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Constitutional Law - International Brotherhood of Teamsters, v. Department of Transportation: The Fourth Amendment, Another Victim of the War on Drugs

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CONSTITUTIONAL LAW

INTERNATIONAL BROTHERHOOD OF TEAMSTERS v. DEPARTMENT OF TRANSPORTATION: THE FOURTH AMENDMENT, ANOTHER VICTIM OF THE WAR ON DRUGS

I. INTRODUCTION

In *International Brotherhood of Teamsters, Chauffeurs, Western Conference of Teamsters v. Department of Transportation*¹ the Ninth Circuit held that regulations mandating various forms of drug testing, enacted by the Federal Highway Administration of the Department of Transportation² (FHWA), did not violate the Fourth Amendment of the United States Constitution.³ The court also held that the decision to promulgate the regulations was not arbitrary or capricious.⁴ The court found that compelling governmental interests in safety and deterrence⁵, balanced against the commercial drivers' limited privacy expectations,⁶ rendered the FHWA's regulations constitutional on their face.⁷

1. *International Bhd. of Teamsters, Chauffeurs, W. Conference of Teamsters v. Department of Transp.*; *Amalgamated Transit Union v. Department of Transp.*; *Railway Labor Executives' Ass'n, United Transp. Union v. Department of Transp.*; *Railway Labor Executives' Ass'n, Bhd. of Maintenance of Way Employees v. Department of Transp.*; *The Oil, Chem. and Atomic Workers Int'l Union ("OCAWIU"), and Locals 1-219, 1-128, and 1-5 v. Department of Transp., Nat'l Transp. Safety Bd.*, 932 F.2d 1292 (9th Cir. 1991) (per Tang, J.; the other panel members were Skopil, J. and Fletcher, J.).

2. The Federal Highway Administration of the Department of Transportation [hereinafter FHWA].

3. *International Bhd. of Teamsters*, 932 F.2d at 1306-1308. (See *infra* note 19 for text of Fourth Amendment.).

4. *Id.* at 1308-09.

5. *Id.* at 1303-04.

6. *Id.* at 1300-02.

7. *Id.* at 1309. Drug testing is not an unreasonable search under the fourth amendment. *Id.*

II. FACTS

On June 14, 1988, the FHWA proposed that certain commercial drivers be tested for the use of controlled substances.⁸ The FHWA conducted public hearings and received comments concerning the proposed drug testing program.⁹ On November 21, 1988, the FHWA published its drug testing regulations.¹⁰ The purpose of the regulations was "to detect and deter the use of drugs by bus and truck drivers."¹¹ All interstate motor carriers were to implement drug testing programs.¹²

The FHWA used the Department of Transportation's procedures for conducting drug tests.¹³ Under this scheme, positive drug test results would be reported first to the employer's designated Medical Review Officer (MRO),¹⁴ who would then report the test results to the employer.¹⁵

The Unions¹⁶ brought actions to challenge the FHWA regulations on their face rather than as applied. They attacked the

8. *International Bhd. of Teamsters*, 932 F.2d at 1294. The proposed rulemaking was codified at 53 Fed. Reg. 22,268 (1988).

9. *International Bhd. of Teamsters*, 932 F.2d at 1294. The FHWA conceded that data was scarce setting out drug use of commercial drivers in regard to highway accidents. The FHWA attributed this to commercial drivers working without supervision. The extent of the problem was left undetermined. *Id.*

10. The regulations were codified at 49 C.F.R. § 391.81-391.123 (1989). The FHWA justified the promulgation of the drug testing regulations due to the pervasiveness of drug abuse in society. *International Bhd. of Teamsters*, 932 F.2d at 1295.

11. 53 Fed. Reg. at 47,135.

12. The regulations require "all interstate motor carriers to implement drug testing programs for drivers operating vehicles (i) weighing more than 26,000 pounds, (ii) carrying fifteen or more passengers, or (iii) transporting hazardous materials." 49 C.F.R. § 391.85. The carriers must test all employee drivers and all contract drivers who are under contract with them for ninety or more days a year. *Id.*

13. See 49 C.F.R. § 40.1-40.41. The drug testing urine collection site must be properly secured and private. 49 C.F.R. § 40.25(e). Direct observation of the urination is allowed only when the monitor may reasonably suspect the integrity of the specimen. *Id.* An immunoassay test is initially performed if there is a positive reading; then it is confirmed through a gas chromatography/mass spectrometry technique. 49 C.F.R. § 40.29(e)-(f).

14. 49 C.F.R. § 40.33(a). The MRO must be a licensed physician with knowledge of substance abuse disorders. 49 C.F.R. § 40.33(b).

15. The MRO investigates alternative explanations for the positive result and must provide the employee an opportunity to explain the result. 49 C.F.R. § 40.33(b)-(c). If the positive result is due to legitimate medical treatment or is scientifically insufficient or unreliable, the test result shall be reported as negative to the employer. 49 C.F.R. § 40.33(f).

