidate shall be allowed to qualify for nomination or election to a state office unless he or she presents such certificate. . . .

office of the candidate's physician. Laboratory procedures concerning privacy follow the Mandatory Guidelines for Federal Workplace Drug Testing Programs, set out at 53 Fed.Reg. 11,979 (1988). The test is designed to reveal the presence or absence of the indicia of five illegal drugs. No information unrelated to drug use is contemplated by the statute; the test simply indicates that the candidate tested positive or negative.

The appellants' arguments comprise three identifiable claims.² First, appellants argue the tests violate the Fourth Amendment prohibition on unreasonable searches and seizures. Second, appellants categorize the statute as affecting the Fourteenth Amendment rights of candidates to run and of voters to choose them. Third, they categorize their refusal to submit to the test as a protected speech act that cannot, under the First Amendment, be the basis for barring a candidate from the ballot.

II.

[1, 2] That the tests at issue are searches within the meaning of the Fourth Amendment seems settled. See *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S.Ct. 1402, 1413, 103 L.Ed.2d 639 (1989). Like the test at issue in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989), this test "is not designed to serve the ordinary needs of law enforcement." 489 U.S. at 666, 109 S.Ct. at 1391. That is, the test is not designed to prosecute crime: no party before us contends otherwise. Special needs are involved. In this circumstance, the courts must "balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." 489 U.S. at 665-66, 109 S.Ct. at 1390-91. Another federal appeals court considering suspicionless drug testing has noted that "*Von Raab's* balancing test is inherently, and

doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others." *Willner v. Thornburgh*, 928 F.2d 1185, 1187 (D.C.Cir.1991).

[3] No federal court seems to have entertained a Fourth Amendment challenge to a state law requiring testing of candidates for high state office. Thus we observe at the outset the special concerns affecting the *Von Raab* balancing test where the state's interest is in setting qualifications for its own officers.

[4] American history is especially important in a case like this one; and the Supreme Court observed nearly a century ago:

It is obviously essential to the independence of the States, and to their peace and tranquility, that their power to prescribe the qualifications of their own officers . . . should be exclusive and free from external interference, except so far as plainly provided by the Constitution of the United States.

Taylor v. Beckham, 178 U.S. 548, 570-71, 20 S.Ct. 890, 898, 44 L.Ed. 1187 (1900); (cited in *Gregory v. Ashcroft*, 501 U.S. 452, 460, 111 S.Ct. 2395, 2400, 115 L.Ed.2d 410 (1991)). In the light of this command, we regard the states as entitled to considerable deference in the characterization of their own interests.

[5] Under the *Skinner-Von Raab* framework, the state's interest is calculated mainly by reference to two factors: the level of documented evidence of a past problem and the fundamental inconsistency of drug use with the demands of the position. In *Skinner*, the Court approved suspicionless drug testing where there was a documented showing of widespread substance abuse among employees in the position to be subjected to testing. 489 U.S. at 607, 109 S.Ct. at 1407-08.

argument here that they chiefly advanced their First and Fourteenth Amendment claims. We regard all federal constitutional arguments except these (First, Fourth, and Fourteenth Amendments) as either abandoned or without merit.

2. Appellants' brief refers to almost every right enumerated in the Constitution. Many of these textual provisions are touched on only in passing, with no citations of authority. The district court focused exclusively on appellants' Fourth Amendment claim, and Appellants asserted at

In *Von Raab*, the Customs office did not demonstrate a past of drug abuse among the employees to be tested. The Court approved the search anyway, however, when confronted with evidence that physical and ethical demands on customs agents were so great as to render drug use totally incompatible with the nature of the position. 489 U.S. at 669-70, 109 S.Ct. at 1393. Thus, because Georgia has not argued that her elected officials have in the past abused drugs, the issue on Georgia's interest is whether unlawful drug use is similarly fundamentally incompatible with high state office.

[6, 7] We think that to ask this question is also to answer it. The people of Georgia place in the trust of their elected officials that which people value most highly: their liberty, their safety, their economic well-being, ultimate responsibility for law enforcement, and so on. The Supreme Court has recognized that "drug abuse is one of the most serious problems confronting our society today," *Von Raab*, 489 U.S. at 674, 109 S.Ct. at 1395, and therefore has approved the drug testing of Customs officers in part because "the national interest [in eradicating drug use] could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics." 489 U.S. at 670, 109 S.Ct. at 1393. That said, it follows, even more forcefully, that those vested with the highest executive authority to make public policy in general and frequently to supervise Georgia's drug interdiction efforts in particular must be persons appreciative of the perils of drug use.³

3. The *Von Raab* situation might be distinguished on the basis that Congress can define the Customs Department's mission and demand sympathy to that mission as a condition of employment, whereas the executive officers here are members of a branch coequal to the Georgia legislature. We regard this distinction as involving a pure question of state law.

Appellants asserted in their complaint that the testing violates the Georgia Constitution, but the district court decided no issues of state law. 28 U.S.C. § 1367 provides that the district courts "may decline to exercise supplemental jurisdiction over a claim" which they otherwise have power to hear if "the claim raises a novel or complex issue of state law...." *Id.* The decision not to exercise supplemental jurisdiction is reviewed for abuse of discretion. *Faucher v.*

But drug use poses significant dangers beyond rendering elected officials unsympathetic to drug interdiction efforts. The nature of high public office in itself demands the highest levels of honesty, clear-sightedness, and clear-thinking. For example, the Lieutenant Governor is the President of the Senate and has other executive duties posed by law; more important, though, the Lieutenant Governor is to replace the Governor should the top executive office become vacant. O.C.G.A. § 45-12-7. The Governor must respond to state emergencies, *id.* § 45-12-30, and if necessary call out the state militia. *Id.* §§ 45-12-27; 45-12-28. He can direct state law enforcement agencies. *See* O.C.G.A. §§ 35-3-8.1; 35-2-33(b). The Governor has broad powers of appointment to important offices, boards, commissions, and so forth. *See generally id.* § 45-12-50; *see also* Ga. Const. Art. I, § 2, par. 1 (Governor appoints members of State Board of Pardons and Paroles). It goes without saying that clear judgment is imperative to the position. Likewise, members of the House of Representatives enact laws of general applicability for the state, while the Commissioner of Agriculture leads an agency with broad regulatory powers. *See generally id.* § 2-2-7 (Commissioner of Agriculture); Ga. Const. Art. III (House of Representatives). The positions are particularly susceptible to the "risks of bribery and blackmail against which the Government is entitled to guard." *Von Raab*, 489 U.S. at 674, 109 S.Ct. at 1395. Simply put, the state's interest in filling these positions with drug-free people is great.⁴

Rodziewicz, 891 F.2d 864, 872 (11th Cir.1990). In view of the complex state constitutional issues presented here and the interests of comity in this sensitive area of federal-state relations, we cannot conclude the district court abused its discretion. *See, e.g., Grant v. Seminole County, Fla.*, 817 F.2d 731, 732 (11th Cir.1987) (finding no abuse of discretion where district court failed to explain dismissal of state claim, because "[e]xercising pendent jurisdiction over the claim would have required the district court to decide a novel question of state law ..."). We also decline to decide the issues of state law raised by appellants.

4. Appellants contend that because the test is administered after substantial notice, drug users may simply discontinue their indulgence for a

Also, we note that our conclusion is strengthened by our deferential reading of Georgia's appraisal of its own interests. Evaluating the governmental interest is necessarily a policy-based inquiry; and while the importance of electing officials whose probity and judgment are unclouded by the use of unlawful drugs may be self-evident to us, we—whatever our own views might be—would be slow to disregard Georgia's appraisal of that need in the light of cases like *Taylor, supra*, reminding us that a state's sovereign interests are at stake.

Against Georgia's interests must be balanced plaintiff-appellants' privacy interests. The Supreme Court in *Skinner*, 489 U.S. at 626, 109 S.Ct. at 1418, noted that drug tests "require employees to perform an excretory function traditionally shielded by great privacy," and Justice Scalia wrote in *Von Raab* that the drug tests there were "particularly destructive of privacy and offensive to personal dignity." 489 U.S. at 680, 109 S.Ct. at 1398 (Scalia, J., dissenting).

But, we think that the intrusion here is even less than that approved in *Von Raab*. Here, the test can be taken at the office of the candidate's physician, whereas in *Von Raab*, the test had to be taken in the company of an (auditory) observer employed by an "independent contractor." Other aspects bearing on the individual's interests are similar to those approved in *Von Raab*. The district court noted that federally-approved privacy guidelines, such as those at 53 Fed. Reg. 11,979 *et seq.* (1988), serve as the benchmark for laboratory procedures. The test reveals only the presence or absence of the indicia of the use of illegal drugs. The results are not made available to law enforcement officers in the event a candidate chooses not to file them (if taken through one's own physician, no state agent need know that the test was administered). And, much like the Customs agents whose privacy expectations are diminished because physical condi-

tioning and ethical behavior are central to job performance, *see Von Raab*, 489 U.S. at 679, 109 S.Ct. at 1398, candidates for high office must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position.

Because the governmental interests of the state of Georgia outweigh the intrusions on privacy effected by the challenged testing, we hold that O.C.G.A. § 21-2-140, as applied to the appellants, does not violate the Fourth Amendment.

III.

[8] Appellants also contend that by barring from the ballot a class of persons (those who refuse to take drug tests), the Georgia legislature has violated the rights of the candidates to run for office and the people to vote for whom they please. In their briefs and at argument, appellants indicated they would characterize the Fourteenth Amendment as creating a nearly absolute barrier to excluding a defined group of persons from the ballot. The Supreme Court, however, has rejected that argument, most recently in *Gregory v. Ashcroft*, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). There, the Court recognized Missouri's prerogative to exclude from the ballot most candidates for the state judiciary over a mandatory retirement age of seventy years. The Court acknowledged that when states bar a class of candidates from the ballot, "the Equal Protection Clause provides a check on such state authority," but cited Article IV, section 4 and the Tenth Amendment for the proposition that

our scrutiny will not be so demanding where we deal with matters resting firmly within a State's constitutional prerogatives. This rule is no more than a recognition of a State's constitutional responsibility for the establishment and operation of its own

be unaware of the 'fade-away effect' of certain drugs." 489 U.S. at 676, 109 S.Ct. at 1396 (citations omitted). Persons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs; these worst cases might be the most dangerous in public office. The testing is not so ineffective as to be unreasonable or irrational in itself.

brief period before testing and, thus, defeat the purpose of the test. They say the testing is just ineffective. But, in balancing the Fourth Amendment interests, there is no requirement that a search be the single most effective one a legislature could design. Also, as the Supreme Court noted in *Von Raab*, "addicts may be unable to abstain for even a limited period of time, or may

government, as well as the qualifications of an appropriately designated class of public office holders.

501 U.S. at 462, 111 S.Ct. at 2402 (citations and internal quotation marks omitted).

Gregory guides us in our disposition of the appellants' equal protection claim. There, the Court held that rational basis-scrutiny applies to state electoral qualifications not involving a suspect classification. 501 U.S. at 470, 111 S.Ct. at 2406. Under rational basis scrutiny, courts "will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational." *Vance v. Bradley*, 440 U.S. 93, 97, 99 S.Ct. 939, 943, 59 L.Ed.2d 171 (1979).

