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Fourth Amendment--Suspicionless Urinalysis Testing: A Constitutionally Reasonable Weapon in the Nation's War on Drugs

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FOURTH AMENDMENT— SUSPICIONLESS URINALYSIS TESTING: A CONSTITUTIONALLY "REASONABLE" WEAPON IN THE NATION'S WAR ON DRUGS?

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

I. INTRODUCTION

On March 21, 1989, the United States Supreme Court upheld suspicionless drug testing of certain employees within the Customs Service.[1] In *National Treasury Employees Union v. Von Raab*, the Court held that the fourth amendment[2] does not prohibit the Customs Service from requiring employees seeking promotions or transfers to positions involving drug interdiction or the carrying of a firearm to take a urinalysis drug test without any individualized or generalized suspicion of drug use by Customs employees.[3] This Note examines the *Von Raab* opinions and concludes that the Court unduly relied on the noncriminal context of the urinalysis testing in justifying its departure from the usual requirements of probable cause and reasonable suspicion. This Note argues that even in a noncriminal context, the Court must first demonstrate special circumstances which render these traditional standards impracticable before employing the balancing of interests methodology. This Note further demonstrates that the Court failed to discount the benefits of suspicionless urinalysis testing by the absence of any drug problem within the Customs work force and consequently erroneously inflated the benefits of such testing. Moreover, this Note contends that the Customs Service's drug testing program is ineffective and hence unreasonable because employees control the occurrence and timing of the drug test. Finally, this Note discusses the ramifications

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

[2] For the relevant text of the fourth amendment, see *infra* note 170 and accompanying text.

[3] *Von Raab*, 109 S. Ct. at 1397.

of the *Von Raab* decision and how it specifically extends to other categories of employees.

II. FACTUAL BACKGROUND

In the summer of 1986, the United States Customs Service implemented a drug testing program applicable to current employees tentatively selected for transfer or promotion to certain "sensitive" positions.[4] Sensitive positions were positions which involved the interdiction of drugs, the carrying of a firearm, or the access to classified information.[5] Under the drug testing program, an employee's promotion or transfer to any of these positions was contingent upon the successful completion of a urinalysis drug test.[6]

The Service's urinalysis testing was not restricted to employees suspected of using or selling drugs.[7] Moreover, the program was not implemented in response to any generalized drug problem within the Customs Service.[8] In fact, in the five months of drug testing prior to the district court's enjoining of the program, no Customs employee seeking a promotion to a sensitive position tested positive for drugs.[9] Additionally, Commissioner Von Raab noted that "the Customs Service has been known throughout the law enforcement community as an agency whose employees demonstrate noteworthy integrity."[10] Nonetheless, the Commissioner stressed that the drug program is justified in light of the Service's special interest in ensuring a drug-free work force.[11]

Under the program, any employee whose application for promotion is tentatively approved will receive advance notice that his promotion is contingent upon successful completion of the drug test.[12] Within five days thereafter, a private company contacts the

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4 *Id.* at 1388. The Service also implemented a drug screening program under which applicants for initial employment were tested. However, since no applicant for initial employment is a party to this suit, the constitutionality of the pre-employment drug program was not before the Court. Brief for the Petitioner at 3 n.1, *Von Raab* (No. 86-1879).

5 *Von Raab*, 109 S. Ct. at 1388. These positions will hereinafter be called "sensitive" positions.

6 *Id.*

7 *Id.*

8 *Id.* at 1387-88. Commissioner Von Raab of the Customs Service stated that he " 'believe[s] that Customs [is] largely drug-free,' that '[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program,' and that he 'hope[s] and expect[s] to receive reports of very few positive findings through drug screening.' " *Id.* at 1400 (Scalia, J., dissenting) (citations omitted).

