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National Treasury Employees Union v. Von Raab: A Broader Special Needs Warrant Exception Dilutes Fourth Amendment Protection, 22 J. Marshall L. Rev. 903 (1989)

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CASENOTES

*NATIONAL TREASURY EMPLOYEES UNION V. VON RAAB**: A BROADER "SPECIAL NEEDS" WARRANT EXCEPTION DILUTES FOURTH AMENDMENT PROTECTION

Due to the devastating social[1] and economic[2] effects of drugs,

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* 109 S. Ct. 1384 (1989).

1. Drug abuse is a serious national problem with tremendous social and economic costs. *See* Barnes, Kinsey & Halpern, *A Question of America's Future: Drug-Free or Not?*, 36 U. KAN. L. REV. 699, 702 (1987-88) [hereinafter *America's Future*] (thorough discussion of drugs and the federal workplace). *But see* Morgan, *The "Scientific" Justification for Urine Drug Testing*, 36 U. KAN. L. REV. 683, 688 (1987-88) (criticism of drug-related statistics used by proponents of urinalysis). Illegal drugs have harmful effects on the human body. *America's Future*, *supra*, at 704. Marijuana's euphoric state debilitates mental functioning, perception, and the performance of fine motor skills. *Id.* It also impairs memory, coordination, depth perception and peripheral vision and may cause anxiety, panic or delusions. *Id.* Cocaine and amphetamines also have dangerous effects including mood-alteration, aggression, paranoia, and schizophrenic symptoms. *Id.* at 705. *See also* Brief for the United States at 34, National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (No. 86-1879) [hereinafter Respondents' Brief] (listing various effects of drugs). In addition, marijuana may affect the user long after the "high" has ended. *America's Future*, *supra*, at 704. One study of volunteer test pilots using flight simulators indicates that marijuana impairment could last over 24 hours. *Id. But see* Morgan, *supra*, at 695 (citing Yesavage, Leirer, Denari, & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325 (1985)).

Several authors, however, question the validity of statements which claim that drug use is pervasive in American society. *See, e.g.*, Morgan, *supra*, at 688; Kaplan & Williams, *Will Employees' Rights Be the First Casualty of the War on Drugs?*, 36 U. KAN. L. REV. 755, 756 (1987-88) [hereinafter *First Casualty*]. *See also* Rothstein, *Drug Testing in the Workplace: The Challenge to Employment Relations and Employment Law*, 63 CHI.[-]KENT L. REV. 683, 686 (1987) (table comparing drug use rates in 1982 to the rates in 1985). Some authors also challenge assertions that marijuana has long-lasting effects on the user. *See* Morgan, *supra*, at 694; *First Casualty*, *supra*, at 763 n.30 (due to its flawed methodology, the Yesavage study's results are suspect).

2. Relevant literature is replete with assertions that illegal drug use costs American employers billions of dollars. *See, e.g.*, *America's Future*, *supra* note 1, at 706 (liability insurance industry estimates that drug use costs employers $50 billion/year); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV., 201, 201-04 (1986) (employee drug use costs the nation $33 billion/year in lost

America has initiated a major offensive in its war on drugs.[3]

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productivity and accident costs). These costs stem from, *inter alia*, drug-related accidents, loss of worker productivity, absenteeism, theft and treatment. *America's Future*, *supra* note 1, at 706. *See also* Respondents' Brief, *supra* note 1, at 34 (drug abusers have decreased productivity, higher absenteeism, and higher turnover rates). Studies indicate that employee drug abuse may cost industry $50 billion per year and $100 billion per year in lost productivity. *America's Future*, *supra* note 1, at 706. Drug using employees function at only 50% to 67% capacity and may have four times as many accidents as nonusers. Rothstein, *supra* note 1, at 689. In January, 1987, the Conrail/Amtrak train collision alone killed sixteen people, injured 174, and resulted in $16.5 million in property damage. Eisner, *Drug Testing: Regulatory and Legal Issues Confronted By the Department of Transportation*, 35 FED. B. NEWS & J. 364, 364 (Oct. 1988). Subsequent investigation revealed that the train's engineer and brakeman had smoked marijuana on the train shortly before the accident. *Id.*

Some authors, however, question the credibility of these lost productivity statistics and its attendant costs to American employers. *See* Morgan, *supra* note 1, at 686 (statistical manipulation); *First Casualty*, *supra* note 1, at 773 & n.68 (greet statistics from "unreliable 'studies'" of employee drug use with great skepticism). Citing a 1984 report of the Research Triangle Institute ("RTI") as the apparent source of lost productivity statistics, one author explains that, strangely, the RTI study equates lower income with lower productivity. *Id.* at 686-88 (citing Harwood, Napolitano, Kristiansen & Collins, *Economic Costs to Society of Alcohol and Drug Abuse and Mental Illness*, 1980 RESEARCH TRIANGLE INSTITUTE (1984)). RTI's Program Director for alcoholism and drug abuse research has publicly acknowledged that proponents have misused this study in an attempt to show business losses due to drug use. *First Casualty*, *supra* note 1, at 773 n.68.

Aside from the possible economic costs to employers, illegal drug abuse results in other economic costs to society at large. U.S. CUSTOMS SERVICE, DEPT. OF THE TREASURY, ANTI-DRUG LAW ENFORCEMENT AND THEIR IMPACT, 15-19 (1987) [hereinafter CUSTOMS]. The cost to victims of drug-related crimes, involving medical, insurance, and property costs, was over $1.5 billion in 1985-1986. *Id.* at 17-18.

In the criminal justice system, federal, state, and local law enforcement agencies expended $4.129 billion in drug law interdiction and investigation activities in 1985. *Id.* at 38. In 1986, this figure rose to $4.890 billion. *Id.* Agencies' drug-directed budget expenditures included manpower for drug squads and task forces, routine patrol confrontations with illegal drug activities, officers' time in litigation, and costs related to informants, drug "buys," specialized drug investigation equipment, and police-sponsored education and prevention programs. *Id.* at 33-34. These expenditures amounted to 16.5% of total police budgets in 1985 and increased to 18.2% in 1986. *Id.* at 38.

3. The Reagan administration undertook several measures to thwart drug abuse. *America's Future*, *supra* note 1, at 699-700. These measures included a strong drug interdiction program, expanded treatment and research programs, improving international cooperation, terminating illegal drug trafficking, drug free schools and a drug free workplace. *Id.* at 699-700, 744-48. To achieve a drug free federal workplace, Reagan issued Executive Order No. 12,564 which directed federal agency heads to implement, *inter alia*, mandatory internal drug testing programs. *Id.* (referring to Executive Order No. 12,564, 3 C.F.R. 224 (1987). For more discussion of Executive Order No. 12,564, see *infra* note 4. In the 1988 presidential election, drug abuse was a major campaign issue. *First Casualty*, *supra* note 1, at 756 n.6. Law enforcement agencies have devoted more funds than ever before to drug-related law enforcement activities. See *supra* note 2 for more discussion concerning the increase in drug-related law enforcement expenditures.

In the workplace, in addition to Executive Order No. 12,564, Reagan lobbied state and local government officials to implement drug free policies. *America's Future*, *supra* note 1, at 745. The Department of Health and Human Services ("HHS") established a "Drug-Free Workplace Helpline" for employers, and the Department of Labor ("DOL") distributes "Workplaces Without Drugs," a pamphlet which provides employers with information on remedies to reduce drug abuse. *Id.* DOL also provides experts to assist and train employers in their efforts to implement drug free pro-

Thousands of American employers have implemented compulsory employee urinalysis programs to detect and deter illegal drug use.[4] If the employer is a governmental body,[5] these urinalysis programs[6]

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grams. *Id.*

For prevention and treatment, Reagan formulated plans to grant $100 million to states and $69 million to communities for comprehensive treatment and prevention programs. *Id.* Pursuant to Executive Order No. 12,564, federal agencies must develop employee assistance programs ("EAP") and coordinate with community resources. Executive Order No. 12,564; 3 C.F.R. 224, 225 (1987) [hereinafter Order No. 12, 564]. In addition, Reagan developed the Center for Substance Abuse Prevention to carry out a national program for prevention, education, and intervention. *America's Future*, *supra* note 1, at 746. Finally, Reagan directed HHS to improve epidemiological methods to track the amount of alcohol and drug abuse and its effects on American society. *Id.*

To halt illegal drug trafficking, Reagan established a foreign policy to interdict and eradicate drugs in source countries. *Id.* He also established a cooperative drug law enforcement initiative with Mexico to protect the southern border. *Id.* at 747. In addition, Reagan expanded federal drug law enforcement, strengthened law enforcement methods, and increased Customs' budget by $400 million. *Id.* Finally, state and local police allocate an increasing amount of their budgets to drug law interdiction and investigation. See *supra* note 2 for a discussion of increasing drug-related law enforcement expenditures.