16. The International Brotherhood of Teamsters, Amalgamated Transit Union, Railway Labor Executives' Association, and Oil, Chemical, and Atomic Workers (collectively, "the Unions").

validity of random, biennial, pre-employment, and post-accident testing schemes.¹⁷ The Ninth Circuit reviewed the FHWA's regulations to decide whether the drug tests can ever be conducted without offending the fourth amendment.¹⁸

III. BACKGROUND

A. THE FOURTH AMENDMENT

The fourth amendment's¹⁹ main function is "to protect personal privacy and dignity against unwarranted intrusion by the state."²⁰ The fourth amendment does not apply to search or seizure effected by a private party on his own, but if the private party acted as an agent or instrument of the government the fourth amendment does apply.²¹ Drug testing

17. *International Bhd. of Teamsters*, 932 F.2d at 1295. The regulations institute drug testing in six instances: 1) random testing, 49 C.F.R. § 391.109; 2) biennial testing (employers may cease biennial testing once they have fully implemented their random drug testing programs), 49 C.F.R. § 391.105; 3) pre-employment drug tests (limited to driver applicants whom the carrier intends to hire), 49 C.F.R. § 391.103; 4) reportable accidents (An accident is "reportable if it involves (a) a fatality, (b) an injury demanding immediate medical treatment away from the scene of the accident, or (c) at least \$4,400 in property damage"), 49 C.F.R. § 391.113; 5) "when the employer has cause to believe that a driver is using a controlled substance." (conduct giving rise to "the reasonable suspicion must have been witnessed by at least one supervisor trained in the detection of probable drug use."), 49 C.F.R. § 391.99; 6) follow-up testing for drivers who tested positive for drug use, C.F.R. § 391.123. The Unions did not challenge the fifth and sixth testing schemes. *International Bhd. of Teamsters*, 932 F.2d at 1295.

18. *Id.* at 1298.

19. U.S. CONST. amend. IV states:

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 particularly describing the place to be searched, and the persons or things to be seized.

Id.

20. *Schmerber v. California*, 384 U.S. 757, 767 (1966). Schmerber was convicted of driving under the influence while intoxicated by liquor. The U.S. Supreme court held that blood taken at Schmerber's objection by a physician in a hospital after he was arrested did not violate Schmerber's Fourth Amendment right to be free of unreasonable searches and seizures. *Id.* at 772.

21. See *United States v. Jacobsen*, 466 U.S. 109, 113-14 (1984). Defendants were convicted of possession of an illegal substance with intent to distribute. Federal agents were informed by the employees of a private freight carrier that they had observed a white powdery substance in a damaged package. *Id.* at 111. These employees had independently opened the package to examine the contents, cut open the package and found plastic bags containing white powder. *Id.* The court stated that the fourth amendment only protected against governmental action. *Id.* at 113. It is not applicable to a search or seizure made by a private citizen unless acting as an agent of the government or with the participation or knowledge of the government. *Id.*

performed by private parties under compulsion of sovereign authority or government regulations is also controlled by the fourth amendment.²²

B. DRUG TESTING & SEARCH AND SEIZURE

The extraction of blood from the human body to be analyzed for alcohol content was first deemed a fourth amendment search in *Schmerber v. California*.²³ While urine testing does not involve surgical intrusion into the body,²⁴ the Federal Courts of Appeals have unanimously agreed that urine testing must be deemed a search under the fourth amendment.²⁵ A urine test may also be a fourth amendment seizure since it may be a meaningful interference with the employee's possessory interest in his bodily fluids.²⁶

When special governmental needs beyond normal law enforcement are served through a fourth amendment intrusion it becomes necessary to balance individual privacy expectations against governmental interests to determine if a warrant or some level of individualized suspicion should be required in the particular context.²⁷ A search generally must be supported by a warrant issued upon probable cause.²⁸ The warrant

22. *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602, 614 (1989). The U.S. Supreme Court held constitutional under the fourth amendment a Federal Administration program that (1) required railroads to administer blood and urine tests to train employees involved in major accidents, and (2) allowed railroads to conduct breath and urine tests to employees who violate certain safety regulations. *Id.* at 633. "[c]lear indices of . . . Government encouragement, endorsement, and participation . . . suffice to implicate the fourth amendment." *Id.* at 615-16.

23. 384 U.S. at 767-68 (*see infra* note 20 for facts of this case.) "The administration of a blood test . . . plainly involves the broadly conceived reach of a search and seizure under the Fourth Amendment." *Id.*

24. *Skinner*, 489 U.S. at 617. "The chemical analysis of urine, like . . . blood, can reveal . . . private medical facts about an employee . . ." *Id.*

25. *Id.* *See* *Railway Labor Executives Assoc. v. Burnley*, 839 F.2d 575, 580 (9th Cir. 1988) (held regulations mandating blood and urine tests of employees after certain train accidents, fatal incidents, and rule violations without requiring individualized suspicion violated employees' fourth amendment rights).