9 Brief for Petitioner at 7, *Von Raab* (No. 86-1879).

10 *Id.*

11 *Id.*

12 *Von Raab*, 109 S. Ct. at 1388.

employee to schedule a time for the urinalysis test.[13] The employee has the option to either proceed with the drug test or withdraw his application for promotion. An employee who withdraws his application will retain his present position without any adverse consequences.[14]

An employee who elects to proceed with the drug test must submit a urine sample for chemical analysis.[15] The sample may be produced behind a partition or in the privacy of a bathroom stall.[16] However, in either instance, a monitor of the same sex will accompany the employee in order to ensure against adulteration or substitution of the urine specimen.[17] The monitor does not observe the employee urinate, but instead listens for the normal sounds of urination.[18] The monitor also inspects the sample's temperature and color.[19]

The urine sample is then tested for marijuana, cocaine, opiates, amphetamines, and phencyclidine.[20] Initially, the samples are tested by the enzyme-multiplied-immunoassay technique, otherwise known as EMIT.[21] Any sample testing positive is further tested by gas chromatography/mass spectrometry (GC/MS).[22] If the GC/MS confirms the positive result, the employee has the right to designate an independent laboratory to test the original urine sample.[23] In addition, since some lawful medications may affect the test results, employees who test positive may then disclose any medical and prescription information or other reasons for exposure to potentially illicit drugs.[24] Employees who cannot offer a satisfactory explanation for the positive test result are subject to removal from the Service.[25]

On behalf of current Customs Service employees, the National Treasury Employees Union brought a suit challenging the constitu-

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13 Reply Brief for Petitioner at 5, *Von Raab* (No. 86-1879).

14 *Id.* The employee will not be dismissed from the Customs Service for refusing to submit to the drug test. *Id.*

15 *Von Raab*, 109 S. Ct. at 1388.

16 *Id.*

17 *Id.*

18 *Id.*

19 *Id.*

20 *Id.* at 1389.

21 *Id.*

22 *Id.*

23 National Treasury Employees Union v. Von Raab, 816 F.2d 170, 181 (5th Cir. 1987).

24 *Von Raab*, 109 S. Ct. at 1389.

25 *Id.*

tionality of the Service's suspicionless drug testing program.[26] The Union alleged that the program violated an employee's fourth amendment right to be free from unreasonable searches.[27] The district court enjoined the program on the ground that the drug test constituted an overly intrusive search without probable cause or reasonable suspicion and therefore, violated the employee's fourth amendment rights.[28]

The Court of Appeals for the Fifth Circuit reversed the district court's decision.[29] Although the court agreed that the drug testing program constituted a search subject to the protections of the fourth amendment, the court found the search to be reasonable.[30] The court determined that the government's compelling interest in not promoting drug users to sensitive positions outweighed the interference with the employee's legitimate expectations of privacy caused by the testing.[31] The United States Supreme Court granted certiorari to consider whether the fourth amendment was violated.[32]

III. SUPREME COURT OPINIONS

A. MAJORITY OPINION

Justice Kennedy, in a five-to-four decision, delivered the majority opinion of the United States Supreme Court.[33] Justice Kennedy observed that the protections of the fourth amendment apply even when the government acts in an employer capacity.[34] The Court held that urinalysis testing constitutes a search within the meaning of the fourth amendment since the urinalysis intrudes upon an individual's reasonable expectations of privacy.[35] To determine whether the search was reasonable and hence constitutional under

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26 National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986).

27 *Id.*

28 *Id.* at 387.

29 National Treasury Employees Union v. Von Raab, 816 F.2d 170, 173 (5th Cir. 1987).

30 *Id.* at 180.

31 *Id.*

32 National Treasury Employees Union v. Von Raab, 108 S. Ct. 1072 (1988). The Supreme Court granted certiorari to consider "whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions." National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989).

33 *Von Raab*, 109 S. Ct. at 1387. Justice Kennedy was joined by Chief Justice Rehnquist and Justices White, Blackmun, and O'Connor.

34 *Id.* at 1390 (citing O'Connor v. Ortega, 480 U.S. 709, 717 (1987) (plurality opinion)); *see* O'Connor, 480 U.S. at 731 (Scalia, J., concurring).