Considering the importance of the mental, emotional, and physical health of high public officials, we cannot conclude that the Georgia legislature acted irrationally. Also, the Georgia statute creates less of a barrier than the one upheld in *Gregory*: whereas Missouri judicial candidates past the mandatory retirement age were permanently barred from the ballot, Georgia candidates are only barred so long as they cannot (or will not) demonstrate that they are drug-free. Thus we hold that O.C.G.A. § 21-2-140 does not improperly infringe on the rights of people to run and of voters to choose the candidate of their choice.

IV.

[9] Appellants' First Amendment claim is based on their assertion that the "refusal tamely to submit to the government's drug testing edict is itself a protected free speech act similar in nature to refusing to salute a flag or the king's hat set upon a post in the village square." We read this argument as an appeal to the rationale of cases like *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441, 94 S.Ct. 656, 38 L.Ed.2d 635 (1974), which invalidated a state statute conditioning ballot access on the filing of an affidavit disavowing the overthrow of state and national governments, and *Bond v. Floyd*, 385 U.S. 116, 87 S.Ct. 339, 17 L.Ed.2d 235 (1966), which held that exclusion of a member of the

Georgia House of Representatives based on his stated opposition to the Vietnam war violated the First Amendment. We think these cases are distinguishable in that they involve pure speech acts, divorced from unlawful conduct.

In that respect, this case is more like *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968), where the court upheld against a First Amendment challenge the prosecution of a young man who burned his draft card, ostensibly in an effort to persuade others to oppose the Vietnam War. There, the Court stated, "[w]e cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." 391 U.S. at 376, 88 S.Ct. at 1678. The Court went on, however, to entertain the "assumption that the alleged communicative element in O'Brien's conduct is sufficient to bring into play the First Amendment." *Id.* Against this backdrop, the Court held that government regulation of conduct containing "speech and nonspeech" elements is "sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial government interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." 391 U.S. at 377, 88 S.Ct. at 1679.

Georgia's drug-testing statute passes muster under the framework of *O'Brien*. First, it is generally within the power of the state of Georgia to prescribe qualifications for its elected officials. See *Gregory*, 501 U.S. at 463, 111 S.Ct. at 2402.

Second, the statute furthers a substantial governmental interest, as described in the Fourth Amendment analysis above.

Third, the government's purpose is not suppression of free expression. The purpose, as we concluded above, is ensuring that high public officials to whom immense responsibilities are entrusted possess the judg-

ment, probity, and alertness required of them. Anyway, it is doubtful whether the statute has even the effect, let alone purpose, of restricting speech rights. We think an audience would much more clearly perceive the intended message of one who burns a draft card than the message of one who declines to take a drug test. See generally *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 294, 104 S.Ct. 3065, 3069, 82 L.Ed.2d 221 (1984) (noting that First Amendment protection of conduct depends on whether conduct "would reasonably be understood by the viewer to be communicative").

Fourth, the regulation is no more restrictive of expression than is necessary. If Georgia's goal is to preclude the nomination or election of people addicted to drugs then it must require, rather than simply advise, that prospective candidates submit to testing. Appellants have not suggested a less restrictive way for Georgia to accomplish its stated objective of keeping drug users out of office. Therefore, we conclude that whatever impact the Georgia statute has on speech does not violate the First Amendment.

V.

[10] No party contends in this appeal that the drug testing in this case is for normal law enforcement. The controversy is about Georgia's rights and the special need Georgia believes it has to take a step to deter illicit drug users from filling important state offices. Especially in the light of federalism and the Tenth Amendment, we are cautious

5. By the way, Georgia publishes almost no official legislative history. And, we do not accept an academic law journal's summary of a post-enactment telephone interview (not conducted under oath) with a single legislator (even one of the sponsors of a bill) as competent legislative history. See, e.g., *Blanchette v. Connecticut General Ins. Corp.*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974) (rejecting use of "subsequent legislative history" because "[P]ost-passage remarks of legislators, however explicit, cannot serve to change the legislative intent.... Such statements represent only the personal views of these legislators."). Nor do we—on the basis of such "history"—accept that Georgia's drug testing law is merely or chiefly symbolic, although that which is symbolic may still have great significance. In their brief, plaintiff-appellants cited to no such law review summaries;

in interfering with the states on matters central to their governance.⁵ O.C.G.A. § 21-2-140 does not violate the First, Fourth, or Fourteenth Amendment rights of candidates for high office in Georgia; we affirm the judgment of the district court.⁶

AFFIRMED.

BARCKETT, Circuit Judge, dissenting:

As the majority recognizes, there is no question that the mandatory drug testing in this case is an unreasonable search prohibited by the Fourth Amendment *unless* it is required by "special governmental needs beyond the normal need for law enforcement," and those needs outweigh the candidates' privacy interests. *National Treasury Employees v. Von Raab*, 489 U.S. 656, 665-66, 109 S.Ct. 1384, 1390-91, 103 L.Ed.2d 685 (1989) (citing *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 109 S.Ct. 1402, 1413-14 (1989)). I dissent because I do not believe that the suspicionless search in these circumstances serves any special governmental need beyond the normal need for law enforcement, and, if it did, I believe that the candidates' privacy interests outweigh the governmental interests when the factors of *Von Raab* are properly considered.

Before balancing the candidates' privacy expectations against the government's interests in conducting suspicionless drug-screening, the court must first ascertain whether this case presents a special governmental need beyond the normal need for law enforcement.¹ In simpler terms, before the

and we think they—given the lack of true legislative history available—were right not to do so.

6. We are aware that qualifying to run for the pertinent public offices is only a few months away. We also recognize that plaintiff-appellants will likely seek review of our decision. For that reason, we have tried to be expeditious in announcing the decision. Because speed seems important, we have perhaps not said all that we could—especially about history; but we think we have said enough to indicate our general point of view.

1. Whether "[s]pecial needs are involved" in this case is determined not by how urine test results will be used against any particular candidate, but by whether the "need" for such testing is *already*

court can balance the competing interests in this case, it must first ask what is so impractical about requiring a warrant or individualized suspicion in the circumstances presented here. It is in this threshold inquiry that I believe the majority first errs.

The majority frames its analysis in terms of whether "unlawful drug use is . . . fundamentally incompatible with high state office." Certainly, the answer to that question is patently obvious, but the question *assumes* unlawful drug use.² This case is not about the incompatibility of drug use and elected office, but rather about whether Fourth Amendment protections can be constitutionally suspended when there is no individualized suspicion, when there is no immediate or direct threat to public safety, when those being searched are not directly involved in the frontlines of drug interdiction, when there is no institutional setting involved such as a prison or public school requiring swift and informal discipline, and when there are no dire consequences as a result of waiting to obtain a warrant if a candidate, or anyone else for that matter, is suspected of violating the law. The first question for the court is *not* whether the state's interest is great enough and its chosen method effective enough to outweigh the privacy interests involved. Rather, it is whether, under *Von Raab*, the circumstances in this case give rise to a *special* governmental need beyond the ordinary needs of law enforcement in the first place. I think not, and the majority's analysis does not support its conclusion to the contrary.³

Essentially, the majority's justification for suspending the requirements of the Fourth Amendment is the state's interest in office-

served by ordinary law enforcement, and is of such a "special" nature as to render the Fourth Amendment's warrant requirement impracticable.

2. O.C.G.A. § 21-2-140 bars from public office either candidates who refuse to take the test because they are ideologically opposed to the government's intrusion upon their privacy, or candidates who fail the test and are thereby only *suspected* of having committed a crime.

3. The majority's reference to the Tenth Amendment interest in setting qualifications for public office misses the point. Georgia's power under

holders who are "drug free," "honest[], clear-sighted[], and clear-thinking," as well as "appreciative of the perils of drug use" and "[]sympathetic to drug interdiction efforts." Putting aside First Amendment concerns as to whether these subjective traits, as desirable as they may be, can be legislated as valid qualifications for public office, this standard not only fails to address why ordinary law enforcement methods are insufficient to protect these interests, but it makes suspicionless searches the rule and obtaining a warrant almost always irrelevant.⁴ Moreover, this rationale seriously erodes the Fourth Amendment's protections for many people beyond the parties involved here.

The Supreme Court has rejected such an overbroad standard in assessing the reasonableness of various governmental drug-testing schemes. In *Skinner* and *Von Raab*, the Court suspended Fourth Amendment protections only when the risks of drug impairment affected those directly on the frontline of drug interdiction efforts, or those who, if under the influence of drugs, could pose an imminent physical threat to the public. The Court found a nexus between the risks of drug use and imminent hazards to public safety, for example, where government employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." *Skinner*, 489 U.S. at 628, 109 S.Ct. at 1419. The Court held that railway safety is a special governmental need beyond the normal need for law enforcement and justifies the suspicionless urine testing of those employees whose drug and alcohol abuse can "cause great human loss," but noted that the regulations "narrowly and

the Tenth Amendment to regulate its electoral process is not absolute. As the majority notes, the state's power to do so is subject to federal constitutional limitations, the extent of which are at issue here.

4. Under this standard, what Fourth Amendment protections would candidates retain to prevent suspicionless testing to research for a physical or mental impairment, AIDS, alcohol or prescription drug abuse, screening DNA for genetic information, or to prevent warrantless invasions of homes to search for drugs, pornography, or other contraband?

specifically" limited testing to the aftermath of a serious accident when individualized suspicion is "most impracticable," or when employees are otherwise directly involved in safety-rules violations. *Id.* at 622, 631, 109 S.Ct. at 1416, 1420-21. Moreover, the Court upheld drug testing only after a showing of past history linking drug and alcohol abuse with serious train accidents. *Id.* at 606-08, 109 S.Ct. at 1407-08.

In *Von Raab*, the Court likewise required such a nexus in upholding suspicionless urine testing of Customs employees who are involved *directly* in enforcing drug laws, or are required to carry firearms. *Von Raab*, 489 U.S. at 670-71, 109 S.Ct. at 1393. While the Court found compelling the Customs Service's interest in "ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment," it also specifically explained how that compelling interest would be undermined by unlawful drug use among such front-line personnel: "A drug user's indifference to the Service's basic mission, or, even worse, his active complicity with malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals." *Von Raab*, 489 U.S. at 670, 109 S.Ct. at 1393. The Court recognized that "the 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*." *Id.* at 671, 109 S.Ct. at 1393 (emphasis added).

The narrow focus of these exceptions was reaffirmed in *Vernonia School District 47J v. Acton*, — U.S. —, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). The Court held that special governmental needs justify randomly testing the urine of schoolchildren, who hold a diminished expectation of privacy in the public school custodial setting, but noted that "it must not be lost sight of that this program is *directed more narrowly* to drug use by school athletes, where the risk of *immediate physical* harm to the drug user or those with whom he is playing his sport is particularly high." *Acton*, — U.S. at —, 115 S.Ct. at 2395 (emphasis added). Thus, it appears that even (unathletic) schoolchildren enjoy greater Fourth Amendment protec-

tions than the majority accords the candidates in this case.

There is nothing so special or immediate about the generalized governmental interests involved here as to warrant suspension of the Fourth Amendment's requirement of individualized suspicion for searches and seizures. There are no exigent circumstances. There is no imminent threat of grave physical harm. The prospective candidates are not on the frontlines of drug interdiction. And, we cannot ignore that candidates are subjected to the ultimate screening program—the voice of the electorate. Thus, I believe the majority errs in concluding that a special governmental need beyond the normal need of law enforcement is present in this case.