4. Urinalysis has invaded the workplace. *First Casualty*, *supra* note 1, at 755. On September 15, 1986, Reagan issued Executive Order No. 12,564 which directs all federal agency heads to implement internal drug testing programs. Order No. 12,564, *supra* note 3, at 226. These programs cover over one million employees. *First Casualty*, *supra* note 1, at 757. Section 4(d) of Executive Order No. 12,564 charges HHS with promulgating scientific and technical guidelines for agency programs. Order No. 12,564, *supra* note 3, at 227. The Supplemental Appropriations for the Homeless Act of 1987 ("Act") governs the scope of federal drug testing programs. *America's Future*, *supra* note 1, at 722 (citing Supplemental Appropriations Act, § 503, 5 U.S.C. § 7301 (1988)). The Act directs, *inter alia*, HHS to publish its guidelines for notice and comment and to certify to Congress that agency programs comply with these guidelines. *Id.*; *First Casualty*, *supra*, note 1, at 757 n.13. Pursuant to Executive Order No. 12,564 and the Act, HHS published final guidelines for the federal drug testing programs and certification standards for participating laboratories. HEALTH AND HUMAN SERVICES, MANDATORY GUIDELINES FOR FEDERAL WORKPLACE DRUG TESTING PROGRAMS, 53 FED. REG. 11,970, 11,970 (1988) [hereinafter GUIDELINES]. The Guidelines explicate various procedures and regulations with which each federal agency must comply before HHS will certify its program to Congress. *Id.*

5. Constitutional guarantees apply only to governmental action. Miller, *supra* note 1, at 217. Consequently, private employers' actions do not trigger constitutional protections. *Id.* The "state action" doctrine limits the scope of the amendments to public employers and private employers that are closely connected with or agents of the government. Skinner v. Railway Labor Executives Assn., 109 S. Ct. 1402, 1411-12 (1989).

6. Urinalysis programs vary according to each employer's objectives. Miike & Hewitt, *Accuracy and Reliability of Urine Drug Tests*, 36 U. KAN. L. REV. 641, 643 (1987-88) [hereinafter *Drug Tests*]. Various types of drug testing programs include mandatory pre-employment testing, random testing of employees, periodic testing, post-accident testing, post-rehabilitation testing, and testing for cause. Eisner, *supra* note 2, at 365.

Most employers use pre-employment testing. Rothstein, *supra* note 1, at 731. They condition offers of employment on the employee's ability to produce a negative test result. Hebert, *Private Sector Drug Testing: Employers' Rights, Risks, and Responsibilities*, 36 U. KAN. L. REV. 823, 824-25 (1987-88). Usually, they incorporate this test into the pre-employment physical. *Id.* at 824.

Some employers use random drug testing, but that is the most controversial type.

See Rothstein, *supra* note 1, at 732 & nn.306-07 (courts fear abuses in the selection process). Random testing programs screen employees, usually by surprise, on a random basis without cause. Hebert, *supra*, at 825.

Periodic testing programs test employees at a certain time such as at the time of promotion or transfer. Hebert, *supra*, at 825. Like random testing, periodic testing programs screen employees without cause. *Id.* ; Rothstein, *supra* note 1, at 732. Most periodic testing programs notify employees of the drug testing. Hebert, *supra*, at 825. Unlike random testing, however, courts view periodic testing favorably. Rothstein, *supra* note 1, at 732.

Most programs test for cause when an employer has a reasonable suspicion that the employee is impaired or uses illegal drugs. Hebert, *supra*, at 826-27. A reasonable suspicion arises if the employer or an informant observes, *inter alia*, the employee using or possessing illegal drugs, impairment, or mood alterations. *Id.* Employers who test for cause should use evenly-applied standards to avoid litigation difficulties. *Id.*

Some programs test employees in certain safety/security sensitive positions ("covered positions"). *See, e.g.*, Order No. 12,564, *supra* note 3, at 226 (departmental heads of executive agencies are directed to test employees in "sensitive positions" which would endanger the public health, safety, or national security if inadequately discharged). Testing programs might also test employees involved in accidents. Hebert, *supra*, at 826. Others require drug tests during the rehabilitation process. *Id.* at 825-26.

Employer-mandated urinalysis programs usually test employees for various combinations of drugs, including amphetamines, barbiturates, benzodiazepines (ValiumTM, LibriumTM), cannabinoids (marijuana), cocaine, methaqualone (quaalude), opiates (morphine), phencyclidine (PCP), propoxyphene (DarvonTM), and LSD. *Drug Tests*, *supra*, at 643. If a positive test result occurs, most employers either discipline the subject by discharge or require her to complete a rehabilitation program. Hebert, *supra*, at 825.

These programs most commonly use urinalysis to determine the presence of illegal drugs in employees. *Id.* at 827. For urinalysis, the employer must first collect the employee's urine sample. Comment, *Making the Grade: Can Student Drug Testing Programs in Public Schools Pass a Legal Challenge?*, 25 WILLAMETTE L. REV. 165, 167 (1989) [hereinafter *Making the Grade*]. Under most programs, employees may urinate into the specimen bottle in private. *Id.* Employees, however, can easily adulterate samples by adding salt or toilet water. *Drug Tests*, *supra*, at 649. Consequently, under some programs, employees must urinate in the collection personnel's presence. *Id.* Programs with private sample collection procedures also guard against sample tampering and substitution. Comment, *supra*, at 168 n.22. Usually collection personnel must stand nearby to observe ordinary sounds of urination and must measure the sample's temperature. *See* GUIDELINES, *supra* note 4, at 11,980-81. In addition, most programs require strict chain of custody procedures for identifying and transporting samples to avoid legal challenges. *Drug Tests*, *supra*, at 642. For one example of chain-of-custody procedures, see GUIDELINES, *supra* note 4, at 11,980-81.

Usually, mandatory urinalysis programs call for two tests. *Drug Tests*, *supra*, at 641-42. Initially, employers use a screening test to eliminate negative samples and then test positive samples with a confirmatory test to identify samples containing targeted drugs. *Id.* The most popular initial screening test is an immunoassay, actually an enzyme multiplied immunoassay test ("EMIT"). *Id.* at 654. The EMIT costs about $15 and employers can administer them at the worksite. *Id.* at 646, 658. Most programs confirm the immunoassay's result with a gas chromatography/mass spectrometry test ("GC/MS"). *Id.* at 642. The GC/MS is very accurate and expensive. Hebert, *supra*, at 827. Each test costs about $40-50 and it requires specialized equipment and procedures. *Drug Tests*, *supra*, at 646, 658 & n.38.

As the body metabolizes drugs, drug metabolites remain in the user's urine for one to three days following use. *Id.* at 642. Marijuana traces, however, can remain in one's urine for several weeks. *Id.* at 642-43. These drug tests identify the presence of metabolites in one's urine and, therefore, are only capable of identifying past use rather than current impairment. *Id.* at 642; Miller, *supra* note 2, at 206. For a detailed discussion of the technical aspects of various immunoassays, see A. ATKINSON,

trigger judicial scrutiny on constitutional grounds.[7] In *National Treasury Employees Union v. Von Raab*,[8] the United States Supreme Court considered whether a 1986 United States Customs Service ("Customs") mandatory urinalysis program, which called for drug testing of employees before transfer to certain positions, violated the fourth amendment.[9] The Court upheld the program's testing of transferees to positions involving drug interdiction or possession of firearms.[10]

In 1986, Customs[11] implemented a mandatory urinalysis program for all transferees into positions involving drug interdiction, the possession of firearms, or the handling of classified material.[12] At that time, Customs' workforce was "largely drug free"[13] and the program was not adopted as a result of suspected drug use among its employees.[14] Commissioner von Raab, nonetheless, justified the urinalysis by noting that drug use is a pervasive social problem.[15]

& J. AMBRE, KALMAN AND CLARK'S DRUG ASSAY: THE STRATEGY OF THERAPEUTIC DRUG MONITORING (2d ed. 1984), *Drug Tests*, *supra*, at 644-49. For a detailed discussion of the technical aspects of the GC/MS and other available confirmatory tests, see *Drug Tests*, *supra*, at 647-49.