35 *Von Raab*, 109 S. Ct. at 1397 (citing Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1412-13 (1989)).

the fourth amendment, the Court balanced the competing interests at stake.[36] After balancing the interference with privacy engendered by the testing against the governmental interests in preventing the promotion of drug users to sensitive positions,[37] the Court concluded that the government's need to conduct suspicionless urine tests outweighed the employee's legitimate expectations of privacy.[38]

1. Warrant and Probable Cause Requirements

At the outset of its analysis, the majority stated the different standards of review historically employed by the Court in assessing the reasonableness of searches conducted by the government.[39] Justice Kennedy observed that a search must generally be supported by a warrant based upon probable cause in order to be deemed reasonable.[40] However, the majority noted that there is only a presumption that reasonable searches be conducted pursuant to a warrant, not an irreducible requirement.[41] The Court went on to note that where a search "serves special governmental needs, beyond the normal need for law enforcement," the appropriate standard of reasonableness is determined by balancing the privacy expectations of employees against the government's interest justifying the search.[42]

Justice Kennedy observed that the drug screening program at issue was "beyond the normal need for law enforcement" since the test results could not be released to criminal prosecutors without the employee's consent.[43] According to the Court, the substantial governmental interests in detecting and deterring the promotion of drug users to sensitive positions presented a "special need" for

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36 *Id.* at 1390.

37 The drug testing program covers positions that involve drug interdiction, the use of firearms, or access to classified information. *Id.* at 1388. The majority did not assess the constitutionality of the Service's drug testing program insofar as it covers employees who have access to classified information. The case was remanded to the court of appeals to determine whether the Service had included positions in this category that did not involve access to classified information. *Id.* at 1397.

38 *Id.* at 1396.

39 *Id.* at 1390.

40 *Id.*

41 *Id.*

42 *Id.* (citing Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1413-14 (1989)). Justice Kennedy cited several cases where searches were deemed reasonable despite the absence of a warrant, probable cause, or any measure of individualized suspicion. These cases include *Skinner*, 109 S. Ct. 1402 (1989), New Jersey v. T.L.O., 469 U.S. 325 (1985), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

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

urinalysis testing.[44]

After establishing that a special need existed for the urinalysis testing, the majority employed the balancing test in order to determine the practicality of a warrant requirement.[45] The majority determined that requiring the Customs Service to obtain a warrant before every urine test was impracticable and would needlessly divert valuable resources from the agency's primary mission.[46] The Court explained that a warrant was unnecessary because the program's procedures satisfied the dual functions of a warrant.[47] The primary purposes of a warrant are 1) to assure the individual that the search is authorized by law and limited in its scope, and 2) to reduce an inspector's discretion in determining who to search.[48] The majority asserted that requiring the Service to obtain a warrant would do little to further these goals. First, since all employees are provided advance notice that their promotion is contingent upon the successful completion of a drug test, the employees are already informed of the search's legality and limited scope. Second, since every employee's promotion to a sensitive position is contingent upon passing the urinalysis test, there is no discretion concerning who is required to take the test.[49] Therefore, the majority concluded that the warrant requirement was not the appropriate standard of legality.[50]

Justice Kennedy next considered the independent probable cause standard.[51] The Court also dispensed with this requirement.[52] Justice Kennedy noted that a probable cause standard "is unhelpful in analyzing the reasonableness of routine administrative functions especially where the Government seeks [1] to *prevent* the development of hazardous conditions or [2] to detect violations that rarely generate articulable grounds for searching any particular place or person."[53] The Court did not discuss the relevancy of

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44 *Id.*

45 *Id.* at 1391.

46 *Id.* at 1390.

47 *Id.*

48 *Id.* at 1391.

49 *Id.*

50 *Id.*

51 *Id.* at 1390-91.