In addition to being troubled by the majority's assumption that a special governmental need beyond the normal need for law enforcement exists which makes obtaining a warrant impractical in this case, I am troubled by the majority's assessment and balancing of the competing interests involved. This case presents a more serious constitutional question than that in *Von Raab* and *Skinner* because of the nature and magnitude of the individual rights involved.

Even if privacy interests are viewed in the narrowest sense, a candidate's legitimate expectation of privacy in his or her bodily fluids is greater than the employees in *Von Raab* or *Skinner*. In balancing the privacy interests of the employees in *Von Raab*, the Court recognized that Customs officers already agree to undergo intrusive screening as a condition of employment: "*Unlike most private citizens or government employees in general*, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity." *Von Raab*, 489 U.S. at 672, 109 S.Ct. at 1394 (emphasis added). The Court likened the necessity in those circumstances to the "extraordinary assurances of trustworthiness and probity" and "intrusive inquiries into . . . physical fitness" required of those who undertake "special positions" such as in our military or intelligence services. *Id.* at 671, 109 S.Ct. at 1394. In *Skinner*, the Court likewise recognized that "the expectations of privacy of covered employees are diminished by reason of their

participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees." *Skinner*, 489 U.S. at 627, 109 S.Ct. at 1418.

I recognize that employment choices may indeed diminish expectations of privacy. An individual need not choose to become a drug interdiction agent, military intelligence officer, or railway engineer, thereby avoiding the intensive training and intrusive screening required by that particular job. But, an individual does not have a constitutional right to a specific kind of employment. The Constitution, however, protects participation in government. While candidates relinquish to the people a great deal of their privacy in choosing to run for public office, the price should not include sacrificing one's Fourth Amendment right to be free from unreasonable searches and seizures.

In conducting the *Von Raab* balancing test, the majority fails to adequately consider the totality of the government's "interference with individual liberty." *Von Raab*, 489 U.S. at 671, 109 S.Ct. at 1393. Not only is the privacy surrounding an individual's bodily functions at stake, but all of the rights associated with participating in a democracy—rights of association, freedom of speech, ballot access, and the right to cast an effective ballot. We are not dealing merely with the denial of a job opportunity, but with the denial of opportunity to participate in our democratic form of government. In light of the interference with these liberty interests, giving the governmental interests here the greater weight seems especially unreasonable.

5. The Supreme Court struck down a previous attempt by the Georgia legislature to disqualify a citizen from public office on the basis of his ideology, noting that: "Madison and Hamilton anticipated the oppressive effect on freedom of expression which would result if the legislature could utilize its power of judging qualifications to pass judgment on a legislator's political views." *Bond v. Floyd*, 385 U.S. 116, 135-37 n. 13, 87 S.Ct. 339, 349-50 n. 13, 17 L.Ed.2d 235 (1966) (holding legislature's use of oath provisions to exclude from its ranks one with whom its majority disagreed on federal government's policy in Vietnam War violated First Amendment).

Finally, I am concerned about the majority's conclusion that the government's actions in this case do not violate the First Amendment. The majority maintains that the government's purpose is not suppression of free expression. Yet, it supports its holding by citing the importance of ensuring that elected officials are "persons appreciative of the perils of drug use" and "[s]ympathetic to drug interdiction efforts." Establishing a certain ideology as a "qualification" for holding public office appears to be a content-based restriction on free expression.⁵ Drug policy is a politically charged issue confronting many government officials who have disparate points of view regarding the "Drug War" and the efficacy of the means employed in fighting it. It is the function of public office holders to write, enforce, and interpret the laws, including drug laws. By conditioning holding public office upon submission to drug screening, however, the Georgia legislature effectively bans from positions of political power not only those candidates who might disagree with the current policy criminalizing drug use, but also those who challenge the intrusive governmental means to detect such use among its citizenry. This statute is neither neutral nor procedural, but, in the majority's own characterization, attempts to ensure that only candidates with a certain point of view qualify for public office.

It is beyond peradventure that a bodily search is significantly intrusive. It is almost equally obvious that the means utilized here would not accomplish the goals purportedly justifying the search.⁶ Thus, this search is more a symbolic gesture than an effective tool to ferret out drug-users or assure exemplary public officials.⁷ Surely, symbolic ges-

6. The majority recognizes that, considering the notice given, any drug user could disguise drug use, and that "[p]ersons who would be caught by Georgia's limited testing would seem to be people who are out of control about drugs...." It also seems that these "worst cases" would be ideal candidates for some form of individualized suspicion.

7. The majority has delineated the government's purported interest in ensuring that candidates "have what it takes" to hold public office as justification for the suspicionless urine testing of candidates. However, the available subsequent legislative history indicates that in passing

tures are not enough to trump the constitutional imperatives of the Fourth Amendment or the right to participate in government.



AMERITRUST COMPANY, N.A., a national banking association, Plaintiff-Counter Defendant-Appellant, Cross Appellee,

v.

C.K. WHITE, Defendant-Counterclaimant-Appellee, Cross Appellant.

No. 94-8370.

United States Court of Appeals,
Eleventh Circuit.

Feb. 6, 1996.

Bank filed suit to collect monies allegedly owing on promissory notes executed by

O.C.G.A. § 21-2-140, the Georgia General Assembly did not appear to be motivated by concerns that state politicians exercise their "best judgment and skill," but rather by the desire to enact a symbolic measure:

"One of the sponsor's of the original 1990 legislation ... proposed the legislation out of a sense of fairness rather than any genuine fear that state politicians were not drug free. The sponsor of the 1990 legislation felt that if city council or state politicians require drug testing of state employees, they too should undergo drug testing. Additionally, if in order to appease public concern about the use of illegal drugs politicians must infringe upon the rights of government employees, the politicians themselves should be treated similarly."

Edith M. Shine, *Legislative Review*, 9 Ga.St. U.L.Rev. 212, 218 (1992) (citing Telephone Interview with Rep. Bob Holmes, House District No. 28 (Apr. 10, 1992)) (footnotes omitted). Representative Holmes stated that the legislation was proposed in response to similar legislation that required school teachers to undergo urine testing because it was unfair to subject teachers to urine tests unless the politicians enacting such a law also were tested. *Id.* at 218 n. 61. Nonetheless, the law did not apply to politicians who were already in office, but only to prospective candidates for those offices. In any event, the Appli-

party subscribing in limited partnership, and subscribing partner counterclaimed for conspiracy to convert partnership's property. The United States District Court for the Northern District of Georgia, No. 1:90-CV-2691-JEC, Julie E. Carnes, J., 848 F.Supp. 1001, entered judgment in favor of subscribing partner on bank's claims and in favor of bank on subscribing partner's counterclaim, and appeal was taken. The Court of Appeals, Clark, Senior Circuit Judge, held that: (1) forfeiture clause in notes executed by subscribing partner at time of his acquisition of interest in limited partnership prevented notes from qualifying as "negotiable instruments" under Georgia law; (2) subscription agreement, promissory notes, and amendment to partnership agreement granting subscribing partner a put option had to be construed together, as single contract; and (3) subscribing partner's exercise of put option, to require general partner to assume his obligation under promissory notes, did not release subscribing partner of his own obligations under notes to limited partnership and partnership's assignees.

Affirmed in part, reversed in part and remanded.

cant Drug Screening Act, which precipitated the mandate for suspicionless testing of political candidates, was struck down later as an unconstitutional infringement of employment applicants' Fourth and Fourteenth Amendment rights. *Georgia Ass'n of Educators v. Harris*, 749 F.Supp. 1110, 1114 (N.D.Ga.1990) (holding generalized governmental interest in maintaining drug-free workplace not sufficiently compelling so as to outweigh applicants' Fourth Amendment rights).

On a final note, Representative Holmes' comments are incapable of "chang[ing] the legislative intent ... expressed before the Act's passage," as in *Blanchette v. Connecticut General Insurance Corp.*, 419 U.S. 102, 132, 95 S.Ct. 335, 353, 42 L.Ed.2d 320 (1974) because, as the majority notes, no "official" history of legislative intent exists. Rather, this case is closer to *Galvan v. Press*, 347 U.S. 522, 526-27, 74 S.Ct. 737, 740, 98 L.Ed. 911 (1954) (relying on 1951 memorandum by Senator McCarran in interpreting ambiguous legislative intent of 1950 statute he sponsored). We are left, therefore, with the wisdom of Mr. Chief Justice John Marshall that "[w]here the mind labours to discover the design of the legislature, it seizes everything from which aid can be derived." *United States v. Fisher*, 6 U.S. (2 Cranch) 358, 386, 2 L.Ed. 304 (1805) (quoted in *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 100 S.Ct. 2051, 64 L.Ed.2d 766 (1980)).

court, in a succinct opinion by Acting Chief Judge Danahy, has correctly analyzed our opinions and identified our intent. For that reason, we see no need to elaborate further and we approve the district court decision and adopt Judge Danahy's opinion as our own.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur.



The CITY OF NORTH MIAMI,
Florida, Petitioner,

v.

Arlene KURTZ, Respondent.

No. 82836.

Supreme Court of Florida.

April 20, 1995.

Rehearing Denied July 5, 1995.

Applicant for position with city challenged constitutionality of regulation requiring job applicants to sign affidavits, as precondition of having their applications considered, stating that they had not used tobacco in preceding year. The Circuit Court, Dade County, Sidney B. Shapiro, J., entered summary judgment for city. Applicant appealed. The District Court of Appeal, Jorgenson, J., 625 So.2d 899, reversed, and, in separate order, certified question as one of great public importance. The Supreme Court, Overton, J., held that: (1) applicant did not have legitimate expectation of privacy regarding whether or not she smoked tobacco, and her Florida constitutional right of privacy thus was not implicated by regulation, and (2) "right to smoke" was not protected by Federal Constitution's implicit privacy provision.

Question answered; District Court's decision quashed; remanded with directions.

Kogan, J., dissented and filed opinion in which Shaw, J., concurred.

1. Constitutional Law ⇌82(7)

Constitutional privacy provision protects citizens from government's uninvited observation of or interference in those areas that fall within ambit of zone of privacy afforded under provision. West's F.S.A. Const. Art. 1, § 23.

2. Constitutional Law ⇌82(7)

Unlike implicit privacy right of federal constitution, Florida's constitutional privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under compelling state interest standard. West's F.S.A. Const. Art. 1, § 23.

3. Constitutional Law ⇌82(10)

Federal Constitution's implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and rearing and education of children.

4. Constitutional Law ⇌82(7)

Although Florida's constitutional privacy right provides greater protection than federal constitution, it was not intended to be guarantee against all intrusion into life of an individual. West's F.S.A. Const. Art. 1, § 23.

5. Constitutional Law ⇌82(7)

Constitutional privacy provision applies only to government action, and right provided under that provision is circumscribed and limited by circumstances in which it is asserted. West's F.S.A. Const. Art. 1, § 23.

6. Constitutional Law ⇌82(7)

Determining whether individual has legitimate expectation of privacy under constitutional privacy provision in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation. West's F.S.A. Const. Art. 1, § 23.

7. Constitutional Law ⇌82(7)

In determining whether job applicant was entitled to protection under constitutional privacy provision, court would first deter-

mine whether government entity was intruding into aspect of applicant's life in which applicant had legitimate expectation of privacy, and, if it were to find in affirmative, would then look to whether compelling interest existed to justify that intrusion and, if so, whether least intrusive means was being used to accomplish the goal. West's F.S.A. Const. Art. 1, § 23.