26. *See Jacobsen*, 466 U.S. at 113. (*See infra* note 21 for discussion of this case.) *See also Skinner*, 489 U.S. at 618, "[n]ot every governmental interference with an individual's freedom of movement raises such constitutional concerns that there is a seizure of the person." *Id.*

27. *Id.* at 617-18.

28. U.S. CONST. amend. IV. *See also Griffin v. Wisconsin*, 483 U.S. 868 (1987). Griffin was convicted of possession of a firearm by a felon while on probation. *Id.* at 870. His home was searched by probation officers without a warrant. *Id.* During this search the officers found a gun. *Id.* The court usually requires a search be pursuant to a warrant and thus supported by probable cause. *Id.* at 873. The court, however,

requirement protects citizens' privacy interests by assuring them that they will not be subject to searches or seizures that are random or arbitrary acts of the government or its agents.²⁹ However, if there is a special need, a warrant or probable cause may not be required.³⁰

The Government has a strong interest in dispensing with the warrant requirement when the burden in obtaining the warrant is apt to frustrate the governmental purpose for the search.³¹ A delay in obtaining a warrant may result in the destruction of evidence.³² A warrant does not provide additional protection of personal privacy.³³ *Skinner* noted that a warrant was not essential to render drug and alcohol test intrusions reasonable under the fourth amendment.³⁴

Even in circumstances where it is reasonable to dispense with the warrant requirement, there must be probable cause for the search.³⁵ However, the usual requirements of a warrant and probable cause³⁶ do not necessarily apply to drug testing.³⁷

has made exceptions when special needs make the warrant and probable cause requirement impracticable. *Id.* The special needs must be beyond the normal need for law enforcement. *Id.* The state's operation of a probation system presents special needs beyond law enforcement that justifies a departure from the probable cause and warrant requirements. *Id.*

29. *Skinner*, 489 U.S. at 621-622.

30. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 666 (1989). The U.S. Supreme Court held that the Custom Service's drug-testing program was subject to the fourth amendment and that it was not necessary for the Custom Service to obtain warrants to conduct drug testing. *Id.*

31. *Camera v. Municipal Court*, 387 U.S. 523, 533 (1967). Camera refused several times to allow the San Francisco Department of Public Health to inspect his premises because they lacked a search warrant. *Id.* at 526-27. Camera was arrested for violating a San Francisco housing code by refusing to allow the warrantless inspection of his residence. *Id.* at 527. The court held that administrative searches of this kind were significant intrusions on the interests protected by the fourth amendment, when conducted without a warrant. *Id.* at 534.

32. *Skinner*, 489 U.S. at 623.

33. *Von Raab*, 489 U.S. at 667 (quoting *South Dakota v. Opperman*, 428 U.S. 364, 383 (1976) (Powell, J., concurring)). "[Because there is not] a discretionary determination to search based on a judgment that certain conditions are present, there are simply no special facts for a neutral magistrate to evaluate." *Id.*

34. *Skinner*, 489 U.S. at 624.

35. *Id.*

36. See U.S. CONST. amend. IV.

37. *Bluestein v. Skinner*, 908 F.2d 451, 455 (9th Cir. 1990), *cert. denied*, U.S. , 111 S. Ct. 954 (1991). The Federal Aviation Administration required random drug testing of private airline employees. *Id.* at 453. Employees included under the regulations were flight crew members, maintenance workers, air traffic controllers and various other categories of employees. *Id.* The testing was designed to deter drug use and to prevent performance by employees under the influence of narcotics. *Id.* at 455. "[i]t is clear that the . . . drug testing requirements serve special needs, beyond the normal need for law enforcement. . . ." *Id.* The court held that the random drug

If a court concludes that a testing program invades reasonable expectations of privacy and that the tests are motivated by special needs other than law enforcement, the court must balance the private and governmental interests to determine if the testing is justified.³⁸

*International Brotherhood of Electrical Workers, Local 1245 v. Skinner*³⁹ established a two-prong test to determine whether an intrusion exists on an individual's reasonable expectation of privacy. The first inquiry is whether employees in a particular industry already have a diminished expectation of privacy due to other circumstances related to their jobs.⁴⁰ The second inquiry looks to the steps taken within the testing program to minimize further intrusion into the employees' privacy.⁴¹

Employees who participate in industries that are regulated to ensure safety, health and fitness have a diminished expectation of privacy.⁴² Drug testing poses a limited threat to regulated employees' privacy expectations.⁴³

The government has a compelling interest in testing employees in these industries.⁴⁴ Employees who are subject to testing could cause severe injury to others even during a momentary lapse of attention.⁴⁵ Testing is also important because employees who are impaired often do not show outward signs.⁴⁶ Where

testing of airline employees who held safety-sensitive positions did not violate the employees' fourth amendment rights. *Id.* at 457. See also *Von Raab*, 489 U.S. at 666.

38. *Bluestein*, 908 F.2d at 455-456.