7. Most legal challenges attack public employers' mandatory urinalysis programs on fourth amendment grounds. Rothstein, *supra* note 1, at 704. Some, however, challenge these programs on several constitutional grounds. *Id.* at 707-08.

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

9. *Id.* at 1387. The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause supported by oath or affirmation, and particularily describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

10. *Von Raab*, 109 S. Ct. at 1390, 1396-98.

11. United States Customs Service ("Customs") is a federal agency charged with collecting import duties, enforcing customs laws, and processing persons and property entering the United States. Brief for the Petitioners at 2, National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (No. 86-1879) [hereinafter Petitioners' Brief]. Customs' primary enforcement responsibility is the interdiction and seizure of illegal drugs. *Von Raab*, 109 S. Ct. at 1388.

12. *Id.* at 1387.

13. *Id.* at 1387. One month before implementation of the program, Commissioner von Raab indicated his belief that Customs was "largely drug free" and further stated that "[t]he Customs Service has been known throughout the law enforcement community as an agency whose employees demonstrate noteworthy integrity." Petitioners' Brief, *supra* note 11, at 6-7. In the five months that the program was in effect, only five samples out of 3,663 urine tests were confirmed positive. *Id.* at 7-8.

14. *Von Raab*, 109 S. Ct. at 1394-95. When Customs implemented its program, Commissioner von Raab acknowledged that "the extent of illegal drug use by Customs employees was not the reason for establishing this program." Petitioners' Brief, *supra* note 11, at 6 n.9. During later proceedings, Customs did not submit any evidence to indicate suspicion of drug use among its workforce. *Id.* at 6-7.

15. *Von Raab*, 109 S. Ct. at 1387-88. Commissioner von Raab justified the program because Customs has a "special responsibility to insure that its workforce remains drug free." Petitioners' Brief, *supra* note 11, at 7-8 n.9. Customs believed its drug testing program would set an example for the country. Respondents' Brief, *supra* note 1, at 36.

Stating that drug users in these positions might be especially vulnerable to bribes offered by traffickers, von Raab also cited the government's substantial interest in assuring individual employee integrity and public safety.[16]

Under the program, Customs notifies qualified transferees that their promotion is contingent upon a negative urinalysis test[17] and then schedules the test five days after notification.[18] The program requires the transferee to urinate privately under indirect observation[19] and follows strict chain-of-custody procedures.[20] The program requires an initial immunoassay screening test[21] which detects drug metabolites in the urine and a very accurate confirmatory test[22] for all positive samples.[23] Since the screening test generally cannot detect drugs consumed five days before testing, an employee can avoid detection simply by abstaining from drug use after notification of the test date.[24]

The National Treasury Employees Union challenged the urinalysis, and the district court enjoined the Customs program,[25] holding

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16. The program's purpose was to provide added assurance of integrity for covered personnel due to Customs' drug interdiction responsibilities. Petitioners' Brief, *supra* note 11, at 6.

17. *Von Raab*, 109 S. Ct. at 1388; Petitioners' Brief, *supra* note 11, at 4-5.

18. Petitioners' Brief, *supra* note 11, at 4.

19. *Von Raab*, 109 S. Ct. at 1388. When the employee reports for the test, she must remove any outer garments and present photographic identification. *Id.* The collection personnel add dye to the toilet water to prevent an employee from adulterating her sample. *Id.* The employee must produce a sample but may do so in a private stall. *Id.* To prevent substitution of the sample from another person, the monitor remains outside the stall to listen for the sounds of urination. *Id.* If the employee is unable to produce a sample, she is detained and given fluids to drink. *Id.* If still unable to produce one, the employee is disqualified for promotion. *Id.* An employee whose sample tests positive is subject to dismissal. Petitioners' Brief, *supra* note 11, at 6.

20. *Von Raab*, 109 S. Ct. at 1388. When the monitor receives the sample, she tests it to ensure that it is the proper temperature and color. *Id.* She then puts a tamperproof seal on the specimen. The employee signs a chain of custody form and the monitor initials it. *Id.* The sample is then sealed in a plastic bag. *Id.* The samples are sent through the mail to a laboratory in California. Petitioners' Brief, *supra* note 11, at 8.

21. *Von Raab*, 109 S. Ct. at 1389. For a discussion of the EMIT test, see *supra* note 6.

22. *Von Raab*, 109 S. Ct. at 1389. The program requires a confirmatory *GC/MS* test for all positive samples. For a discussion of this test, see *supra* note 6.

23. *Von Raab*, 109 S. Ct. at 1389. Customs' program screens samples for marijuana, cocaine, opiates, amphetamines, and phencyclidine. *Id.*

24. Petitioners' Brief, *supra* note 11, at 9. In an uncontested affidavit, plaintiff's expert, Dr. David Greenblatt, explained that the program was "essentially useless for determining whether employees use illegal drugs because . . . most individuals who use illegal drugs can avoid a 'true positive' result by abstaining from drug use upon receiving short notice that they will be tested, and by increasing their fluid intake." *Id.* at 9 n.12.

25. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380, 381, 391 (E.D. La. 1986), *rev'd*, 816 F.2d 170 (5th Cir. 1987), *aff'd*, 109 S. Ct. 1384 (1989).

that mandatory urinalysis in the absence of suspicion is an unreasonable search under the fourth amendment.[26] The Court of Appeals for the Fifth Circuit reversed,[27] holding that the program is reasonable, even in the absence of suspicion, because the government's need to search outweighs the employee's reduced expectation of privacy.[28]

The Supreme Court granted certiorari to consider whether suspicionless, mandatory urinalysis of transferees to government positions involving drug interdiction and possession of firearms violates the fourth amendment.[29] In affirming the fifth circuit,[30] the Court recognized that a warrantless[31] search is presumptively unreasonable.[32] It held, however, that Customs' special need to detect and deter drug use made compliance with the warrant clause impractical and justified a suspicionless search.[33] Calling the drug testing of job transferees a routine administrative function, the Court held that Customs' substantial interests outweighed the employee's diminished expectation of privacy.[34] The Court concluded, therefore, that the Customs' urinalysis program met the fourth amendment's standard of reasonableness.[35]

In its analysis, the Court stated that compulsory urinalysis implicates the fourth amendment because it intrudes into employees' reasonable expectations of privacy.[36] Recognizing that the fourth

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26. *Id.* at 387.

27. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 182 (5th Cir. 1987), *aff'd*, 109 S. Ct. 1384 (1989).

28. *Id.* at 173.

29. *Von Raab*, 109 S. Ct. at 1387.

30. *Id.* at 1390, 1397-98.

31. The warrant clause of the fourth amendment provides that "no warrant 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." U.S. CONST. amend. IV.

32. *Von Raab*, 109 S. Ct. at 1390, 1397.

33. *Id.* at 1390-92.

34. *Id.* at 1392-94, 1396-97 & n.2.

35. *Id.* at 1396-98.

36. *Id.* at 1390. The fourth amendment limits governmental search and seizure powers in order to prevent arbitrary and unwarranted governmental intrusions. *E.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976) (border checkpoint operation); United States v. Ortiz, 422 U.S. 891, 895 (1975) (border search of car); Camara v. Municipal Ct., 387 U.S. 523, 528 (1967) (administrative search by municipal health and safety inspectors). It applies to both civil and criminal governmental authorities. *Von Raab*, 109 S. Ct. at 1390; New Jersey v. T.L.O., 469 U.S. 325, 335 (1985). The fourth amendment proscribes only "unreasonable" searches. *E.g.*, Skinner v. Railway Labor Executives Ass'n., 109 S. Ct. 1402, 1414 (1989) (Federal Railroad Administration's drug and alcohol testing program); United States v. Sharpe, 470 U.S. 675, 682 (1985) (Drug Enforcement Administration agent's 20 minute detention of suspect).