8. Constitutional Law ⇨82(11)

Municipal Corporations ⇨217.3(4)

Applicant for city job did not have legitimate expectation of privacy regarding whether or not she smoked tobacco, and her constitutional right of privacy thus was not implicated when city required her to sign affidavit stating that she had not used tobacco in preceding year as condition of being considered for employment; smokers are constantly required to reveal whether they smoke, including at restaurants, hotels and motels, when renting automobiles, and while working. West's F.S.A. Const. Art. 1, § 23.

9. Constitutional Law ⇨82(11)

Municipal Corporations ⇨217.3(4)

City did not violate Federal Constitution's implicit privacy provision when it required applicant for city job to sign affidavit stating that she had not used tobacco in preceding year as condition of considering her for employment; "right to smoke" was not included within penumbra of fundamental rights protected by that provision, and, even if some protected interest were implicated, rational basis existed for regulation in that city had legitimate interest in reducing health insurance costs and increasing productivity, and city used least intrusive means to attain this goal since regulation did not prevent current employees from smoking and did not affect present health care benefits of employees.

Thomas M. Pflaum, Micanopy, Pedro P. Echarte, Jr., Miami, and David M. Wolpin, North Miami, for petitioner.

1. Notably, because Florida's constitutional privacy provision applies only to government action, the provision would not be implicated if a job

Pamela A. Chamberlin of Mitrani, Rynor & Gallegos, P.A., Miami, for respondent.

VERTON, Justice.

We have for review *Kurtz v. City of North Miami*, 625 So.2d 899 (Fla. 3d DCA 1993). After the district court issued that decision, it certified, in a separate order, the following question as one of great public importance:

DOES ARTICLE I, SECTION 23 OF THE FLORIDA CONSTITUTION PROHIBIT A MUNICIPALITY FROM REQUIRING JOB APPLICANTS TO REFRAIN FROM USING TOBACCO OR TOBACCO PRODUCTS FOR ONE YEAR BEFORE APPLYING FOR, AND AS A CONDITION FOR BEING CONSIDERED FOR EMPLOYMENT, EVEN WHERE THE USE OF TOBACCO IS NOT RELATED TO JOB FUNCTION IN THE POSITION SOUGHT BY THE APPLICANT?

This question involves the issue of whether applicants seeking government employment have a reasonable expectation of privacy under article I, section 23, as to their smoking habits.¹ We have jurisdiction. Art. I, § 3(b)(4), Fla. Const. For the reasons expressed, we answer the certified question in the negative, finding that Florida's constitutional privacy provision does not afford Arlene Kurtz, the job applicant in this case, protection under the circumstances presented.

The record establishes the following unfuted facts. To reduce costs and to increase productivity, the City of North Miami adopted an employment policy designed to reduce the number of employees who smoke tobacco. In accordance with that policy decision, the City issued Administrative Regulation 1-46, which requires all job applicants to sign an affidavit stating that they have not used tobacco or tobacco products for at least one year immediately preceding their application for employment. The intent of the regulation is to gradually reduce the number of smokers in the City's work force by means of natural attrition. Consequently, the regu-

applicant was applying for a position with a private employer.

lation only applies to job applicants and does not affect current employees. Once an applicant has been hired, the applicant is free to start or resume smoking at any time. Evidence in the record, however, reflects that a high percentage of smokers who have adhered to the one year cessation requirement are unlikely to resume smoking.

Additional evidence submitted by the City indicates that each smoking employee costs the City as much as \$4,611 per year in 1981 dollars over what it incurs for non-smoking employees. The City is a self-insurer and its taxpayers pay for 100% of its employees' medical expenses. In enacting the regulation, the City made a policy decision to reduce costs and increase productivity by eventually eliminating a substantial number of smokers from its work force. Evidence presented to the trial court indicated that the regulation would accomplish these goals.

The respondent in this case, Arlene Kurtz, applied for a clerk-typist position with the City. When she was interviewed for the position, she was informed of Regulation 1-46. She told the interviewer that she was a smoker and could not truthfully sign an affidavit to comply with the regulation. The interviewer then informed Kurtz that she would not be considered for employment until she was smoke-free for one year. Thereafter, Kurtz filed this action seeking to enjoin enforcement of the regulation and asking for a declaratory judgment finding the regulation to be unconstitutional.

In ruling on a motion for summary judgment, the trial judge recognized that Kurtz has a fundamental right of privacy under article I, section 23, of the Florida Constitution. The trial judge noted that Kurtz had presented the issue in the narrow context of whether she has a right to smoke in her own home. While he agreed that such a right existed, he concluded that the true issue to be decided was whether the City, as a governmental entity, could regulate smoking through employment. Because he found that there is no expectation of privacy in employment and that the regulation did not violate any provision of either the Florida or the federal constitutions, summary judgment was granted in favor of the City.

The Third District Court of Appeal reversed. The district court first determined that Kurtz' privacy rights are involved when the City requires her to refrain from smoking for a year prior to being considered for employment. The district court then found that, although the City does have an interest in saving taxpayers money by decreasing insurance costs and increasing productivity, such interest is insufficient to outweigh the intrusion into Kurtz' right of privacy and has no relevance to the performance of the duties involved with a clerk-typist. Consequently, the district court concluded that the regulation violated Kurtz's privacy rights under article I, section 23, of the Florida Constitution. We disagree.

[1-3] Florida's constitutional privacy provision, which is contained in article I, section 23, provides as follows:

Right of privacy.—Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law.

This right to privacy protects Florida's citizens from the government's uninvited observation of or interference in those areas that fall within the ambit of the zone of privacy afforded under this provision. *Shaktman v. State*, 553 So.2d 148 (Fla.1989). Unlike the implicit privacy right of the federal constitution, Florida's privacy provision is, in and of itself, a fundamental one that, once implicated, demands evaluation under a compelling state interest standard. *Winfield v. Division of Pari-Mutuel Wagering*, 477 So.2d 544 (Fla.1985). The federal privacy provision, on the other hand, extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 97 S.Ct. 2010, 52 L.Ed.2d 675 (1977).

[4-7] Although Florida's privacy right provides greater protection than the federal constitution, it was not intended to be a guarantee against all intrusion into the life of an individual. *Florida Bd. of Bar Examin-*

ers re Applicant, 443 So.2d 71 (Fla.1983). First, the privacy provision applies only to government action, and the right provided under that provision is circumscribed and limited by the circumstances in which it is asserted. *Id.* Further, "[d]etermining whether an individual has a legitimate expectation of privacy in any given case must be made by considering all the circumstances, especially objective manifestations of that expectation." *Stall v. State*, 570 So.2d 257, 260 (Fla.1990) (alteration in original) (quoting *Shaktman*, 553 So.2d at 153 (Fla. 1989) (Ehrlich, C.J., concurring)), *cert. denied*, 501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991). Thus, to determine whether Kurtz, as a job applicant, is entitled to protection under article I, section 23, we must first determine whether a governmental entity is intruding into an aspect of Kurtz's life in which she as a "legitimate expectation of privacy." If we find in the affirmative, we must then look to whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal.

[8] In this case, we find that the City's action does not intrude into an aspect of Kurtz' life in which she has a legitimate expectation of privacy. In today's society, smokers are constantly required to reveal whether they smoke. When individuals are seated in a restaurant, they are asked whether they want a table in a smoking or non-smoking section. When individuals rent hotel or motel rooms, they are asked if they smoke so that management may ensure that certain rooms remain free from the smell of smoke odors. Likewise, when individuals rent cars, they are asked if they smoke so that rental agencies can make proper accommodations to maintain vehicles for non-smokers. Further, employers generally provide smoke-free areas for non-smokers, and employees are often prohibited from smoking in certain areas. Given that individuals must reveal whether they smoke in almost every aspect of life in today's society, we conclude that individuals have no reasonable expectation of privacy in the disclosure of that information when applying for a government job and, consequently, that Florida's right of pri-

vacancy is not implicated under these unique circumstances.

In reaching the conclusion that the right to privacy is not implicated in this case, however, we emphasize that our holding is limited to the narrow issue presented. Notably, we are not addressing the issue of whether an applicant, once hired, could be compelled by a government agency to stop smoking. Equally as important, neither are we holding today that a governmental entity can ask any type of information it chooses of prospective job applicants.

[9] Having determined that Kurtz has no legitimate expectation of privacy in revealing that she is a smoker under the Florida constitution, we turn now to her claim that the regulation violates her rights under the federal constitution. As noted, the federal constitution's implicit privacy provision extends only to such fundamental interests as marriage, procreation, contraception, family relationships, and the rearing and educating of children. *Carey*. Clearly, the "right to smoke" is not included within the penumbra of fundamental rights protected under that provision. *Grusendorf v. City of Oklahoma City*, 816 F.2d 539 (10th Cir.1987) (the act of smoking a cigarette does not rise to the level of a fundamental right). Moreover, even if we were to find that some protected interest under the federal constitution were implicated so as to require a rational basis for the regulation we would still find the regulation to be constitutional. *Kelley v. Johnson*, 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed.2d 708 (1976) (when assuming a liberty interest exists in an employment regulation, regulation must be reviewed under a rational basis test). As acknowledged by the district court, the City has a legitimate interest in attempting to reduce health insurance costs and to increase productivity. On these facts, the City's policy cannot be deemed so irrational that it may be branded arbitrary. *Kelley*. In fact, under the special circumstances supported by the record in this case, we would find that the City has established a compelling interest to support implementation of the regulation. As previously indicated, the record reflects that each smoking employee costs the City as much as \$4,611 per year in

1981 dollars over what it incurs for non-smoking employees; that, of smokers who have adhered to the one year cessation requirement, a high percentage are unlikely to resume smoking; and that the City is a self-insurer who pays 100% of its employees' medical expenses. We find that the elimination of these costs, when considered in combination with the other special circumstances of this case, validates a compelling interest in the City's policy of gradually eliminating smokers from its work force. We also find that the City is using the least intrusive means in accomplishing this compelling interest because the regulation does not prevent current employees from smoking, it does not affect the present health care benefits of employees, and it gradually reduces the number of smokers through attrition. Thus, we find the regulation to be constitutional under both the federal and Florida constitutions.

For the reasons expressed, we answer the question in the negative, finding that Florida's constitutional privacy provision does not afford the applicant, Arlene Kurtz, protection because she has no reasonable expectation of privacy under the circumstances of this case. Accordingly, we quash the district court's decision, and we remand this case with directions that the district court of appeal affirm the trial court judgment.

It is so ordered.

GRIMES, C.J., and HARDING, WELLS and ANSTEAD, JJ., concur.

KOGAN, J., dissents with an opinion, in which SHAW, J., concurs.

KOGAN, Justice, dissenting.

As the majority itself notes, job applicants are free to return to tobacco use once hired. I believe this concession reveals the anti-smoking policy to be rather more of a speculative pretense than a rational governmental policy. Therefore I would find it unconstitutional under the right of due process. See *Department of Law Enforcement v. Real Property*, 588 So.2d 957 (Fla.1991).