39. 913 F.2d 1454 (1990).

40. *Id.* at 1463.

41. *Id.*

42. *Skinner*, 489 U.S. at 627. See The Hours of Service Act (1907), where the relationship between safety and employee fitness was recognized by Congress.

43. *Skinner*, 489 U.S. at 628. ("[d]iminished expectation of privacy attaches to information relating to the physical condition of covered [by regulation] employees and to . . . reasonable means of procuring such information." *Id.*)

44. *Id.* The government's compelling interests in testing are not an undue infringement on the employees' privacy expectation and outweighs the employees' privacy concerns. *Id.* at 633. See also *Von Raab*, 489 U.S. at 675 n. 3. "It is sufficient that the Government have a compelling interest in preventing an otherwise pervasive societal problem from spreading to the particular context." *Id.*

45. *Skinner*, 489 F.2d at 628. "An idle locomotive, sitting in the roadhouse, is harmless. It becomes lethal when operated negligently by persons who are under the influence of alcohol or drugs." *Id.*

46. *Id.* Supervisors are not trained to detect outward signs that are not detectable by lay persons or in many cases physicians. *Id.* "Employees . . . can cause great human loss before any signs of impairment become noticeable to supervisors or others." *Id.* See also *Von Raab* 489 U.S. at 674. "Detecting drug impairment on the part of employees can be a difficult task, especially where . . . it is not feasible to subject employees . . . to day to day scrutiny that is the norm in more traditional office environments." *Id.*

the harm the Government seeks to guard against is substantial, prevention furnishes an adequate justification for reasonable searches in furtherance of the governmental goals.⁴⁷

IV. THE COURT'S ANALYSIS

A. THE APPLICABILITY OF THE WARRANT REQUIREMENT

The Ninth Circuit balanced the drivers' privacy expectations against the government's interest to determine whether a warrant is required by the Constitution.⁴⁸ The FHWA implemented the drug testing schemes to promote public safety and to deter drug use by bus and truck drivers.⁴⁹ The Ninth Circuit found no need for a warrant because of the standardized nature of the tests and the administrators' minimal discretion in the selection of which employees to test.⁵⁰ Thus, the fourth amendment does not mandate that motor carriers obtain a warrant prior to administration of the drug tests ordered by the FHWA.⁵¹

B. RANDOM DRUG TESTING

The Ninth Circuit inquired into the decrease in privacy caused by the search,⁵² relative to the driver's privacy

47. *Id.* at 674-75.

48. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1299 (9th Cir. 1991).

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.

Von Raab, 489 U.S. at 665-66.

49. 53 Fed. Reg. at 47,135.

50. *International Bhd. of Teamsters*, 932 F.2d at 1299. The regulations define how the tests are to be administered and also specify how drivers are to be selected for testing. *Id.* "With respect to pre-employment, post-accident, and biennial drug testing, the drivers are selected by objectively discernible triggering events (a job application, accident, and passage of a preestablished period of time, respectively)." *Id.*

51. *Id.* at 1300. Previous decisions concerning drug-testing hold that the weight is against a warrant requirement. *See, e.g., Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 623-24 (1989); *Bluestein v. Skinner*, 908 F.2d 451, 457 (1990). *See infra* notes 22 and 37 for facts and accompanying discussion of these cases.

52. The search consisted of the act of urination required to collect the specimen. *International Bhd. of Teamsters*, 932 F.2d at 1300.

expectation.⁵³ The privacy expectations of commercial truck drivers are markedly less than those of the public in general.⁵⁴ The court noted that commercial drivers operate in a highly regulated industry.⁵⁵ As such these drivers have already submitted to substantial federal monitoring of their physical health and qualifications,⁵⁶ and they currently undergo biennial urinalysis as part of their regular required physical.⁵⁷ Consequently, the court concluded that the incremental decrease in privacy, resulting from collection of a second urine specimen for drug-testing, was constitutionally tolerable.⁵⁸

The FHWA's primary interests in enacting these regulations were enhanced transportation safety, accident avoidance, and deterrence of drug use.⁵⁹ The Unions argued that there was insufficient evidence of a serious drug problem among commercial drivers, therefore, there was no justification for an abridgement of the drivers' fourth amendment rights.⁶⁰ However, the FHWA had a compelling governmental interest in preventing drivers from using illegal drugs while behind the wheel, showing a concern for safety and deterrence, thus leading to the implementation of random drug testing on commercial drivers.⁶¹

The FHWA had a compelling governmental interest in instituting the drug-testing scheme, and there is only an incremental intrusion on the commercial drivers' privacy expectation.⁶² Random drug testing of commercial drivers does not

53. *Id.*

54. *Id.* 49 C.F.R. § 391.41 regulates the physical condition of drivers. See *National Fed'n of Fed. Employees v. Cheney*, 884 F.2d 603, 612-13 (D.C. Cir. 1989), *cert. denied*, U.S. , 110 S. Ct. 864 (1990) (privacy expectations of security guards were reduced because of extensive medical examinations they were already subjected to); *Thomson v. Marsh*, 884 F.2d 113, 115 (4th Cir. 1989) (employees at chemical plants had reduced privacy expectations because of annual physicals that included urine testing).