Governmental interference amounts to a fourth amendment search or seizure if it infringes on an individual's reasonable expectation of privacy. *E.g.*, *Skinner*, 109 S. Ct. at 1412; United States v. Jacobsen, 466 U.S. 109, 113 (1984) (federal agents' seizure of suspect's package). A reasonable expectation of privacy is one "that society is 'prepared to recognize as legitimate'." *T.L.O.*, 469 U.S. at 338 (quoting Hudson v.

amendment applies to the government in its capacity as an employer, the Court determined that Customs' program must meet the constitutional requirement of reasonableness.[37] Although the *Von Raab* Court noted that a warrantless search is presumptively unreasonable,[38] it concluded that it may be impractical to require compliance with the warrant clause where the search serves special governmental needs beyond the ordinary need for law enforcement.[39]

The Court found that Customs' special need to detect and deter drug users from occupying certain positions of responsibility justified departure from the warrant requirement.[40] The Court concluded that requiring Customs to procure a warrant for this routine employment decision would divert its resources and compromise its mission.[41] Additionally, the Court stated that a warrant would not protect the employees' privacy because the warrant's primary purpose of notification was already satisfied by the program's five-day advance notice requirement.[42]

In determining the level of suspicion needed to conduct the urinalysis, the Court found that the fourth amendment's probable cause standard was not helpful because it usually relates to criminal investigations.[43] The Court, analogizing Customs' urinalysis to building inspections and border stop searches of cars for illegal aliens, stated that in these situations, requiring any level of suspicion would be impractical.[44] Consequently, it held that due to Cus-

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Palmer, 468 U.S. 517, 526 (1984)).

The Court has held that urinalysis invades three different privacy interests: 1) one's reasonable expectation of privacy in the excretory function; 2) one's privacy interest in her urine; and 3) the chemical analysis invades one's privacy expectation in her personal medical information which is contained in the urine. *Skinner*, 109 S. Ct. at 1413 & n.4; *see Von Raab*, 109 S. Ct. at 1390 (urinalysis invades reasonable privacy expectation). In describing the intrusion of personal privacy and dignity occasioned by the urinalysis, the Court noted that:

> [t]here are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Skinner, 109 S. Ct. at 1413, *quoting*, National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

37. *Von Raab*, 109 S. Ct. at 1390.

38. *Id.* at 1390, 1397.

39. *Id.* at 1390-91.

40. *Id.* at 1390-91. The Court stated that to require a government employer to obtain a warrant for every "work-related intrusion" would prevent it from functioning. *Id.* at 1391.

41. *Id.* at 1391.

42. *Id.* The Court also noted that the program has elaborate procedures and an automatic process which, upon selection for transfer, allows no room for Customs officials' discretion. Consequently, the Court held that there were no facts for a magistrate to evaluate. *Id.*

43. *Id.* at 1391-92.

44. *Id.* at 1392. The Court stated that this standard is unhelpful in analyzing the reasonableness of routine administrative functions where the government needs

toms' substantial need for detecting and deterring drug use, the drug screening did not require that suspicion be reasonable.[45]

In balancing each parties' interests, the Court emphasized Customs' function as the United States' primary defense against drug trafficking and noted its employees' unique exposure to contraband and smugglers.[46] The Court concluded that drug-using employees may be tempted both by traffickers' bribes and previously seized contraband.[47] Further, the Court asserted that drug users could jeopardize the national interest in self-protection by becoming indifferent to drug interdiction or even by colluding with drug traffickers.[48] The Court held, therefore, that Customs' goal of deterring drug users from occupying drug interdiction positions serves a compelling national interest in self-protection by ensuring that transferees are ethically incorruptible and physically fit.[49] In addition, the Court found Customs to have a compelling safety interest in requiring that transferees to positions involving the possession of firearms be unimpaired.[50]

In determining the weight of Customs' interests, the Court rejected the Union's contention that the program was unreasonable because it was not justified by a belief that it would produce searched-for evidence.[51] The Court noted that the Customs' workforce is not immune to the national drug abuse problem and stated that the fact that the urinalysis program might discover only a few users would not negate its validity.[52] In addition, the Court concluded that the program is effective, notwithstanding the five-day advance notice, because addicts may not be able to abstain,

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to prevent or detect hazardous conditions and violations which do not generate cause to search. *Id.* at 1391-92.

45. *Id.* at 1392. The Court actually said that the "Government's need to conduct the suspicionless searches . . . outweighs the privacy interests of employees . . . ." *Id.*

46. *Id.* at 1392. The Court noted that drug smuggling has caused a national crisis in law enforcement and that smugglers are managing to bring increasing amounts of illegal drugs into America. *Id.*

47. *Id.* The Court explained that Customs officers have been targets of bribery by smugglers and several had been removed for integrity violations. *Id.* at 1392-93. However, there is no evidence that these violations were a consequence of drug use. *Id.* at 1400.

48. *Id.* at 1393.

49. *Id.* at 1393, 1395. The Court asserted that because of Customs' unique mission, the government has a compelling interest in ensuring that transferees do not use drugs even while off duty. *Id.* at 1395.

50. *Id.* at 1393, 1395. Due to the risk of injury, the Court explained that impaired perception and judgment may cause disastrous consequences. *Id.* at 1393. The Court stated that ensuring against this risk actually furthers fourth amendment values since deadly force in some circumstances may violate the fourth amendment. *Id.*

51. *Id.* at 1394-95. Customs did not suspect any drug use in its workforce and only 5 out of 3,600 employees have tested positive. Nevertheless, the Court found that these facts were unpersuasive. *Id.*

52. *Id.*

avoidance techniques are risky and uncertain, and users probably will not know how to defeat the test.[53] Therefore, the Court held that the program bears a close relationship to Customs' goals.[54]

The Court then balanced Customs' special needs against the urinalysis programs's interference with the employees' privacy expectations.[55] Although the Court found urinalysis to be a substantial intrusion in some contexts,[56] it found that the employment relationship diminished the transferees' privacy expectations because the nature of their jobs should lead them to expect inquiry into their fitness and ethics.[57] In addition, the Court noted that procedural aspects of the program minimize the search's intrusiveness.[58] Consequently, the Court concluded that the employees' diminished expectations of privacy do not outweigh Custom's special safety and integrity needs,[59] and held that mandatory urinalysis of transferees to positions involving drug interdiction and possession of firearms is reasonable under the fourth amendment.[60]

The *Von Raab* decision is flawed for three reasons. First, the government's asserted interests do not justify exemption from the fourth amendment's warrant clause.[61] Second, under the facts of *Von Raab*, a urinalysis program without suspicion is unreasonable.[62] Not only is urinalysis highly intrusive,[63] but there are less intrusive alternative methods to detect drug use.[64] Finally, in balancing the parties' respective interests, the Court improperly tipped the bal-

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53. *Id.* at 1396. The Court found the contention that transferees could defeat the test through abstention or adulteration of the sample to overstate the case. *Id.* It is also noted that each individual's elimination process varied and might extend for five days. *Id.* Consequently, the Court claimed that no employee could reasonably expect to defeat the test. *Id.*

54. *Id.*

55. *Id.* at 1393-94.

56. *Id.* at 1393. For a discussion of the intrusiveness of urinalysis, see *supra* note 36 and accompanying text.

57. *Von Raab*, 109 S. Ct. at 1393-94. The Court explained that operational realities may render otherwise unreasonable intrusions reasonable within the employment context. *Id.* at 1393. Although it recognized that employees rarely have diminished expectations of privacy in their persons, the Court compared Customs' urinalysis to routine searches of United States mint employees. *Id.* It also noted that military or intelligence service employees may expect intrusive inquiries into their fitness. *Id.* at 1393-94.

58. *Id.* at 1394 n.2.

59. *Id.* at 1394.

60. *Id.* at 1396.

61. For a discussion of the applicability of the warrant clause to Customs' urinalysis program, see *infra* notes 68-87 and accompanying text.

62. For a discussion of the unreasonableness of suspicionless urinalysis, see *infra* notes 88-104 and accompanying text.

63. See *supra* note 36 and accompanying text for a discussion of urinalysis' intrusiveness.

64. See *infra* note 80 and accompanying text for a discussion of other drug detection alternatives.

ance in Customs' favor.[65] The *Von Raab* Court trivialized the individual's privacy interests at stake,[66] and over-emphasized the government's interests, ignoring both the fact that Customs' workforce is largely drug free and that its urinalysis program is ineffective.[67]

First, in concluding that requiring compliance with the presumptive warrant clause[68] would be unreasonable, the *Von Raab* Court ignored its own precedent when it found that Customs' goal of deterring and detecting drug users made compliance with the warrant requirement impractical. In the past, the Court has created exceptions to the clause in a very few, carefully-drawn circumstances.[69] In balancing parties' interests, the Court has determined whether the government has any practical or exigent need to conduct a warrantless search.[70] Traditionally, the Court has decided whether compliance would unreasonably delay the search, thereby frustrating the government's purpose.[71] For example, the Court has justified exemp-

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65. For a discussion of the Court's biased balancing test, see *infra* notes 105-116 and accompanying text.