The privacy issue is more troublesome, to my mind. There is a "slippery-slope" problem here because, if governmental employers can inquire too extensively into off-job-site behavior, a point eventually will be reached at which the right of privacy under article I,

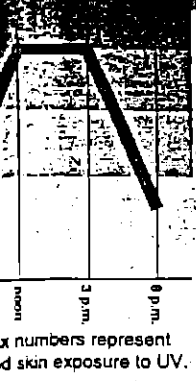
section 23 clearly will be breached. An obvious example would be an inquiry into the lawful sexual behavior of job applicants in an effort to identify those with the "most desirable" lifestyles. Such an effort easily could become the pretext for a constitutional violation. The time has not yet fully passed, for example, when women job applicants have been questioned about their plans for procreation in an effort to eliminate those who may be absent on family leave. I cannot conceive that such an act is anything other than a violation of the right of privacy when done by a governmental unit.

Health-based concerns like those expressed by the City also present a definite slippery slope to the courts. The time is fast approaching, for example, when human beings can be genetically tested so thoroughly that susceptibility to particular diseases can be identified years in advance. To my mind, any governmental effort to identify those who might eventually suffer from cancer or heart disease, for instance, itself is a violation of bodily integrity guaranteed by article I, section 23. Moreover, I cannot help but note that any such effort comes perilously close to the discredited practice of eugenics.

The use of tobacco products is more troubling, however. While legal, tobacco use nevertheless is an activity increasingly regulated by the law. If the federal government, for instance, chose to regulate tobacco as a controlled substance, I have no trouble saying that this act alone does not undermine anyone's privacy right. However, regulation is not the issue here because tobacco use today remains legal. The sole question is whether the government may inquire into off-job-site behavior that is legal, however unhealthy it might be. In light of the inherently poor fit between the governmental objective and the ends actually achieved, I am more inclined to agree with the district court that the right of privacy has been violated here. I might reach a different result if the objective were better served by the means chosen.

SHAW, J., concurs.





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"I've been involved with the community since I moved in. I've tried to stay on top of the issues," Minnis said. "We (people in northwest St. Johns County) feel that we're not getting a voice, and we're not getting information back."

Currently, the District is held by Switzerland Republican Don Jordan, the only incumbent commissioner seeking election this year. In addition to the challenge by Minnis, faces opposition from a Democrat and a fellow Republican.

Republican voters in District 1 will choose between Jordan and Pal Howell on Sept. 3. The GOP victor will eventually square off against Minnis and Democrat Dutch Register in the Nov. 5 general election.

District 1 includes largely rural sections north and west of St. Augustine, including the rapidly-growing residential communities of Julington Creek and Fruit Cove.

Approximately 12,200 registered voters call District 1 home. Republicans outnumber Democrats by a 50 percent to 40 percent margin. Independent and other party voters make up the remaining 10 percent.

St. Johns County commissioners are elected to a four-year term. The post pays \$32,680 annually. The seven-member commission is the county's governing body, and it crafts an annual spending plan, which totals \$145 million this year.

Minnis said she wants county budget priorities focused on recreation and fire protection. She questions the county's management of \$185,000, money paid by the developer of Julington Creek Plantation for fire protection efforts.

"What the residents of northwest St. Johns County who use the Switzerland Fire Department would like to know is what happened to the \$185,000 and what is the documentation that outlines restrictions for its use?" Minnis asked.

Growth is the most critical issue facing St. Johns County, according to Minnis, who said important government services are lagging far behind demands created by a residential building

for 17 years, and she has been a summer resident of Veg Lake Reservoir near Collbran since retiring in 1985. She wintered in St. Augustine. She was a native of Hope, Ark., and she graduated from a Fayetteville, Ark. high school and received a B.A. from the University of Arkansas, Fayetteville. She was a member of the First United Meth-

Tracy Stevens, St. Augustine sons, Glenn Allen Hay, St. Augustine, Roy Paul Hay, Bellevue sister, Carol Steiner, Col. S.C.; one brother, John Hay, St. Augustine; and one child.

Eva Hollis

Funeral services for Eva Hollis, 91, who died Aug. 16, 1996, St. Augustine, were held Aug. 17 at the Fleming Island Baptist Church. Burial was in Holly Hill Cemetery.

Mrs. Hollis was reared in the Fellows orphanage, and she was a Registered Nurse for more than 40 years. She graduated from the Newell Sanitarium, Chicago, Tenn.

Survivors include a daughter, Audrey Hollis (Mrs. John) and her brother, Edward Forrester. She has four grandchildren, four great-grandchildren and other relatives.

St. Augustine Record
Tuesday, August 27, 1996

At her request, cremation has taken place, and services will be at a later date. Those wishing may

SOUND OFF

Results

Overwhelming support for welfare client drug tests

From staff

There were 421 callers who responded to Sunday's Sound-Off question about drug testing for those who receive public assistance in St. Johns County. Should the county proceed with plans to require that welfare recipients take drug tests?

Of those who responded, 400 callers (95 percent) said yes, while 21 callers (5 percent) said no.

This is not intended to be a scientific survey but only a rough indication of community intensity toward a specific topic.

SANDS OF TIME

(The following are from The St. Augustine Record and The St. Augustine Evening Record.)

25 YEARS AGO

Happy First Birthday: Kyle Paccetti, son of Mr. and Mrs. Kyle Paccetti, North Beach; Christopher Allen Thierrien, son of Mr. and Mrs. Gerald Thierrien, Route 3.

Members of the Little League championship Cardinals were feted at a picnic and awarded trophies at an outing at Davenport Park recently. Tommy Tiffany, Gil Wise, Ricky Powers, Mike Haney, Darrell Masters, Jimmy Wall, Anthony Gadson, Randy Stovall, Steven

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CALL MISS PA

Date: Mon, 26 Aug 1996 20:52:07 -0700
To: atty@aug.com (Pat McCormack)
From: owens@adnc.com (Howard Owens)
Subject: Re: ECO: Error Found

You must have hit this article in Alta Vista or another search engines.
Search engines scan pages every several weeks. ECO replaces articles every week or two, so Alta Vista is almost always out of date. A copy of the old page (w/code) is below.

>Below is the result of your feedback form. It was submitted by Pat
>McCormack (atty@aug.com) on Monday, August 26, 1996 at 18:21:08

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>
>Comments: i pulled up header "Drug screening will continue. by Dave
>Schwab" listed as
><http://www.sandiego-online.com/eco/page1.html> -size 10K - 18 Jun 96,
but
>article did not list header. i would really like that article (on
drug
>screening). can you help me find it?
>
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<!DOCTYPE HTML PUBLIC "-//Netscape Comm. Corp.//DTD HTML//EN">

<html>

<head>

<TITLE>Page 1</TITLE>

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<H1>Drug screening will continue</H1>

<H3 align = center> by Dave Schwab
</H3>

<p>The Board of Supervisors has extended a mandatory drug-screening program for residents on the county dole

<p>The Board voted on consent to continue the General Relief Alcohol and Drug Services (GRADS) program, which provides drug testing and treatment for welfare recipients through private-sector providers, like the McAlister Institute For Treatment and Education, Inc., a non-profit corporation at 1365 N. Johnson Ave. in El Cajon.

<p>The GRADS program has been in effect in San Diego County since July 1, 1995.

<p>County supervisors this week extended the GRADS program through Alcohol and Drug Services contracts for fiscal year 1996-97, with an option to provide continuing services through June 30, 2000.

<p>A pilot project is also underway to extend drug testing as an eligibility requirement for another county welfare program -- Aid To Families With Dependent Children (AFDC).

<p>"The county is sponsoring an initiative, AB 707 in Sacramento, which would make screening, testing and treatment a requirement of AFDC eligibility," said Dale Fleming of the county Department of Social Services. "Borrowing from our experience with the indigent adult cash program (GRADS), we want to give the same opportunity for recovery services to the family population."

<p>Fleming said 18 to 22 percent of AFDC mothers have substance abuse problems. Drug testing and treatment as a requirement of AFDC eligibility is not intended to be punitive, she added, but a means of assisting drug-impacted AFDC families toward sobriety.

<p>"We feel this is a key component of any welfare reform effort,"

concluded Fleming. "It's believed that self-sufficiency is less likely to occur if there is substance abuse in the home. Getting the parent to recover is the first step in self-sufficiency. The intent is to make sure receipt of public funds is a temporary solution for families -- not a lifestyle."

<p>If passed, legislation requiring AFDC drug testing and treatment would likely take at least another year to implement.

<p>"It's a long-term effort," concluded Fleming.

<p>Al Medina, deputy director of the county's Alcohol and Drug Services Department, said around 25 percent of general relief recipients screened are determined to be chemically dependent.

<p>El Cajon's McAlister Institute contracts with the county to provide on-site drug screening and treatment services for general relief applicants for the GRADS program.

<p>McAlister provides substance abuse counseling and drug education, and also exposes clients to community resources, such as job training and resume writing, said Jeanne McAlister, institute director.

<p>The institute serves clients from every walk of life, McAlister noted.

<p>"All kinds," she said, "pregnant moms, the homeless, attorneys, welders, people who cannot get a job in their chosen field for whatever reason."

<p>County general relief recipients get \$219 a month for unemployment, \$111 for food stamps, or both, added McAlister.

<p>Part of the problem with general relief is that it's easy for recipients to become dependent on it.

<p>"I believe any system becomes abused by certain folks," McAlister pointed out. "It starts out with good intentions, good guidelines, and somehow becomes an enabling situation. People get used to receiving

the
money and not working. What the county is trying to do is eliminate
those
people who are misusing or abusing the funding."

<p>McAlister believes the GRADS program has been effective in its goal
of
"weeding out" welfare abusers. She pointed out that the number of
applicants for general relief "dropped dramatically" after drug
testing and
treatment was made a mandatory funding requirement.

<p>"It's (GRADS) been more successful than anybody thought it would
be, the
screening and intervention," she concluded.."It's very rewarding to
see
people come into the program depressed and discouraged, and get some
hope
-- go out of here with a job."

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ment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability, is high among older workers, whose numbers are great and growing and whose employment problems are grave. In industries affecting commerce, the existence of arbitrary discrimination in employment because of age burdens commerce and the free flow of goods. It is the purpose of this act to promote employment of older persons based on ability rather than age and to prohibit arbitrary age discrimination in employment.

(2) **DEFINITIONS.**—For the purpose of this act:

(a) "Employer" means the state or any county, municipality, or special district or any subdivision or agency thereof. This definition shall not apply to any law enforcement agency or firefighting agency in this state.

(b) "Employment agency" means any person, including any agent thereof, regularly undertaking, with or without compensation, to procure employees for an employer, including state and local employment services receiving federal assistance.

(c) "Employee" means an individual employed by any employer.

(d) "Department" means the Department of Labor and Employment Security.

(3) **PROHIBITED ACTIVITIES; EXCEPTIONS.**—

(a) Except as provided in paragraph (f), it is unlawful for an employer to:

1. Fail or refuse to hire, discharge or mandatorily rehire, or otherwise discriminate against any individual with respect to the compensation, terms, conditions, or privileges of employment because of age.

2. Limit, segregate, or classify employees in any way which would deprive, or tend to deprive, any individual of employment opportunities, or otherwise adversely affect an individual's status as an employee, because of age.

3. Reduce the wage rate of any employee or otherwise alter the terms or conditions of employment in order to comply with this act, unless such a reduction is with the employee's express or implied consent.

(b) Except as provided in paragraph (f), it is unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of age or to classify or refer for employment any individual on the basis of age.