52 *Id.* at 1391-92. Justice Kennedy cited several cases where the Court held that a search was reasonable despite the absence of probable cause. These cases include Colorado v. Bertine, 479 U.S. 367 (1987), O'Connor v. Ortega, 480 U.S. 709 (1987), Camara v. Municipal Court, 387 U.S. 523 (1967), and United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

53 *Von Raab*, 109 S. Ct. at 1391-92 (emphasis in original) (citing *Camara*, 387 U.S. at 535-36; *Martinez-Fuerte*, 428 U.S. at 557).

these factors to the urinalysis scheme at this point in the opinion. Nevertheless, the majority's later discussion of the petitioner's first contention[54] encompasses these considerations.[55]

2. Balancing the Competing Interests at Stake

The majority continued its analysis by thoroughly examining the competing interests at stake.[56] The majority concluded that the government's need to conduct suspicionless testing outweighed the employee's expectations of privacy, and thus, the urinalysis tests were constitutionally permissible.[57]

Justice Kennedy first inquired into the government's interests. The Court found that the ultimate objective behind the drug testing program was to prevent the promotion of drug users to sensitive positions.[58] The Court focused on the subsidiary objectives of urinalysis testing with respect to employees seeking drug interdiction positions. The principal justification advanced was the interest in maintaining the integrity of its work force.[59] In particular, the Court asserted that drug users are more susceptible to bribery, blackmail, and misappropriating confiscated contraband for personal use.[60] According to the majority, drug interdiction agents are often exposed to drug traffickers and large quantities of illegal drugs.[61] Therefore, a drug user's increased susceptibility to corruption could "facilitate importation of sizable drug shipments or block apprehension of dangerous criminals."[62]

Next, the Court assessed the government's interests in preventing the promotion of drug users to positions involving the use of firearms. Suspicionless testing of such employees was upheld as a legitimate means of enhancing public safety.[63] The majority contended that requiring drug users to carry firearms posed intolerable risks to the employee, fellow agents, and the public since a drug-related lapse of attention could have irreversible, disastrous consequences.[64]

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54 *Id.* at 1395.

55 *See infra* notes 74-76 and accompanying text.

56 *Von Raab*, 109 S. Ct. at 1392-94.

57 *Id.* at 1392. Presumably, the Court dispensed with the less stringent individualized suspicion standard for the same reasons that it found the probable cause requirement impracticable. *See supra* note 51-55 and accompanying text.

58 *Id.* at 1392-93.

59 *Id.*

60 *Id.*

61 *Id.* at 1392.

62 *Id.* at 1393.

63 *Id.*

64 *Id.*

As for the privacy interests of the Customs employees, the majority drew a distinction between these individuals and "most private citizens or government employees in general."[65] The Court found that employees subject to testing had expectations of privacy considerably lower than that of most private citizens.[66] The majority likened the Customs employees to members of the military or United States Mint work force and contended that such employees enjoy a diminished expectation of privacy by virtue of the special ethical and physical demands of their occupation.[67] Since these jobs require extraordinary fitness and probity, the testing scheme provides information directly relating to an applicant's competence.[68] Justice Kennedy therefore concluded that although the urinalysis tests interfere with employee privacy interests, these interests are outweighed by the government's interest in a drug-free Customs Service.[69]

3. Responding to the Employees' Union

Upon concluding the balancing of interests test, the majority addressed two arguments raised by the National Treasury Employees Union.[70] First, the majority rejected the Employees Union's contention that drug testing is unreasonable because it was not implemented in response to an existing drug problem within the Customs Service, and hence, was not predicated on the expectation of detecting drug users.[71] Justice Kennedy emphasized that drug abuse is prevalent throughout society.[72] According to the Court, there is no reason to believe that "American workplaces," like the Customs Service, are not affected by such a pervasive societal problem.[73]

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65 *Id.* at 1394.

66 *Id.* at 1393-94.

67 *Id.* at 1393.

68 *Id.* at 1394.