66. For a discussion challenging the Court's trivialization of the privacy interests at stake, see *infra* notes 95-104, 110 and accompanying text.

67. See *infra* notes 111-116 and accompanying text for a discussion of the unreasonableness of Customs' program due to these flaws.

68. *See* United States v. Place, 462 U.S. 696, 701 (1983) (searches without warrant are *per se* unreasonable); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) (same); Katz v. United States, 389 U.S. 347, 357 (1967) (same); *see also* Arkansas v. Sanders, 442 U.S. 753, 758 (1979) (warrant clause is not an inconvenience to be weighed against government goals); United States v. Chadwick, 433 U.S. 1, 6-11 (1977) (historical discussion of the warrant clause). For text of the warrant clause, see *supra* note 31.

69. *E.g.*, United States v. United States Dist. Ct., 407 U.S. 297, 318 (1972) (electronic surveillance in domestic security matters requires warrant); Camara v. Municipal Ct., 387 U.S. 523, 528-29 (1967) (municipal health and safety inspection requires warrant).

70. Skinner v. Railway Labor Execut. Ass'n., 109 S. Ct. 1402, 1416 (1989) (need for swift and orderly action in the chaotic aftermath of a major railroad accident); O'Connor v. Ortega, 480 U.S. 709, 720 (1987) (need to enter employees' offices frequently); New Jersey v. T.L.O., 469 U.S. 325, 337, 339-40 (1985) (school officials' need for swift and informal disciplinary measures); *id.* at 356 (Brennan, J., dissenting) (special governmental need justifying departure from warrant requirement flows from exigency - "the press of time"); Illinois v. LaFayette, 462 U.S. 579, 589 (1983) (impracticality of setting up fixed checkpoints for vessels); United States v. Villamonte-Marquez, 462 U.S. 640, 645-46 (1983) (jail administrators' practical need to guard against claims of theft or carelessness); Bell v. Wolfish, 441 U.S. 520, 540, 546, 560 (1979) (prison administrators' security needs); United States v. Martinez-Fuerte, 428 U.S. 530, 556-57 (1976) (heavy flow of traffic); Wyman v. James, 400 U.S. 309, 321 (1971) (practical need of welfare caseworker to assess eligibility); *Camara*, 387 U.S. at 539-40 (1967) (absent an emergency, health inspector has no practical need to forego compliance with warrant clause).

71. *Skinner*, 109 S. Ct. at 1416, 1420 (blood and urine tests of railroad employees); *T.L.O.*, 469 U.S. at 340 (search of student's handbag); *Camara*, 387 U.S. at 533 (municipal inspection). *See also O'Connor*, 480 U.S. at 720 (delay in entering employee's office for files would frustrate employer's goal of efficient workplace); Schmerber v. California, 384 U.S. 757, 770-71 (1966) (for officer to delay bloodtest would result in destruction of the evidence and would frustrate his purpose of obtaining evidence of alcohol content).

tion from the clause for searches where there is a special governmental need for swift action.[72] In addition, the Court has considered the burden of requiring governmental compliance.[73] The Court has found compliance "unduly burdensome" where there is a special governmental need for frequent intrusion,[74] or where the government agent involved is unfamiliar with the "niceties of probable cause."[75] In very few circumstances, the Court has also justified exemption where there is a special governmental need for surprise action.[76]

In *Von Raab*, however, the circumstances fail to generate any of these practical governmental needs.[77] Since Customs has no need for swift action, the delay necessary to obtain a warrant would not frustrate Customs' ultimate goal of detecting and deterring drug use. This is readily apparent in Customs' procedure of scheduling the test five days after notification. This also indicates Customs has no need for surprise action. In addition, the compulsory urinalysis applies to current employees selected for transfer who have gone through a time-consuming selection *process*.[78] During this process, Customs could easily establish probable cause[79] by administering

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72. *See Skinner*, 109 S. Ct. at 1416 (to determine cause of train accident employer must collect blood and urine samples swiftly due to body's rapid elimination process); *T.L.O.*, 469 U.S. at 340 (need for swift and informal disciplinary procedures in school setting); Michigan v. Tyler, 436 U.S. 499, 509 (1978) (burning building); Cardwell v. Lewis, 417 U.S. 583, 589-90 (1974) (mobility of car); Chimel v. California, 395 U.S. 752, 763 (1969) (danger of weapon or concealed evidence); Terry v. Ohio, 392 U.S. 1, 20, 23 (1968) (possible occurrence of offense and existence of dangerous weapons); *Schmerber*, 384 U.S. at 770 (1966) (destruction of evidence).

73. *O'Connor*, 480 U.S. at 720 (hospital administrators); *T.L.O.*, 469 U.S. at 342 (school officials); Arkansas v. Sanders, 442 U.S. 753, 765-66 n.14 (1979) (police); Marshall v. Barlow's, Inc., 436 U.S. 307, 316-321 (1978) (Occupational Safety and Health inspector).

74. *O'Connor*, 480 U.S. at 720 (employer's frequent need to enter employee's office for files).

75. *T.L.O.*, 469 U.S. at 343. *See also*, *Skinner*, 109 S. Ct. at 1416 (imposing unwieldy procedures on railroad supervisors is unreasonable); *O'Connor*, 480 U.S. at 724-25 (hospital administrators). *But see T.L.O.*, 469 U.S. at 363-68 (Brennan, J., concurring in part and dissenting in part) (probable cause standard is non-technical, easily-applied, common sense standard).

76. Donovan v. Dewey, 452 U.S. 594, 603-04 (1981) (unannounced, frequent inspections of mining operations are essential to regulatory scheme); United States v. Biswell, 406 U.S. 311, 316 (1972) (unannounced inspections essential to regulate sale of firearms).

77. Petitioners' Brief, *supra* note 11, at 34-37. *See Skinner*, 109 S. Ct. at 1426 (Marshall, J., dissenting) (no exigency prevents railroad officials from obtaining a warrant for the chemical analysis of blood and urine samples); *T.L.O.*, 469 U.S. at 356-57 (Brennan, J., concurrining in part and dissenting in part).

78. *See* Petitioners' Brief, *supra* note 11, at 3.

79. The probable cause standard is met " 'where the facts and circumstances within their knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief' that a criminal offense had occurred." *T.L.O.*, 469 U.S. at 363-64 (Brennan, J., concurring in part and dissenting in part) (quoting Carroll v. United States, 267 U.S. 132,

dexterity and rapid eye tests which are quite accurate at detecting drug impairment.[80] Administering theses tests by surprise would not only be constitutional, but would further Customs' goal more effectively than the urinalysis program which requires notification. An individual's test results, extensive background checks, and past employment records on performance, absenteeism and productivity taken together could establish the probable cause necessary to support a warrant to conduct urinalysis.[81]

Nor is the frequency of Customs' needs to search so great that compliance with the warrant requirement would unduly burden Customs' resources. The program requires very few searches to meet its goals. It only tests candidates for transfer to two types of positions. In addition, urinalysis is expensive,[82] and other, less intrusive methods could establish probable cause, perhaps with less expense.[83] Finally, since Customs utilizes the warrant procedure and probable cause concept daily in its contact with the public, requiring compliance with the warrant clause would not unduly burden this government employer.[84]

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162 (1925), *overruled*, 399 U.S. 42 (1970)). Later, the Court explained that probable cause depends upon "the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Id.* (quoting Brinegar v. United States, 338 U.S. 160, 175 (1949)).

80. Rapid Eye Testing ("RET") has been used by several organizations as a screening procedure before conducting urinalysis. Comment, *supra* note 6, at 170. It has been used by the National Football League, the Los Angeles Dodgers, and the California Highway Patrol. *Id.* at 170 n.39. A trained examiner performs five tests, making the individual's eyes respond to stimuli: she looks at the eye color, the pupil size, the pupils' reaction to light, the ability to see peripheral objects, and the ability to remain crosseyed. *Id.* at 170, 180 n.107. If the subject of the test exhibits two of the five symptoms, she is probably drug impaired. *Id.* at 170.