55. *International Bhd. of Teamsters*, 932 F.2d at 1300. "Drivers have long been subjected to federal regulation". *Id.*

56. *Id.* Regulations regarding the physical condition of the driver are found in 49 C.F.R. 391.41.

57. 49 C.F.R. 391.105 See also 49 C.F.R. 391.45.

58. *International Bhd. of Teamsters*, 932 F.2d at 1302.

59. 53 Fed. Reg. at 22,271.

60. *International Bhd. of Teamsters*, 932 F.2d at 1304. The Unions also argued that the FHWA failed to rely on less intrusive alternatives to drug testing. *Id.*

61. *Id.* There is a vital governmental interest in the sobriety and fitness of operators of dangerous instrumentalities or equipment. *Id.* "While a single accident may not imperil as many lives as a single airline or train crash, the vast number of drivers on the road at any time multiplies the danger to motorists and raises the FHWA's concern for transportation safety to the level of a compelling governmental interest." *Id.*

62. *Id.* at 1305.

offend the fourth amendment despite the lack of a warrant or individual suspicion.⁶³

C. PERIODIC TESTING

Major carriers must conduct a drug test on all drivers during their first medical examination following commencement of the entire drug testing program.⁶⁴ One year after random drug testing has been fully implemented, motor carriers may discontinue periodic urinalysis for controlled substance use.⁶⁵

The court observed that the constitutional analysis applied to random drug testing applies equally to periodic testing.⁶⁶ Because random testing could miss some drivers, the FHWA has a compelling interest in guaranteeing that all drivers are tested at least once.⁶⁷ Blanket testing will better promote transportation safety and will further advance deterrence, because no driver using or contemplating using drugs will be tempted to play the odds in the hope that random testing will not target him.⁶⁸

The transportation concerns articulated in the FHWA's regulations are compelling.⁶⁹ This outweighs the incremental

63. *Id.* at 1306. See *Hartness v. Bush*, 919 F.2d 170, 173 (D.C. Cir. 1990). In *Hartness* the district court entered a preliminary injunction forbidding agencies in the Executive Office of the President from conducting random urinalysis drug-testing of employees with secret national security clearances. *Id.* at 171. The court held that the random drug testing of employees with secret national security clearances was valid. *Id.* See also *Bluestein*, 908 F.2d at 455 (see *infra* note 37 for discussion of this case.); *American Fed'n of Gov't Employees v. Skinner*, 885 F.2d 884, 889-93 (D.C. Cir. 1989), *cert. denied*, U.S. , 110 S.Ct. 1960 (1990). This action was brought by the American Federation of Government Employees challenging a suspicionless drug testing plan of Department of Transportation employees, alleging violations of the fourth amendment. *Id.* at 886. The court held that the employees' privacy interests were outweighed by the Department of Transportation's compelling interest in preventing drug abuse among employees. *Id.* at 898. The searches could be conducted without any individualized suspicion and were reasonable and consistent with the fourth amendment. *Id.*

64. 49 C.F.R. § 391.105(a). "A motor carrier shall require a driver to be tested . . . at least once every two years commencing with the driver's first medical examination . . . after the motor carrier's implementation of a drug testing program." *Id.* "Exception. A motor carrier may use a driver who participates in a drug testing program of another motor carrier or controlled substance consortium." 49 C.F.R. § 391.105(b).

65. *Id.* at § 391.105(c). Periodic urinalysis may be discontinued if the motor carrier tests its drivers at a 50 percent rate. *Id.*

66. *International Bhd. of Teamsters*, 932 F.2d at 1306. "The drivers' privacy objections have significantly less force in this context." *Id.*

67. *Id.* at 1307.

68. *Id.* "All will know that all will be tested." *Id.*

69. *Id.* at 1305-06.

intrusion on the driver's privacy.⁷⁰ The balance struck in favor of random drug testing does not offend the fourth amendment.⁷¹

D. PRE-EMPLOYMENT TESTING

Pre-employment testing does not violate the fourth amendment for the same reasons as the previous drug-testing schemes.⁷² The privacy expectations of commercial drivers are significantly reduced relative to other members of society.⁷³ They have voluntarily entered a profession which requires physical examinations and urinalysis.⁷⁴ The intrusion is less than in random testing, and there is no element of surprise.⁷⁵ The test is triggered by the job applicant's voluntary conduct and will occur only once in the applicant's career with that carrier.⁷⁶

Pre-employment testing ensures that drivers who use drugs never get behind the wheel.⁷⁷ The concern for preempting accidents outweighs the minimal intrusion on job applicants' privacy, making the conduct of suspicionless, pre-employment testing constitutional.⁷⁸

E. POST-ACCIDENT TESTING

The FHWA's regulations require that drivers arrange to be tested for drug use within thirty-two hours of a "reportable accident."⁷⁹ The Unions voiced the same objections here as they did in regard to the other testing situations.⁸⁰ The FHWA

70. *International Bhd. of Teamsters*, 932 F.2d at 1305-06.