(c) Except as provided in paragraph (f), it is unlawful for a labor organization to:

1. Exclude or expel from its membership, or otherwise discriminate against, any individual because of age.

2. Limit, segregate, or classify its membership, or fail or refuse to refer for employment any individual, in any way which would limit, deprive, or tend to deprive the individual of employment opportunities or which would otherwise adversely affect the individual's status as an employee or as an applicant for employment solely because of age.

3. Cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) It is unlawful:

1. For an employer to discriminate against any employee or applicant for employment;

2. For an employment agency to discriminate against any individual; or

3. For a labor organization to discriminate against any member or applicant for membership,

because such employee, applicant for employment, individual, member, or applicant for membership has opposed any practice made unlawful by this section or because the employee, applicant for employment, individual, member, or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, a proceeding, or litigation under this act.

(e) Except as provided in paragraph (f), it is unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to:

1. Employment by such employer;

2. Membership in such labor organization or any classification or referral for employment by such labor organization; or

3. Any classification or referral for employment by such employment agency,

which notice or advertisement indicates any preference, limitation, specification, or discrimination based on age.

(f) It is not unlawful for an employer, employment agency, or labor organization to:

1. Take any action otherwise prohibited under paragraph (a), paragraph (b), paragraph (c), or paragraph (e), based on a bona fide occupational qualification reasonably necessary to the normal operation of the particular business.

2. Observe the terms of a bona fide seniority system or any bona fide employee benefit plan, such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this act.

3. Discharge or otherwise discipline an individual for good cause.

(4) **APPEAL; CIVIL SUIT AUTHORIZED.**—Any employee of the state who is within the Career Service System established by chapter 110 and who is aggrieved by a violation of this act may appeal to the Public Employees Relations Commission under the conditions and following the procedures prescribed in part II of chapter 447. Any person other than an employee who is within the Career Service System established by chapter 110, or any person employed by the Public Employees Relations Commission, who is aggrieved by a violation of this act may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this act.

(5) **NOTICE TO BE POSTED.**—Each employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the department setting forth such information as the department deems appropriate to effectuate the purposes of this act.

History.—ss. 6, 7, 8, 10, 11, ch. 76-208; s. 1, ch. 77-174; s. 7, ch. 79-7; s. 31, ch. 79-190; s. 4, ch. 81-169; s. 75, ch. 86-183; s. 679, ch. 95-147.

112.0455 Drug-Free Workplace Act.—

(1) **SHORT TITLE.**—This section shall be known and may be cited as the "Drug-Free Workplace Act."

(2) PURPOSE.—This section is intended to:

(a) Promote the goal of drug-free workplaces within government through fair and reasonable drug-testing methods for the protection of public employees and employers.

(b) Encourage employers to provide employees who have drug use problems with an opportunity to participate in an employee assistance program or an alcohol and drug rehabilitation program.

(c) Provide for confidentiality of testing results.

(3) FINDINGS.—The Legislature finds that:

(a) Drug use has serious adverse effects upon a significant portion of the workforce, resulting in billions of dollars of lost productivity each year and posing a threat to the workplace and to public safety and security.

(b) Maintaining a healthy and productive workforce, safe working conditions free from the effects of drugs, and quality products and services is important to employers, employees, and the general public in this state. The Legislature further finds that drug use creates a variety of workplace problems, including increased injury on the job, increased absenteeism, increased financial burden on health and benefit programs, increased workplace theft, decreased employee morale, decreased productivity, and a decline in the quality of products and services.

(c) Certain drug-testing standards are necessary to protect persons participating in workplace drug-testing programs.

(d) In balancing the interests of employers, employees, and the welfare of the general public, the establishment of standards to assure fair and accurate testing for drugs in the workplace is in the best interests of all.

(4) NO LEGAL DUTY TO TEST.—All drug testing conducted by employers shall be in conformity with the standards established in this section and all applicable rules promulgated pursuant to this section. However, employers shall not have a legal duty under this section to request an employee or job applicant to undergo drug testing. No testing of employees shall take effect until local drug abuse assistance programs have been identified.

(5) DEFINITIONS.—Except where the context otherwise requires, as used in this act:

(a) "Drug" means alcohol, including distilled spirits, wine, malt beverages, and intoxicating liquors; amphetamines; cannabinoids; cocaine; phencyclidine (PCP); hallucinogens; methaqualone; opiates; barbiturates; benzodiazepines; synthetic narcotics; designer drugs; or a metabolite of any of the substances listed herein.

(b) "Drug test" or "test" means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.

(c) "Initial drug test" means a sensitive, rapid, and reliable procedure to identify negative and presumptive positive specimens. All initial tests shall use an immunoassay procedure or an equivalent, or shall use a more accurate scientifically accepted method approved by the Agency for Health Care Administration as such more accurate technology becomes available in a cost-effective form.

(d) "Confirmation test," "confirmed test," or "confirmed drug test" means a second analytical procedure used to identify the presence of a specific drug or metabolite in a specimen. The confirmation test must be different in scientific principle from that of the initial test procedure. This confirmation method must be capable of providing requisite specificity, sensitivity, and quantitative accuracy.

(e) "Chain of custody" refers to the methodology of tracking specified materials or substances for the purpose of maintaining control and accountability from initial collection to final disposition for all such materials or substances and providing for accountability at each stage in handling, testing, storing specimens, and reporting of test results.

(f) "Job applicant" means a person who has applied for a special risk or safety-sensitive position with an employer and has been offered employment conditioned upon successfully passing a drug test.

(g) "Employee" means any person who works for salary, wages, or other remuneration for an employer.

(h) "Employer" means any agency within state government that employs individuals for salary, wages, or other remuneration.

(i) "Prescription or nonprescription medication" means a drug or medication obtained pursuant to a prescription as defined by s. 893.02 or a medication that is authorized pursuant to federal or state law for general distribution and use without a prescription in the treatment of human diseases, ailments, or injuries.

(j) "Reasonable suspicion drug testing" means drug testing based on a belief that an employee is using or has used drugs in violation of the employer's policy drawn from specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Reasonable suspicion drug testing shall not be required except upon the recommendation of a supervisor who is at least one level of supervision higher than the immediate supervisor of the employee in question. Among other things, such facts and inferences may be based upon:

1. Observable phenomena while at work, such as direct observation of drug use or of the physical symptoms or manifestations of being under the influence of a drug.

2. Abnormal conduct or erratic behavior while at work or a significant deterioration in work performance.

3. A report of drug use, provided by a reliable and credible source, which has been independently corroborated.

4. Evidence that an individual has tampered with a drug test during employment with the current employer.

5. Information that an employee has caused, or contributed to, an accident while at work.

6. Evidence that an employee has used, possessed, sold, solicited, or transferred drugs while working or while on the employer's premises or while operating the employer's vehicle, machinery, or equipment.

(k) "Specimen" means a tissue or product of the human body capable of revealing the presence of drugs or their metabolites.

(l) "Employee assistance program" means an established program for employee assessment, counseling,

and possible referral to an alcohol and drug rehabilitation program.

(m) "Safety-sensitive position" means any position, including a supervisory or management position, in which a drug impairment would constitute an immediate and direct threat to public health or safety.

(n) "Special risk" means employees who are required as a condition of employment to be certified under chapter 633 or chapter 943.

(6) NOTICE TO EMPLOYEES.—

(a) Employers with no drug-testing program shall ensure that at least 60 days elapse between a general one-time notice to all employees that a drug-testing program is being implemented and the beginning of actual drug testing. Employers with drug-testing programs in place prior to the effective date of this section are not required to provide a 60-day notice period.

(b) Prior to testing, all employees and job applicants for employment shall be given a written policy statement from the employer which contains:

1. A general statement of the employer's policy on employee drug use, which shall identify:

a. The types of testing an employee or job applicant may be required to submit to, including reasonable suspicion or other basis; and

b. The actions the employer may take against an employee or job applicant on the basis of a positive confirmed drug test result.

2. A statement advising the employee or job applicant of the existence of this section.

3. A general statement concerning confidentiality.

4. Procedures for employees and job applicants to confidentially report the use of prescription or nonprescription medications both before and after being tested. Additionally, employees and job applicants shall receive notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. A list of such medications shall be developed by the Agency for Health Care Administration.

5. The consequences of refusing to submit to a drug test.

6. Names, addresses, and telephone numbers of employee assistance programs and local alcohol and drug rehabilitation programs.

7. A statement that an employee or job applicant who receives a positive confirmed drug test result may contest or explain the result to the employer within 5 working days after written notification of the positive test result. If an employee or job applicant's explanation or challenge is unsatisfactory to the employer, the person may contest the drug test result as provided by subsections (14) and (15).

8. A statement informing the employee or job applicant of his or her responsibility to notify the laboratory of any administrative or civil actions brought pursuant to this section.

9. A list of all drugs for which the employer will test, described by brand names or common names, as applicable, as well as by chemical names.

10. A statement regarding any applicable collective bargaining agreement or contract and the right to appeal to the Public Employees Relations Commission.

11. A statement notifying employees and job applicants of their right to consult the testing laboratory for technical information regarding prescription and nonprescription medication.

(c) An employer shall include notice of drug testing on vacancy announcements for those positions where drug testing is required. A notice of the employer's drug-testing policy shall also be posted in an appropriate and conspicuous location on the employer's premises, and copies of the policy shall be made available for inspection by the general public during regular business hours in the employer's personnel office or other suitable locations.

(7) TYPES OF TESTING.—An employer is authorized, but not required, to conduct the following types of drug tests:

(a) *Job applicant testing.*—An employer may require job applicants to submit to a drug test and may use a refusal to submit to a drug test or a positive confirmed drug test as a basis for refusal to hire the job applicant.

(b) *Reasonable suspicion.*—An employer may require an employee to submit to reasonable suspicion drug testing.

(c) *Routine fitness for duty.*—An employer may require an employee to submit to a drug test if the test is conducted as part of a routinely scheduled employee fitness-for-duty medical examination that is part of the employer's established policy or that is scheduled routinely for all members of an employment classification or group.

(d) *Followup testing.*—If the employee in the course of employment enters an employee assistance program for drug-related problems, or an alcohol and drug rehabilitation program, the employer may require said employee to submit to a drug test as a followup to such program, and on a quarterly, semiannual, or annual basis for up to 2 years thereafter.

(8) PROCEDURES AND EMPLOYEE PROTECTION. All specimen collection and testing for drugs under this section shall be performed in accordance with the following procedures:

(a) A sample shall be collected with due regard to the privacy of the individual providing the sample, and in a manner reasonably calculated to prevent substitution or contamination of the sample.

(b) Specimen collection shall be documented, and the documentation procedures shall include:

1. Labeling of specimen containers so as to reasonably preclude the likelihood of erroneous identification of test results.

2. A form for the employee or job applicant to provide any information he or she considers relevant to the test, including identification of currently or recently used prescription or nonprescription medication, or other relevant medical information. Such form shall provide notice of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test. The providing of information shall not preclude the administration of the drug test, but shall be taken into account in interpreting any positive confirmed results.

(c) Specimen collection, storage, and transportation to the testing site shall be performed in a manner which will reasonably preclude specimen contamination or adulteration.

(d) Each initial and confirmation test conducted under this section, not including the taking or collecting of a specimen to be tested, shall be conducted by a licensed laboratory as described in subsection (12).