RET is 83% accurate not only at detecting drug impairment, but also at identifying the particular drug used. *Id.* at 170 n.43; *First Casualty*, *supra* note 1, at 772 n.67. The Los Angeles police Department uses RET to determine whether DWI suspects are drug impaired. *First Casualty*, *supra* note 1, at 772 n.67. Compelling urinalysis only for employees who have suspect RET results minimizes the intrusiveness and the cost to employers. Comment, *Making the Grade*, *supra* note 6, at 170. A RET probably would not constitute a "search" since it involves looking into one's eyes which are exposed to the public. *Id.* at 179-80.

81. Probable cause is a fluid, easily-applied common sense standard. New Jersey v. T.L.O., 469 U.S. 325, 363-64 (1985) (Brennan, J., concurring in part and dissenting in part); see *supra* note 79 for a discussion of the probable cause standard used by the Court. The standard varies from context to context because it takes into account the nature of the search. *Camara*, 387 U.S. at 538. For example, the facts needed to justify probable cause for a warrant to inspect private dwellings are different than those needed to justify a warrant to search for evidence of a criminal offense. *Id.* In light of such a fluid standard, Customs would not have too much difficulty in establishing probable cause to justify a warrant to compel urinalysis.

82. For a discussion of the cost of urinalysis, see *supra* note 6.

83. See *supra* note 80 and accompanying text for a discussion of alternative detection methods.

84. Petitioners' Brief, *supra* note 11, at 36-37. Customs employees routinely apply the probable cause standard in their contact with the public. *Id.*

In its determination that the warrant clause requirement is impractical under the facts of *Von Raab*, the Court ignored its traditional requirement of practical or urgent needs. Instead, the Court justified exemption from the clause on the basis of Customs' ultimate goal of detecting and deterring drug-using transferees.[85] Of course, the government will always assert an "important" interest. In the absence of practical or urgent needs, however, exemption from the clause for an important goal alone will render the clause void and useless.[86] If mere government assertion of a worthy societal

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85. Traditionally, the Court has placed an additional burden on the government to justify exemption from the clause and has refused to exempt its action where the government could only show a worthy goal. *See* Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Indeed, the Court has required the government to show that exigencies make its course imperative to justify exemption. Arkansas v. Sanders, 442 U.S. 753, 760, 763 (1979) (Occupational Safety and Health inspections require warrant); United States v. United States Dist. Ct., 407 U.S. 297, 324 (1972) (Douglas, J., concurring) (electronic surveillance in domestic security matters requires warrant).

In *Almeida-Sanchez*, although the government presented the important goal of illegal alien interdiction, the Court refused to exempt searches of cars conducted by roving border patrols 20 miles north of the border from the probable cause requirement. *Almeida-Sanchez*, 413 U.S. at 273. In the words of the Court,

> It is not enough to argue, as does the Government, that the problem of deterring unlawful entry by aliens across long expanses of national boundaries is a serious one. The needs of law enforcement stand in constant tension with the Constitution's protections of the individual against certain exercises of official power. It is precisely the predictability of these pressures that counsels a resolute loyalty to constitutional safeguards.

Id.

In *Von Raab*, however, the Court ignored its own delineation of the issue before it. In *Camara*, the Court wrote that "the question is not whether the public interest justifies the type of search . . . , but whether it should be evidenced by a warrant which . . . depends in part upon whether the burden of obtaining [one] is likely to frustrate the governmental purpose behind the search." *Camara*, 387 U.S. at 533. Instead of engaging in this inquiry, the *Von Raab* Court simply rejected all arguments against exemption without ever pointing to *any* practical need for Customs to be exempt from the constitutional restrictions on its actions.

86. *See* Skinner v. Railway Labor Execut. Ass'n., 109 S. Ct. 1402, 1423-24 (1989) (Marshall, J., dissenting) (without probable cause provisions, fourth amendment is devoid of meaning). The purpose of the clause is to give content to the fourth amendment's requirement of reasonableness. *Id.* at 1423; *United States Dist. Ct.*, 407 U.S. at 309; *see also Almeida-Sanchez*, 413 U.S. at 277 (Powell, J., concurring). The framers determined that the proper balance between the individual's privacy and the government's need to obtain evidence could be maintained by the warrant and probable cause standard. United States v. Place, 462 U.S. 696, 722 (1983) (Blackmun, J., concurring). They struck the balance in favor of protecting individual privacy rights by circumscribing governmental intrusion and allowing only searches validated by a warrant issued upon probable cause, even at the risk of losing the desired evidence. *See Skinner*, 109 S. Ct. at 1430 (Marshall, J., dissenting) (efforts to maximize public welfare must be pursued within constitutional boundaries). If the end alone justifies the means, then the express warrant and probable cause standard for determining the constitutionality of means employed can serve no purpose. *See id.* at 1423-26 (Marshall, J., dissenting) (the Court has practically read the probable cause standard out of the Constitution). Without the express standard of the warrant clause, the amendment itself is useless because the term "unreasonable" is subject to shifting majorities' "momentary vision of the social good." New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Brennan, J., concurring in part and dissenting in part); *Skinner*, 109 S. Ct. at

objective exempts its action from the warrant clause, then the *Von Raab* Court has set a dangerous precedent indeed.[87]

Second, even if the warrant requirement is impractical, the *Von Raab* Court deviated from its own precedent in exempting Customs' urinalysis from any requirement of suspicion.[88] In warrant exception cases, the Court has weighed the intrusiveness of the search to determine what level of suspicion the government needs for the search to be reasonable.[89] The Court has required more intrusive searches to be based on higher levels of suspicion.[90] The Court has weighed

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1423 (Marshall, J., dissenting).

87. *Von Raab* is a classic case where the Court has engaged in a "heroic" exercise of symbolism, making Customs employees an example of our government's commitment to eradicating drug use while trampling fourth amendment rights in the process. *Von Raab*, 109 S. Ct. at 1398, 1402 (Scalia, J., dissenting). Such a practice in symbolism "seriously imperils 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'" *Skinner*, 109 S. Ct. at 1426 (Marshall, J., dissenting), *quoting*, Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347, 353 (1967). In times of grave societal threats, beneficent governmental goals may result in unconstitutional means, the unconstitutionality of which is difficult to notice. *See id.* at 1422 (Marshall, J., dissenting). It is extremely dangerous to allow fundamental freedoms to be sacrificed for these societal urgencies. *Id.* Brief consideration of the World War II relocation camp cases like Korematsu v. United States, 323 U.S. 214 (1944) or of the Red Scare-McCarthy era cases like Schenck v. United States, 249 U.S. 47 (1919) makes this danger to fourth amendment privacy rights in the face of urgent societal goals quite evident. *Id.* In the words of Justice Brandeis:

> [e]xperience 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.

Olmstead, 277 U.S. at 479 (Brandeis J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347, 353 (1967).

88. *See Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting) (Court has never allowed suspicionless bodily search except for prison inmates); *Skinner*, 109 S. Ct. at 1424 & n.2 (Marshall, J., dissenting) (suspicionless searches are nonintrusive encounters with no personal contact). Traditionally, the Court has been protective of privacy interests. *See* Delaware v. Prouse, 440 U.S. 648, 663 (1979) (suspicionless spot checks for drivers licenses invalidated due to physical and psychological intrusiveness); Michigan v. Tyler, 436 U.S. 499, 505 (1978) (individual retains privacy interest in burned building); United States v. Ortiz, 422 U.S. 891, 896 (1975) (search of car is "substantial invasion of privacy"); Terry v. Ohio, 392 U.S. 1, 24-25 (1968) (limited frisk of outer garments is severe intrusion on "cherished personal security").

In the past, the Court has required probable cause for searches that are less intrusive than urinalysis. *See Place*, 462 U.S. at 708-10 (90 minute detention of luggage requires probable cause); United States v. Brignoni-Ponce, 422 U.S. 873, 880-81 (1975) (momentary border stop of cars to briefly question occupants requires reasonable suspicion); *Terry*, 392 U.S. at 30 (carefully limited search of outer garments requires reasonable suspicion).

89. *See Place*, 462 U.S. at 722-23 & n.2 (Blackmun, J., concurring) (critical threshold issue is search's intrusiveness); United States v. Villamonte-Marquez, 462 U.S. 579, 588-89 (1983) (higher level of cause needed for roving patrol stops than for checkpoint stops due to intrusiveness); *Prouse*, 440 U.S. at 656 (same).