71. *Id.* at 1306. The FHWA's regulations are constitutional on their face. *Id.*

72. *Id.* at 1307.

73. *Id.*

74. *International Bhd. of Teamsters*, 932 F.2d at 1307. The physical examination and the urinalysis is conducted to determine the commercial driver's qualifications. *Id.*

75. *Id.*

76. *Id.*

77. *Id.* "The FHWA need not wait until a driver is actually working (and thus a potential daily hazard) to begin promoting safety and deterrence." *Id.* "The FHWA's decision to require pre-employment testing . . . was [based], at least in part, by . . . evidence of high drug use rates among job applicants." *Id.* at 1307-08 n. 9.

78. *Id.* at 1307-08.

79. 49 C.F.R. § 391.113(a). An accident is reportable if it involves (1) a fatality, (2) an injury demanding immediate medical treatment away from the scene of the accident, or (3) at least \$4,400 in property damage. 49 C.F.R. § 394.3.

80. *International Bhd. of Teamsters*, 932 F.2d at 1308. These objectives were "the intrusion on privacy and the lack of evidence that drug use is a significant factor in accidents involving commercial trucks." *Id.*

bases for post-accident drug testing regulations are deterrence and the need to gather information⁸¹ about the causes of accidents.⁸² The Ninth Circuit upheld the constitutionality of the post-accident drug testing.⁸³

II. The Arbitrary and Capricious Claim

The Ninth Circuit held that the promulgation of these regulations was not arbitrary and capricious.⁸⁴ The FHWA explained why it chose to implement these regulations and considered how these tests would affect the drivers' privacy.⁸⁵ The tests were designed to maximize the drivers' privacy and confidentiality.⁸⁶ The FHWA collected evidence documenting the drug use problem, and demonstrated efficacy of the various drug tests in achieving the goals of deterrence and transportation safety.⁸⁷

V. CRITIQUE

In light of the recent acceptance by the U.S. Supreme Court of drug tests for customs agents⁸⁸ and railroad

81. *Id.* The court did not "express an opinion on whether the government's interest in data collection alone would outweigh the intrusion on drivers' privacy in this instance." *Id.* at n. 11.

82. *Id.* With the information about the causes of accidents appropriate measures can be taken to safeguard the public. *Id.* See also 53 Fed. Reg. at 47,140-41.

83. *International Bhd. of Teamsters*, 932 F.2d at 1308.

84. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292, 1308 (9th Cir. 1991).

85. *Id.* "The announced purpose of the testing program was to detect and deter the use of drugs by bus and truck drivers." *Id.* at 1294. The FHWA reasoned that:

Drug testing and sanctions for use will help discourage substance use and reduce absenteeism, accidents, health care costs, and other drug-related problems. It will act as a deterrent to those individuals who might be tempted to try drugs for the first time or who currently use drugs. Finally, drug testing will protect the health and safety of the employees of motor carriers and other users of the highway system through the early identification and referral for treatment of workers with drug use problems.

Id.

86. *Id.* at 1308.

87. *Id.* The evidence collected was both testimonial and empirical. *Id.* "The FHWA conceded from the outset that data documenting actual drug use by commercial drivers and its role in highway accidents were scarce." *Id.* at 1295. This was attributed to commercial drivers working without supervision. *Id.* "While the FHWA's investigation might not have been paradigmatic, it . . . was sufficiently reasonable to justify its actions." *Id.* at 1308-09.

88. See *National Treasury Employees' Union v. Von Raab*, 489 U.S. 656 (1989) (upholding drug testing when individuals sought promotions and transfers). See *infra* note 30 for facts and accompanying discussion of this case.

workers,⁸⁹ the Ninth Circuit's approval of random, pre-employment, post-accident, and biennial drug testing in *International Brotherhood of Teamsters v. Department of Transportation* is in accord with the U.S. Constitution's fourth amendment search and seizure element and within the mainstream of judicial reasoning.⁹⁰ The finding in *International Bhd. of Teamsters* is also consistent with previous Ninth Circuit decisions.⁹¹ Nevertheless, the allowance of drug testing of commercial drivers is an extension of the erosion of an individual's fourth amendment privacy rights against unreasonable search and seizure by the current Supreme Court.⁹² "Constitutional principles, once abandoned, are not easily reclaimed."⁹³

The Ninth Circuit and the U.S. Supreme Court have focused on the safety interests promoted by drug testing.⁹⁴ Traditionally, public health and safety concerns have been considered the highest level of public interest considerations.⁹⁵ However, this

89. See *Skinner v. Railway Labor Executives' Assco.*, 489 U.S. 602 (1989) (upholding post accident tests for railroad workers). See *infra* note 22 for facts and accompanying discussion of this case.