(e) A specimen for a drug test may be taken or collected by any of the following persons:

1. A physician, a physician's assistant, a registered professional nurse, a licensed practical nurse, a nurse practitioner, or a certified paramedic who is present at the scene of an accident for the purpose of rendering emergency medical service or treatment.

2. A qualified person employed by a licensed laboratory.

(f) A person who collects or takes a specimen for a drug test conducted pursuant to this section shall collect an amount sufficient for two drug tests as determined by the Agency for Health Care Administration.

(g) Any drug test conducted or requested by an employer may occur before, during, or immediately after the regular work period of the employee, and shall be deemed to be performed during work time for the purposes of determining compensation and benefits for the employee.

(h) Every specimen that produces a positive confirmed result shall be preserved by the licensed laboratory that conducts the confirmation test for a period of at least 210 days from the time the results of the positive confirmation test are mailed or otherwise delivered to the employer. However, if an employee or job applicant undertakes an administrative or legal challenge to the test result, the employee or job applicant shall notify the laboratory and the sample shall be retained by the laboratory until the case or administrative appeal is settled. During the 180-day period after written notification of a positive test result, the employee or job applicant who has provided the specimen shall be permitted by the employer to have a portion of the specimen retested, at the employee or job applicant's expense, at another laboratory, licensed and approved by the Agency for Health Care Administration, chosen by the employee or job applicant. The second laboratory must test at equal or greater sensitivity for the drug in question as the first laboratory. The first laboratory which performed the test for the employer shall be responsible for the transfer of the portion of the specimen to be retested, and for the integrity of the chain of custody during such transfer.

(i) Within 5 working days after receipt of a positive confirmed test result from the testing laboratory, an employer shall inform an employee or job applicant in writing of such positive test result, the consequences of such results, and the options available to the employee or job applicant.

(j) The employer shall provide to the employee or job applicant, upon request, a copy of the test results.

(k) Within 5 working days after receiving notice of a positive confirmed test result, the employee or job applicant may submit information to an employer explaining or contesting the test results, and why the results do not constitute a violation of the employer's policy.

(l) If an employee or job applicant's explanation or challenge of the positive test results is unsatisfactory to the employer, a written explanation as to why the employee or job applicant's explanation is unsatisfactory, along with the report of positive results, shall be provided by the employer to the employee or job applicant. All such documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and shall be retained by the employer for at least 1 year. This exemption is subject to the Open Government Sunset Review Act in accordance with 's. 119.14.

(m) No employer may discharge, discipline, refuse to hire, discriminate against, or request or require rehabilitation of an employee or job applicant on the sole basis of a positive test result that has not been verified by a confirmation test.

(n) In addition to the limitation under paragraph (m):

1. Except as provided in subparagraph 3., no employer may discharge, discipline, or discriminate against an employee on the sole basis of the employee's first positive confirmed drug test, unless the employer has first given the employee an opportunity to participate in, at the employee's own expense or pursuant to coverage under a health insurance plan, an employee assistance program or an alcohol and drug rehabilitation program, and:

a. The employee has either refused to participate in the employee assistance program or the alcohol and drug rehabilitation program or has failed to successfully complete such program, as evidenced by withdrawal from the program before its completion or a report from the program indicating unsatisfactory compliance, or by a positive test result on a confirmation test after completion of the program; or

b. The employee has failed or refused to sign a written consent form allowing the employer to obtain information regarding the progress and successful completion of an employee assistance program or an alcohol and drug rehabilitation program.

2. An employee in a safety-sensitive position shall be placed by the employer in a non-safety-sensitive position, or if such position is unavailable, on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.

3. A special risk employee may be discharged or disciplined for the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.

(o) Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

(p) No employer may discharge, discipline, or discriminate against an employee, or refuse to hire a job applicant, on the basis of any prior medical history revealed to the employer pursuant to this section.

(q) An employer who performs drug testing or specimen collection shall use chain-of-custody procedures as established by the Agency for Health Care Administration to ensure proper recordkeeping, handling, labeling, and identification of all specimens to be tested.

(r) An employer shall pay the cost of all drug tests, initial and confirmation, which the employer requires of employees.

(s) An employee or job applicant shall pay the costs of any additional drug tests not required by the employer.

(t) No employer shall discharge, discipline, or discriminate against an employee solely upon voluntarily seeking treatment, while under the employ of the employer, for a drug-related problem if the employee has not previously tested positive for drug use, entered an employee assistance program for drug-related problems, or entered an alcohol and drug rehabilitation program. However, special risk employees may be subject to discharge or disciplinary action when the presence of illicit drugs, pursuant to s. 893.13, is confirmed.

(u) Where testing is conducted based on reasonable suspicion, each employer shall promptly detail in writing the circumstances which formed the basis of the determination that reasonable suspicion existed to warrant the testing. A copy of this documentation shall be given to the employee upon request and the original documentation shall be kept confidential and exempt from the provisions of s. 119.07(1) by the employer pursuant to subsection (11) and retained by the employer for at least 1 year. This exemption is subject to the Open Government Sunset Review Act in accordance with 's. 119.14.

(v) If an employee is unable to participate in outpatient rehabilitation, the employee may be placed on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave-without-pay status, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay. Upon successful completion of an employee assistance program or an alcohol and drug rehabilitation program, the employee shall be reinstated to the same or equivalent position that was held prior to such rehabilitation.

(9) CONFIRMATION TESTING.—

(a) If an initial drug test is negative, the employer may in its sole discretion and at the employer's expense seek a confirmation test.

(b) Only licensed laboratories as described in subsection (12) shall conduct confirmation drug tests.

(c) All positive initial tests shall be confirmed using gas chromatography/mass spectrometry (GC/MS) or an equivalent or more accurate scientifically accepted method approved by the Agency for Health Care Administration as such technology becomes available in a cost-effective form.

(10) EMPLOYER PROTECTION.—

(a) No employee or job applicant whose drug test result is confirmed as positive in accordance with the

provisions of this section shall, by virtue of the result alone, be defined as a person with a "handicap" as cited in the 1973 Rehabilitation Act.

(b) An employer who discharges or disciplines an employee or refuses to hire a job applicant in compliance with this section shall be considered to have discharged, disciplined, or refused to hire for cause.

(c) No physician-patient relationship is created between an employee or job applicant and an employer or any person performing or evaluating a drug test, solely by the establishment, implementation, or administration of a drug-testing program.

(d) Nothing in this section shall be construed to prevent an employer from establishing reasonable work rules related to employee possession, use, sale, or solicitation of drugs, including convictions for drug-related offenses, and taking action based upon a violation of any of those rules.

(e) Nothing in this section shall be construed to operate retroactively, and nothing in this section shall abrogate the right of an employer under state law to conduct drug tests prior to January 1, 1990. A drug test conducted by an employer prior to January 1, 1990, is not subject to this section.

(f) If an employee or job applicant refuses to submit to a drug test, the employer shall not be barred from discharging or disciplining the employee, or from refusing to hire the job applicant. However, nothing in this paragraph shall abrogate the rights and remedies of the employee or job applicant as otherwise provided in this section.

(g) An employer who refuses to hire a job applicant based on a positive confirmed drug test result shall not be required to hold the employment position vacant while the job applicant pursues administrative action. However, should the job applicant prevail in the actions, the employer shall provide him or her the opportunity of employment in the next available comparable position.

(h) An employer shall refer an employee with a first-time positive confirmed drug test result to an employee assistance program or an alcohol and drug rehabilitation program, unless such employee is discharged as provided in subparagraph (8)(n)3. If the results of a subsequent confirmed drug test are positive, the employer may discharge or discipline the employee.

(i) Nothing in this section shall be construed to prohibit an employer from conducting medical screening or other tests required by any statute, rule, or regulation for the purpose of monitoring exposure of employees to toxic or other unhealthy substances in the workplace or in the performance of job responsibilities. Such screening or tests shall be limited to the specific substances expressly identified in the applicable statute, rule, or regulation, unless prior written consent of the employee is obtained for other tests.

(j) An employer shall place a safety-sensitive position employee whose drug test result is confirmed positive in a non-safety-sensitive position, or if such a position is unavailable, on leave status while the employee participates in an employee assistance program or an alcohol and drug rehabilitation program. If placed on leave status without pay, the employee shall be permitted to use any accumulated leave credits prior to being placed on leave without pay.

(k) A special risk employee may be discharged or disciplined on the first positive confirmed drug test result when illicit drugs, pursuant to s. 893.13, are confirmed. No special risk employee shall be permitted to continue work in a safety-sensitive position, but may be placed either in a non-safety-sensitive position or on leave status while participating in an employee assistance program or an alcohol and drug rehabilitation program.

(11) CONFIDENTIALITY.—

(a) Except as otherwise provided in this subsection, all information, interviews, reports, statements, memoranda, and drug test results, written or otherwise, received or produced as a result of a drug-testing program are confidential and exempt from the provisions of s. 119.07(1) and s. 24(a), Art. I of the State Constitution, and may not be used or received in evidence, obtained in discovery, or disclosed in any public or private proceedings, except in accordance with this section.

(b) Employers, laboratories, employee assistance programs, drug and alcohol rehabilitation programs, and their agents may not release any information concerning drug test results obtained pursuant to this section without a written consent form signed voluntarily by the person tested, except where such release is compelled by a hearing officer or a court of competent jurisdiction pursuant to an appeal taken under this section, or where deemed appropriate by a professional or occupational licensing board in a related disciplinary proceeding. The consent form must contain, at a minimum:

1. The name of the person who is authorized to obtain the information.
2. The purpose of the disclosure.
3. The precise information to be disclosed.
4. The duration of the consent.
5. The signature of the person authorizing release of the information.

(c) Information on drug test results shall not be released or used in any criminal proceeding against the employee or job applicant. Information released contrary to this section shall be inadmissible as evidence in any such criminal proceeding.

(d) Nothing herein shall be construed to prohibit certifying bodies of special risk employees from receiving information on positive confirmed drug test results for the purpose of reviewing certification.

(e) Nothing herein shall be construed to prohibit the employer, agent of the employer, or laboratory conducting a drug test from having access to employee drug test information when consulting with legal counsel in connection with actions brought under or related to this section or where the information is relevant to its defense in a civil or administrative matter.

(f) The exemptions in this subsection are subject to the Open Government Sunset Review Act in accordance with 's. 119.14.

(12) DRUG-TESTING STANDARDS; LABORATORIES.—

(a) No laboratory may analyze initial or confirmation drug specimens unless:

1. The laboratory is licensed and approved by the Agency for Health Care Administration using criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug-testing program.

2. The laboratory has written procedures to ensure chain of custody.

3. The laboratory follows proper quality control procedures, including, but not limited to:

a. The use of internal quality controls including the use of samples of known concentrations which are used to check the performance and calibration of testing equipment, and periodic use of blind samples for overall accuracy.

b. An internal review and certification process for drug test results, conducted by a person qualified to perform that function in the testing laboratory.

c. Security measures implemented by the testing laboratory to preclude adulteration of specimens and drug test results.

d. Other necessary and proper actions taken to ensure reliable and accurate drug test results.

(b) A laboratory shall disclose to the employer a written test result report within 7 working days after receipt of the sample. All laboratory reports of a drug test result shall, at a minimum, state:

1. The name and address of the laboratory which performed the test and the positive identification of the person tested.

2. Positive results on confirmation tests only, or negative results, as applicable.

3. A list of the drugs for which the drug analyses were conducted.

4. The type of tests conducted for both initial and confirmation tests and the minimum cutoff levels of the tests.

5. Any correlation between medication reported by the employee or job applicant pursuant to subparagraph (8)(b)2. and a positive confirmed drug test result.