90. *Compare Ortiz*, 422 U.S. at 896 (search of car requires probable cause) *and Almeida-Sanchez*, 413 U.S. at 273 (same) *with Prouse*, 440 U.S. at 648 (brief, roving stop of car to check for driver's license and registration requires reasonable suspicion)

two factors to determine the intrusiveness of a search: the actual interference with the individual's personal privacy,[91] and the individual's relationship with the governmental body conducting the search.[92] Depending upon this relationship, an individual may have a reduced expectation of privacy.[93] In those circumstances in which an individual has a reduced expectation of privacy, the Court has found more intrusive government action to be reasonable on lesser levels of suspicion.[94]

Because government employees have reduced privacy expectations, the Court has found an employer's search of an employee's office based on reasonable suspicion to be constitutional.[95] However, except in cases where there are pressing, exigent needs,[96] the Court has *never* reduced an individual's privacy interest to allow intrusive bodily searches without *any* cause.[97] Traditionally, the Supreme

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and Brignoni-Ponce, 422 U.S. at 884 (roving border patrol stops for brief questioning requires reasonable suspicion).

Compare Prouse, 440 U.S. at 663 *with Villamonte-Marquez*, 462 U.S. at 579, 592-93 (suspicionless boarding of vessels upheld for brief documentation check) *and* United States v. Martinez-Fuerte, 428 U.S. 543, 545 (1976) (brief, fixed checkpoint stop without suspicion upheld).

91. The Court considers both the objective and the subjective intrusion of a search. *Prouse*, 440 U.S. at 656-57. The objective intrusion of a search refers to both the nature and quality of the search. *See id.* at 656; United States v. Place, 462 U.S. 696, 703 (1983) (drug enforcement agents' 90 minute detention of luggage). In determining the subjective intrusion of the search, the Court takes into account the physical and psychological effects that the intrusion may have on the individual. *Prouse*, 440 U.S. at 656-57. The Court considers whether the search generates concern, fright, annoyance, and anxiety. *See id.* ; *Ortiz*, 422 U.S. at 894-95; *Terry*, 392 U.S. at 24-25 (1968) (frisk of person).

92. *See Skinner*, 109 S. Ct. at 1417 (given employment context, transport of employees was minimal intrusion); O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (reasonable privacy expectations vary in different contexts); New Jersey v. T.L.O., 469 U.S. 325, 337 (1985) (search's reasonableness depends on its context).

93. *See Skinner*, 109 S. Ct. at 1422 (railroad employee has diminished privacy expectation in information concerning fitness); *O'Connor*, 480 U.S. at 718 (depending on work environment, employee may have no privacy expectation at all); United States v. Montoya de Hernandez, 473 U.S. 531, 538-40 (1985) (entrant at the border has reduced privacy expectation).

94. Winston v. Lee, 470 U.S. 753, 767 (1985). *See Skinner*, 109 S. Ct. at 1419 (due to reduced privacy expectation, suspicionless blood and urine tests upheld); Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (due to reduced privacy expectation, suspicionless body cavity searches of prison inmates upheld).

95. *See O'Connor*, 480 U.S. at 726 (employer entry into employee's office for files). However, an individual does not leave his fourth amendment rights at the door. *Skinner*, 109 S. Ct. at 1430 (Marshall, J., dissenting); *see also O'Connor*, 480 U.S. at 717.

96. *See Skinner*, 109 S. Ct. at 1418-20 (impaired railroad employees could cause great human loss and property damage); Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562, 566 (8th Cir, 1988) (impaired nuclear power plant employees could cause catastrophic harm); McDonnell v. Hunter, 809 F.2d 1302, 1308 (8th Cir. 1987) (prison guards in contact with maximum security inmates).

97. *See Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting) (Court has never upheld suspicionless body search except for prison inmates); Skinner v. Railway Labor Executives Ass'n., 109 S. Ct. 1402, 1423-25, 1427, 1429 (1989) (Marshall, J., dis-

Court has permitted suspicionless searches only where they are minimally intrusive,[98] or on commercial premises in pervasively regulated industries.[99] In such circumstances, the Court reasoned that limited intrusions are the only practical means for the government to accomplish its goal.[100]

In contrast, urinalysis is a very intrusive search[101] and the procedural protections taken by Customs cannot change the *nature* of the search. Customs is not a heavily regulated industry and although Customs transferees know about the testing, mere knowledge is not equivalent to the implied consent of a participant in a pervasively

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senting) (probable cause is indispensable prerequisite for full scale search). Usually, the Court requires personal intrusions or detentions to be based on cause. *See Winston*, 470 U.S. at 767 (state needs substantial justification to intrude on one's body); United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975) (border patrol's detention of cars beyond momentary questioning requires probable cause); Schmerber v. California, 384 U.S. 757, 770 (1966) (fourth amendment forbids bodily intrusions on mere chance of finding evidence). *Cf.* South Dakota v. Opperman, 428 U.S. 364, 390 n.8 (1976) (Marshall, J., dissenting) (Court has never permitted search of car or home on mere assumption that it might contain weapons).

98. *Skinner*, 109 S. Ct. at 1424 (Marshall, J., dissenting). *But see* Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (suspicionless body cavity searches of inmates is reasonable).

In *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976), the Court explained that a fixed checkpoint stop was a minimal intrusion because the occupants were only required to respond to one or two questions and possibly show some identification. *Id.* at 558. In addition, neither the vehicle nor the occupants were searched. *Id. Compare* United States v. Villamonte-Marquez, 462 U.S. 579 (1983) (minimally intrusive fixed checkpoint stop requires no suspicion) *with* Delaware v. Prouse, 440 U.S. 648 (1979) (brief spot check stop to inspect documents requires reasonable suspicion) *and Brignoni-Ponce*, 422 U.S. at 873 (roving border patrol stop for brief questioning requires reasonable suspicion). Although roving patrols and fixed checkpoint stops both involve brief detention for questioning, the roving patrol requires a higher level of cause because they are more likely to frighten or annoy travelers. *See* United States v. Ortiz, 422 U.S. 891, 894-95 (1975) (difference between checkpoint and roving stop is the level of intrusiveness).

99. *Skinner*, 109 S. Ct. at 1424 (Marshall, J., dissenting) ("routinized, fleeting, and nonintrusive encounters" entailing no personal contact). Because of the pervasiveness of federal licensing and regulation in some industries, the Court has upheld suspicionless, statutory inspections of commercial premises. Donovan v. Dewey, 452 U.S. 594, 606 (1981) (stone quarry); United States v. Biswell, 406 U.S. 311, 317 (1972) (gun dealer); Colonnade Catering Corp. v. United States, 397 U.S. 72, 75-76 (1970) (liquor dealer). In upholding these programs, the Court has found that a participant in such an industry has a substantially reduced privacy interest due to the pervasiveness of the regulatory system. *Dewey*, 452 U.S. at 606 (mining); Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978) (occupational safety and health inspection); *Biswell*, 406 U.S. at 316 (sale of firearms). The Court has also noted the minimum intrusiveness of these inspections. Camara v. Municipal Ct., 387 U.S. 523, 537 (1967) (inspection neither personal in nature or aimed at discovering criminal evidence).

100. *Villamonte-Marques*, 462 U.S. at 589 (brief, suspicionless inspection of vessel); *Prouse*, 440 U.S. at 663 (roving stop of car); *Brignoni-Ponce*, 422 U.S. at 881 (roving stop of car). *But cf. Skinner*, 109 S. Ct. at 1419 n.9 (search's reasonableness does not turn on existence of less intrusive alternatives); Illinois v. LaFayette, 462 U.S. 640, 647 (1983) (same).

101. For a discussion of urinalysis' intrusiveness, see *supra* note 36.

regulated industry.[102] Therefore, an employee's implied consent to search cannot be inferred. While transferees may expect fitness and integrity investigation, they do not expect personal bodily intrusion.

In addition, the *Von Raab* Court failed to note other practical alternatives for detecting drug use, such as background checks, past employment records, and rapid eye tests.[103] In an uncharacteristic manner, the Court callously represented urinalysis as a routine administrative function and compared citizens' most private expectations in their persons to a proprietor's interest in his commercial stock. The *Von Raab* decision that urinalysis without suspicion is reasonable is a substantial deviation from precedent.[104]

Finally, the *Von Raab* Court manipulated the fourth amendment balancing test to find Customs' urinalysis program reasonable.[105] Traditionally, when the warrant clause requirements are impractical, the Court weighs the parties' respective interests to determine the search's reasonableness.[106] The Court has found the government's action to be reasonable if the search is justified in its inception and if it is an effective means to further the government's goal.[107] Generally, a search is justified in its inception if the govern-

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102. *See Marshall*, 436 U.S. at 313-14 (Occupational Safety and Health Act's regulations not pervasive enough to allow inspections on implied consent theory); *Donovan*, 452 U.S. at 606 (pervasiveness of regulatory scheme determines if inspection program requires warrant).