90. *International Bhd. of Teamsters, Chauffeurs, W. Conference of Teamsters v. Department of Transp.*; *Amalgamated Transit Union v. Department of Transp.*; *Railway Labor Executives' Ass'n, United Transp. Union v. Department of Transp.*; *Railway Labor Executives' Ass'n, Bhd. of Maintenance of Way Employees v. Department of Transp.*; *The Oil, Chem. and Atomic Workers Int'l Union ("OCAWIU"), and Locals 1-219, 1-128, and 1-5 v. Department of Transp., Nat'l Transp. Safety Bd.*, 932 F.2d 1292 (9th Cir. 1991).

91. See, e.g., *Railway Labor Executives' Assoc. v. Skinner*, 934 F.2d 1096 (9th Cir. 1991) (holding Federal Railroad Administration's random drug testing regulations did not infringe on railroad employees' privacy interest, thus constitutional); *International Bhd. of Electrical Workers v. Skinner*, 913 F.2d 1454 (9th Cir. 1990) (holding Department of Transportation drug testing of employees engaged in natural gas, liquefied natural gas, and hazardous liquid pipeline operations constitutional); *Bluestein v. Skinner*, 908 F.2d 451 (9th Cir. 1990), *cert. denied*, U.S. , 111 S.Ct. 954, 112 (1991) (holding Federal Aviation Administration regulations requiring random drug testing of flight crew members, maintenance personnel, air traffic controllers, and several other categories of employees in the private commercial aviation industry does not violate the fourth amendment).

92. See *Skinner*, 489 U.S. 602 (1989) (Marshall, dissenting) The majority in the Ninth Circuit has been "... swept away by society's obsession with stopping the scourge of illegal drugs ... [the decisions in *International Bhd. of Teamsters* and by the current Supreme Court] ... will reduce the privacy all citizens may enjoy." *Id.*

93. *Hartness*, 919 F.2d at 175 (Edwards, dissenting).

94. See, e.g., *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989); *International Bhd. of Teamsters*, 932 F.2d 1292; *International Bhd. of Electrical Workers*, 913 F.2d 1454; *Bluestein*, 908 F.2d 451.

95. *Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pa. Transp. Auth.*, 863 F.2d 1110, 1124 (3rd Cir. 1988). The unions challenged proposed random and return-to-work urinalysis drug and alcohol testing by the public transportation authority. *Id.* at 1112. The court concluded that random drug testing was

focus is at the expense of individuals' fourth amendment rights. The Department of Transportation's drug testing regulations for commercial drivers is far broader and more intrusive than the testing upheld by the U.S. Supreme Court in *Skinner* and *Von Raab*.⁹⁶ In both *Skinner* and *Von Raab* the testing occurred only at one time, when it was prompted by specific events.⁹⁷ In *International Bhd. of Teamsters* there is recurring intrusive testing.⁹⁸ Even though the commercial drivers are subject to comprehensive biennial medical examinations that include urinalysis,⁹⁹ the biennial medical examination does not justify drug testing that is a further intrusion of individual rights. The medical examination's purpose is not to test for drug use,¹⁰⁰ therefore, the commercial driver suffers more than a minimal privacy intrusion.

Even if there is availability of notice before the drug testing, it is not sufficient to justify a suspicionless search under the fourth amendment.¹⁰¹ In reality, there is no notice for random or post-accident testing even though there is notification by the regulation itself that random and post-accident testing will occur. The commercial driver does not know when random testing or an accident will occur. For pre-employment and biennial testing there may be notice by the consensual aspect of applying for employment, since there is notice that an applicant may be subject to drug testing.

The court has balanced the public interest in safety and the government's interest in drug-free commercial drivers against an individual's privacy rights, trying to justify all types of drug testing. It appears that the court's ruling may lead to

valid under the fourth amendment, but there was no reasonableness to the return-to-work drug testing. *Id.* at 1113. Thus, there are some public interests that justify more than a minimal privacy intrusion. *Id.* at 1124.

96. See *Skinner*, 489 U.S. 602; see also *Von Raab*, 489 U.S. 656.

97. See *Skinner*, 489 U.S. at 602; see also *Von Raab*, 489 U.S. at 656.

98. *International Bhd. of Teamsters*, 932 F.2d at 1295.

99. *Id.* at 1300. Urinalysis to detect infections of the genito-urinary tract, history of luetic infection or latent syphilis is included in these examinations. *Id.* The purpose of these examinations is to detect physical, mental, or organic defects that would affect the driver's ability to operate a motor vehicle safely. *Id.* at 1301 n. 5.

100. *Id.* See *Skinner*, 489 U.S. at 649.