No report shall disclose the presence or absence of any drug other than a specific drug and its metabolites listed pursuant to this section.

(c) The laboratory shall submit to the Agency for Health Care Administration a monthly report with statistical information regarding the testing of employees and job applicants. The reports shall include information on the methods of analyses conducted, the drugs tested for, the number of positive and negative results for both initial and confirmation tests, and any other information deemed appropriate by the Agency for Health Care Administration. No monthly report shall identify specific employees or job applicants.

(d) Laboratories shall provide technical assistance to the employer, employee, or job applicant for the purpose of interpreting any positive confirmed test results which could have been caused by prescription or nonprescription medication taken by the employee or job applicant.

²(13) RULES.—

(a) The Agency for Health Care Administration is hereby authorized to promulgate rules, using criteria established by the National Institute on Drug Abuse as guidelines for modeling the state drug-testing program, concerning, but not limited to:

1. Standards for drug-testing laboratory licensing, suspension, and revocation of a license.

2. Body specimens and minimum specimen amounts which are appropriate for drug testing.

3. Methods of analysis and procedures to ensure reliable drug-testing results, including standards for initial tests and confirmation tests.

4. Minimum cutoff detection levels for drugs or their metabolites for the purposes of determining a positive test result.

5. Chain-of-custody procedures to ensure proper identification, labeling, and handling of specimens being tested.

6. Retention, storage, and transportation procedures to ensure reliable results on confirmation tests and retests.

7. A list of the most common medications by brand name or common name, as applicable, as well as by chemical name, which may alter or affect a drug test.

(b) The Department of Management Services is hereby authorized to adopt rules for all executive branch agencies implementing this section.

(c) The Board of Regents is hereby authorized to promulgate rules for the State University System implementing this section.

(d) The State Courts Administrator is hereby authorized to promulgate rules for the state courts system implementing this section.

(e) The Justice Administrative Commission is hereby authorized to promulgate rules on behalf of the state attorneys and public defenders of Florida, the Office of Capital Collateral Representative of Florida, and the Judicial Qualifications Commission.

(f) The Joint Legislative Management Committee is hereby authorized to promulgate rules, policies, or procedures for the employees and members of the legislative branch implementing this section.

This section shall not be construed to eliminate the bargainable rights as provided in the collective bargaining process where applicable.

(14) DISCIPLINE REMEDIES.—

(a) An executive branch employee who is disciplined or who is a job applicant for another position and is not hired pursuant to this section, may file an appeal with the Public Employees Relations Commission. Any appeal must be filed within 30 calendar days of receipt by the employee or job applicant of notice of discipline or refusal to hire. The notice shall inform the employee or job applicant of the right to file an appeal, or if available, the right to file a collective bargaining grievance pursuant to s. 447.401. Such appeals shall be resolved pursuant to the procedures established in ss. 447.207(1)-(4), 447.208(2), and 447.503(4) and (5). A hearing on the appeal shall be conducted within 30 days of the filing of the appeal, unless an extension is requested by the employee or job applicant and granted by the commission or an arbitrator.

(b) The commission shall promulgate rules concerning the receipt, processing, and resolution of appeals filed pursuant to this section.

(c) Appeals to the commission shall be the exclusive administrative remedy for any employee who is disciplined or any job applicant who is not hired pursuant to this section, notwithstanding the provisions of chapter 120. However, nothing in this subsection shall affect the right of an employee or job applicant to file a collective

bargaining grievance pursuant to s. 447.401 provided that an employee or job applicant may not file both an appeal and a grievance.

(d) An employee or a job applicant who has been disciplined or who has not been hired pursuant to this section must exhaust either the administrative appeal process or collective bargaining grievance-arbitration process.

(e) Upon resolving an appeal filed pursuant to paragraph (c), and finding a violation of this section, the commission may order the following relief:

1. Rescind the disciplinary action, expunge related records from the personnel file of the employee or job applicant and reinstate the employee.

2. Order compliance with paragraph (10)(g).

3. Award back pay and benefits.

4. Award the prevailing employee or job applicant the necessary costs of the appeal, reasonable attorney's fees, and expert witness fees.

(15) NONDISCIPLINE REMEDIES.—

(a) Any person alleging a violation of the provisions of this section, that is not remediable by the commission or an arbitrator pursuant to subsection (14), must institute a civil action for injunctive relief or damages, or both, in a court of competent jurisdiction within 180 days of the alleged violation, or be barred from obtaining the following relief. Relief is limited to:

1. An order restraining the continued violation of this section.

2. An award of the costs of litigation, expert witness fees, reasonable attorney's fees, and noneconomic damages provided that damages shall be limited to the recovery of damages directly resulting from injury or loss caused by each violation of this section.

(b) Any employer who complies with the provisions of this section shall be without liability from all civil actions arising from any drug testing program or procedure performed in compliance with this section.

(c) Pursuant to any claim alleging a violation of this section, including a claim under this section where it is alleged that an employer's action with respect to a person was based on an incorrect test result, there shall be a rebuttable presumption that the test was valid if the employer complied with the provisions of this section.

(d) No cause of action shall arise in favor of any person based upon the failure of an employer to establish a program or policy for drug testing.

(16) FEDERAL COMPLIANCE.—The drug-testing procedures provided in this section do not apply where the specific work performed requires employees or job applicants to be subject to drug testing pursuant to:

- (a) Federal regulations that specifically preempt state and local regulation of drug testing with respect to such employees and job applicants;

- (b) Federal regulations or requirements enacted or implemented in connection with the operation of federally regulated facilities;

- (c) Federal contracts where the drug testing is conducted for safety, or protection of sensitive or proprietary data or national security; or

- (d) State agency rules that adopt federal regulations applicable to the interstate component of a federally regulated activity.

(17) **LICENSE FEE.**—Fees from licensure of drug-testing laboratories shall be sufficient to carry out the responsibilities of the Agency for Health Care Administration for the regulation of drug-testing laboratories. The Agency for Health Care Administration shall collect fees for all licenses issued under this part. Each nonrefundable fee shall be due at the time of application and shall be payable to the Agency for Health Care Administration to be deposited in a trust fund administered by the Agency for Health Care Administration and used only for the purposes of this section. The fee schedule is as follows: For licensure as a drug-testing laboratory, an annual fee of not less than \$8,000 or more than \$10,000 per fiscal year; for late filing of an application for renewal, an additional fee of \$500 per day shall be charged.

History.—s. 1, ch. 89-173; s. 1, ch. 90-238; s. 25, ch. 90-360; s. 1, ch. 91-201; s. 6, ch. 91-279; s. 4, ch. 91-429; s. 40, ch. 92-279; s. 55, ch. 92-326; s. 7, ch. 93-129; s. 2, ch. 95-119; s. 680, ch. 95-147.

Note.—

A. Repealed by s. 1, ch. 95-217.

B. Section 4, ch. 95-217, provides that "[n]otwithstanding any provision of law to the contrary, exemptions from chapter 119, Florida Statutes, or chapter 286, Florida Statutes, which are prescribed by law and are specifically made subject to the Open Government Sunset Review Act in accordance with section 119.14, Florida Statutes, are not subject to review under that act, and are not abrogated by the operation of that act, after October 1, 1995."

Note.—Section 7, ch. 93-129, purported to amend subsection (13)(a), but failed to set out in full the flush left language at the end of the subsection. Absent affirmative evidence that the Legislature intended to repeal the language, the subsection is set out in full, pending clarification by further action by the Legislature.

112.046 Political party committee membership allowed.—Notwithstanding any other provision of law, an officer or employee of the state or any political subdivision may also serve as a member of the state executive committee or county executive committee of a political party. No person shall be required to resign from public office or employment, nor shall any person be fired or removed from such public office or employment, because of membership on such a committee prior to June 25, 1980.

History.—s. 3, ch. 80-207; s. 681, ch. 95-147.

112.048 Voluntary retirement with half pay authorized for elective officers of cities or towns; appropriation.—

(1) The intent of the Legislature is to authorize and direct each city and town to provide a system of retirement for elected officials, but it is further the intent that each city or town may determine whether the system will be contributory or noncontributory.

(2)(a) From and after June 3, 1939, whenever any elective officer of any city or town of this state has held any elective office of such city or town for a period of 20 years or more consecutively, or for a period of 20 years or more consecutively, except for one period not exceeding 6 months, such elective officer may voluntarily resign or retire from such elective office with the right to be paid on the officer's own requisition by such city or town during the remainder of his or her natural life a sum equal to one-half of the full amount of the annual or monthly salary that such city or town was authorized by law to pay said elective officer at the time of resignation or retirement; and such city and town shall appropriate and provide in its annual budget sufficient moneys to meet the requirements of this section when no other plan is available for elected local officials. In cases in

which an elective officer during any term of office entered or enters and served or serves in the Armed Forces of the United States during any period during which the United States was or shall be engaged in war and thereafter was or shall be appointed or again elected to the same elective office prior to discharge from such service in the Armed Forces, such time of service in the Armed Forces shall not be construed to be a break in consecutive service and shall be counted in determining the years of consecutive service of such elective officer.

(b) The provisions of this subsection shall not operate to preclude any elected officer from retiring under, and receiving benefits pursuant to, the provisions of this section as it existed prior to October 1, 1973, if such officer had, prior to that date, completed the required 20 years of service or been elected to a term upon the expiration of which he or she completes the required 20 years of service. However, if on October 1, 1973, an elected officer had completed at least 10 of the required 20 years of service, the city or town may elect to provide an annual or monthly retirement salary as provided in this subsection.

(3) Each city or town may by ordinance establish a contributory retirement system for those officials defined in subsection (2). The rules for participation, the amount of the official's contributions, and the method of appropriation and payment may be determined by ordinance of the city or town.

History.—s. 1, ch. 19247, 1939; CGL 1940 Supp. 2998(1); s. 1, ch. 57-805; s. 1, ch. 65-455; s. 1, ch. 72-280; s. 4, ch. 73-129; s. 1, ch. 74-231; s. 1, ch. 84-351; s. 682, ch. 95-147.

Note.—Former ss. 165.25, 121.20.

112.05 Retirement; cost-of-living adjustment; employment after retirement.—

(1)(a) Whenever any state official or state employee has attained the age of 70 years or more and has served the state as either an official or employee, or both, for as much as 20 consecutive years or more or for an aggregate time of 30 years or more, or whenever any state official or employee, irrespective of age, has served the state as either an official or employee, or both, for 30 consecutive years or more, or for as much as an aggregate of 35 years or more, such official or employee may retire from office as such official or employee with the right to be paid, and shall be paid monthly on his or her own requisition during the remainder of his or her natural life one-half the amount of the average monthly salary received during the last 10 years of such service; and sufficient money to meet the requirements of this section is hereby appropriated out of any moneys in the State Treasury not otherwise appropriated. Provided, that military service in the Armed Forces of the United States shall be computed as a part of the time specified hereinabove as entitling a state official or employee to the benefits of this section. This section shall apply only to persons retired or persons who are on a state payroll June 30, 1953, and remain continuously on a state payroll until eligible to retire. This section shall not affect any state official or employee who has already retired under any retirement act, except that no Cabinet officer qualifying shall receive less than \$4,500 per year.