103. For a discussion of other drug detection methods, see *supra* note 80.

104. *See* Almeida-Sanchez v. United States, 413 U.S. 266, 270-72 (1973). In *Almeida-Sanchez*, the Court struck down a roving border patrol's suspicionless search of a car. *Id.* at 273. In doing so, the Court rejected the government's contentions that the search fell into the "administrative exception." *Id.* at 270-72. The Court explained the difference between the search of a car and a commercial inspection lies in the fact commercial proprietors "engaged in such federally licensed and regulated enterprises accept the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business." *Id.* at 271.

Like the petitioner in *Almeida-Sanchez*, Customs employees are "not engaged in any regulated or licensed business." *See id.* Referring to this "absurd" analogy, Justice Marshall noted, "[t]his line of cases has exclusively involved searches of employer *property*, with respect to which 'certain industries have such a history of government oversight that no reasonable expectation of privacy could exist for a *proprietor* over the *stock* of such enterprise'." *Skinner*, 109 S. Ct. at 1429-30 (Marshall, J., dissenting), *quoting*, Marshall v. Barlow's, Inc., 436 U.S. 307, 313 (1978)).

105. *See Skinner*, 109 S. Ct. at 1424-25, 1429 (Marshall, J., dissenting) (Court's shameless manipulable balancing inquiry). In his dissent in *Skinner*, Justice Marshall concluded that, even under the balancing test, the urinalysis is unreasonable. *Id.* at 1430-31. He went further to say that "[o]nly by erroneously deriding as 'minimal' the privacy and dignity interests at stake, and by uncritically inflating the likely efficacy of the . . . testing program, does the majority strike a different balance." *Id.* at 1431.

106. *E.g.*, O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (employer's interest in efficient workplace versus employee's privacy in office); United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (Customs' interest at the border versus alien's privacy); Winston v. Lee, 470 U.S. 753, 760 (1985) (state's interest in evidence versus suspect's interest in his body); United States v. Villamonte-Marquez, 462 U.S. 579, 588 (1983) (Customs' interest in checking vessels versus shipowner's privacy).

107. Usually, the Court requires the search to be justified in its inception and

ment reasonably believes that it will produce the searched-for evidence.[108] The search must also be more than marginally effective in furthering the government's goal.[109]

In its balancing process, the *Von Raab* Court trivialized the privacy interests at stake, drawing an "absurd analogy" between the privacy interests of Customs transferees and those of commercial proprietors.[110] Despite urinalysis' highly intrusive nature,[111] however, the *Von Raab* Court justified Customs' urinalysis by citing our society's pervasive drug problem rather than a concrete belief that urinalysis would detect drug users.[112] Customs did not even expect to detect users: it admitted that its workforce was largely drug free. In addition, the urinalysis program could be marginally effective at best,[113] given Customs' notification process which provides a trans-

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reasonably related in scope. *E.g.*, *O'Connor*, 480 U.S. at 726 (employer's search of employee's office); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (principal's search of student's handbag); Terry v. Ohio, 392 U.S. 1, 20 (1968) (police officer's frisk of suspicious-looking male).

108. *O'Connor*, 480 U.S. at 726. *See Montoya de Hernandez*, 473 U.S. at 541 (detention of traveler based on reasonable suspicion of alimentary smuggling justified in inception).

109. *See* Delaware v. Prouse, 440 U.S. 648, 659-60 (1979) (due to its negligible contribution to safety, roving spot check is not "sufficiently productive mechanism" to further government's goal); National Treasury Employees Union v. Von Raab, 816 F.2d 170, 183 (5th Cir. 1987) (Hill, J., dissenting) (effectiveness is the most important factor). The Court has found a search to be reasonable in scope if "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive . . . ." *T.L.O.*, 469 U.S. at 342.

110. Skinner v. Railway Labor Execut. Ass'n., 109 S. Ct. 1402, 1427 (1989) (Marshall, J., dissenting) (absurd analogy between urinalysis and fixed checkpoint stops); *id.* at 1423, 1426-32 (Marshall, J., dissenting) (Court trivialized raw intrusiveness of urinalysis). For a discussion of urinalysis as a substantial invasion of privacy, see *supra* note 36 and *supra* note 88 (Court has been protective of privacy interests). *But see* Michigan v. Tyler 436 U.S. 499, 505 (1978) (individual retains privacy interest in burned premises).

111. For a discussion of urinalysis' intrusiveness, see *supra* note 36.

112. *See Von Raab*, 109 S. Ct. at 1399-1400 (Scalia, J., dissenting) (opinion is supported by nothing but speculation); *Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting) (mere assertion of a "special need" justifies demeaning urinalysis). *But see* Almeida-Sanchez v. United States, 413 U.S. 266, 273-74 (1973) (assertion of a serious national problem is not enough to support search).

113. *See* Delaware v. Prouse, 440 U.S. 648, 658-63 (1979); *Von Raab*, 816 F.2d at 183 (program is ineffective because it only tests transferees, it only tests once, and employees can defeat test by abstaining after notification). In *Prouse*, the Court struck down suspicionless, roving spot checks because of their intrusion, their "marginal contribution" to highway safety, their great interference with innocent travellers, and the availability of alternative methods. *Prouse*, 440 U.S. at 657-63. The Court found the program to be only marginally effective because "the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed." *Id.* at 659-60. The Court held that, given the availability of alternative methods, the spot checks' marginal contribution to safety could not justify the practice. *Id.* at 659.

Since Customs' workforce is largely drug free, its urinalysis program is very similar to the spot checks invalidated in *Prouse*. The number of innocent employees

feree with five days warning before a drug test. Thus, the transferee need only abstain from drug use for five days to defeat the test entirely. The Court's assertion that transferees might be unable to abstain or probably will not know they can beat the test is very unconvincing.

Moreover, this program is ineffective in achieving Customs' goal of integrity and safety in the covered positions. It only tests employees for drugs once, at the time of transfer, and never tests the employees currently in these positions. Further, urinalysis is unable to detect current, on-the-job impairment, thereby defeating the safety goal.[114] In the face of these facts, the Court's conclusion that the urinalysis program is effective in meeting Customs' goals reveals a bias in favor of the government.[115] In striking its balance, therefore, the Court should have held that the urinalysis program is unreasonable because it is both unjustified in its inception and it is ineffective in furthering Customs' goals.[116]

In upholding Customs' suspicionless urinalysis program, the *Von Raab* Court not only broadened the "special needs" exception, but practically eliminated any warrant and cause requirement for civil searches of government employees. In our society's rush to "solve" the drug crisis, the Court has sanctioned the use of highly intrusive mandatory urinalysis, notwithstanding the availability of less intrusive alternatives, and allowed the government to justify an intrusive bodily search merely by claiming a compelling interest. The *Von Raab* decision is thus a green light for millions of employers to implement employee urinalysis programs.

If the Court continues to relax the warrant and cause requirements to accommodate the crisis of the day, everyone's fourth amendment rights will be jeopardized. Regrettably, in *Von Raab*, the Court has altered the fourth amendment balance between individuals and their government with the individual's privacy rights in

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tested will be great, while the number of employees detected as users will be small. In addition, there are alternative drug detection methods available. Like the spot checks in *Prouse*, the urinalysis program can make only a marginal contribution to Customs' goals.

114. *See supra* note 6 (urinalysis can only detect past use).

115. *See Skinner*, 109 S. Ct. at 1432 (Marshall, J., dissenting) (Court blindly accepted government's assertion that program will deter drug use).

116. *See Von Raab*, 109 S. Ct. at 1399-1400 (Scalia, J., dissenting) (program is based on speculative needs and harms resulting from drug use); *Skinner*, 109 S. Ct. at 1423, 1431-32 (Marshall, J., dissenting) (Court overlooked serious flaws in urinalysis program and uncritically inflated its efficacy).

danger of becoming "[r]ights declared in words [but] lost in reality."[117]

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117. Olmstead v. United States, 277 U.S. 438, 473 (1928) (Brandeis, J., dissenting), *overruled*, Katz v. United States, 389 U.S. 347, 353 (1967).