101. See *Skinner*, 489 U.S. at 637, 641, 650 (Marshall, dissenting) "Constitutional requirements like probable cause are not fair-weather friends, present when advantageous, conveniently absent when special needs make them seem not." *Id.* at 637. "There is no drug exception to the Constitution, any more than there is a communism exception or an exception for other real or imagined sources of domestic unrest." *Id.* at 641. "The benefits of suspicionless blood and urine testing are far outstripped by the costs imposed on personal liberty by such sweeping searches." *Id.* at 650.

future decisions affecting every employee in every profession and employment.¹⁰² Soon most employees may be subject to drug testing.¹⁰³ Hopefully the ruling in *International Bhd. of Teamsters* is limited to the testing of workers in sensitive or safety related jobs, which the courts' decisions indicate.

What is sufficient to be a government compelling interest to justify drug testing? There probably are sufficient governmental interests to mandate drug testing when there are statistics available to prove a drug problem in a particular industry and when public safety is at risk. The court's decision, however, does not state that when there is proof of a drug problem in an industry, there will be less scrutiny of the drug testing regulations.¹⁰⁴ When there is not statistical proof of a drug problem, the courts should scrutinize the drug testing regulations more closely to determine whether a compelling government interest in public safety justifies the erosion of civil liberties and the protection guaranteed by the fourth amendment. There should be concern regarding the degree that individual rights and liberties are falling victim to the government's war on drugs.¹⁰⁵ In *Hartness* there was no evidence of a drug problem in employees with secret national security clearances,¹⁰⁶ just as there was no evidence of a drug problem in commercial drivers in *International Bhd. of Teamsters*.¹⁰⁷ The court in *Von Raab* rationalized the lack of evidence with the response that the workplace is not immune from the social problem of drug abuse.¹⁰⁸ If this type of generalization justifies searches without suspicion, then the fourth amendment has limited

102. See *Von Raab*, 489 U.S. at 685 (Scalia, dissenting). "[i]f those who carry guns can be [exposed to needless indignity], . . . so can all others whose work, if performed under the influence of drugs, may endanger others, automobile drivers, operators of potentially dangerous equipment, construction workers, school crossing guards." *Id.*

103. See Hass, *The Supreme Court Enters the "Jar Wars": Drug Testing, Public Employees, and the Fourth Amendment*, 94 DICK. L. REV. 305, 306 n. 6, 8 (1990). "Approximately 50% of the Fortune 500 companies have implemented some form of drug testing." *Id.* "[t]he controversy over drug testing also extends to efforts to test college, professional and amateur athletes, prisoners, pre-trial detainees, probationers, parolees, and others who are not employees." *Id.*

104. See *International Bhd. of Teamsters*, 932 F.2d 1292.

105. *Hartness*, 919 F.2d at 174 (Edwards, dissenting). See also *Von Raab*, 489 U.S. at 687 (Scalia, dissenting). "[t]he impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.*

106. *Hartness*, 919 F.2d at 175 (Edwards, dissenting). See *infra* note 63 for discussion of this case.

107. *International Bhd. of Teamsters*, 932 F.2d at 1295.

108. *Von Raab*, 489 U.S. at 684.

protection.¹⁰⁹ The fourth amendment is a constitutional command, not merely a discretionary doctrine to be waived for good cause.¹¹⁰ The recent decisions by the Ninth Circuit and the U.S. Supreme Court seem to reshape the fourth amendment to accommodate the current drug problem.¹¹¹

There also are the issues of the expense and practicality of the drug tests. There is the possibility of excessive costs involved in the testing, depending on the procedure. There also is the possible loss of productivity and morale among those to be tested.¹¹² These concerns, however, should be weighed against the value of human life, injury, property saved and the deterrent effect. Drug testing may also provide more accurate data for accident reports, have an effect on the insurance industry costs, and the costs of transportation and shipping.

VI. CONCLUSION

In *International Brotherhood of Teamsters v. Department of Transportation*,¹¹³ the Ninth Circuit upheld the Department of Transportation's Federal Highway Administration's regulations mandating six forms of drug testing of commercial truck and bus drivers. This was held despite the argument that such testing violated the individual's constitutional right against unreasonable searches and seizures under the fourth amendment.¹¹⁴ This case appears to open the way for the future erosion of fourth amendment protection in other occupations and professions and in other aspects of individuals' lives.

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109. See *Hartness*, 919 F.2d at 175 (Edwards, dissenting).

110. *Hartness*, 919 F.2d at 174 (Edwards, dissenting). "[t]he judiciary is . . . without authority to trim back the fourth amendment." *Id.*

111. *Id.* at 175. See also *Von Raab* 498 U.S. at 687 (Scalia, dissenting). The primary intention is to demonstrate the government's determination to win its war on drugs. It is "[o]bvious 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." *Id.*

112. See *Hass*, 94 DICK. L. REV. at 368. "[m]any constitutionally unencumbered private employers may have been hesitant to implement drug testing, with the attendant risks of employee resentment and union opposition." *Id.*

113. *International Bhd. of Teamsters v. Department of Transp.*, 932 F.2d 1292 (9th Cir. 1991).

114. *Id.* at 1294.

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