69 *Id.* According to the majority, there are several factors that mitigate the program's intrusiveness: 1) the absence of administrative discretion in determining who must submit a urine sample since every employee's transfer or promotion is contingent upon successful completion of the drug test; 2) giving an employee advance notice of the test; 3) not requiring visual observation of the employee urinating; 4) restricting the chemical analysis to only reveal the presence of a limited number of specified drugs; and 5) permitting the employee to delay disclosing personal medical information, which may affect the urinalysis results, until after the test result is positive. *Id.* at 1394 n.3.

70 The petitioner, National Treasury Employees Union, will hereinafter be called the Employees Union.

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

72 *Id.* at 1395.

73 *Id.* (citing Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989); Masino v. United States, 589 F.2d 1048, 1050 (1978)).

The Court also expressed doubt that Customs supervisors could detect drug use by employees without urinalysis testing. First, Customs Service employees operate in a unique environment; employees and their work product are not subject to daily scrutiny by supervisors.[74] Second, supervisors will be unaware of off-duty drug use.[75] Justice Kennedy noted that the government has a compelling interest in ensuring that covered employees do not use drugs off-duty since any drug use increases an employee's susceptibility to bribery and blackmail.[76]

Furthermore, Justice Kennedy contended that even if the Customs Service was drug-free, the government had compelling interests in preventing drug abuse from spreading to the Customs Service.[77] The majority emphasized that employing drug users in sensitive positions could create "extraordinary safety and national security hazards."[78] Justice Kennedy observed that a primary objective of the program was to avoid the promotion of drug users to sensitive positions.[79] In this regard, the program was reasonable even though most employees tested will have never used illicit drugs.[80] The Court concluded that the compelling governmental interests in preventing drug abuse from spreading to the Customs Service justified the drug testing program.[81]

The Court also rejected the second contention of the Employees Union. The Employees Union argued that urinalysis testing is not " 'a sufficiently productive mechanism to justify its intrusion upon Fourth Amendment interests' "[82] because drug users can avoid detection by abstaining from drug use after receiving notification of their test date. The Court expressed doubt that an addict could abstain from drugs for even a brief period of time.[83] Moreover, the majority argued that a drug user is unlikely to know the abstention period necessary to avoid detection.[84] The length of time that particular drugs remain detectable varies widely depending on the individual.[85] In some cases, drugs remain detectable in

74 *Id.*
75 *Id.*
76 *Id.*
77 *Id.* at 1395 & n.3.
78 *Id.* For a description of the potential dangers of promoting drug users to sensitive positions, see *supra* notes 60-64 and accompanying text.
79 *Von Raab*, 109 S. Ct. at 1395.
80 *Id.*
81 *Id.*
82 *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 658-59 (1979)).
83 *Id.* at 1396.
84 *Id.*
85 *Id.*

urine twenty-two days after ingestion.[86] Thus, the majority reasoned that a drug user, abstaining after the test date is assigned, still faces a significant risk of testing positive.[87] The Court concluded that the risk of being detected will deter drug users from seeking promotions to sensitive positions.[88]

The majority concluded its opinion by briefly discussing the Service's urinalysis testing as it relates to employees with access to classified information.[89] Although the majority agreed in principle that the government has a compelling interest in protecting "truly sensitive information,"[90] the Court expressly avoided ruling on the reasonableness of the Service's program with respect to this category of positions. The majority questioned whether the Service may have included positions in this category which do not in fact involve the access to "truly sensitive information."[91] Thus, the Court remanded the case to the court of appeals with instructions to examine the criteria used by the Customs Service in determining what information is classified and whom to test under this category.[92]

B. DISSENTING OPINIONS

Justice Marshall dissented[93] from the *Von Raab* holding for the reasons stated in the following sources: 1) his own dissenting opinion in *Skinner v. Railway Labor Executives Ass'n*;[94] 2) Justice Scalia's dissenting opinion in *Von Raab*;[95] and 3) the dissenting opinion of the circuit judge below in *Von Raab*.[96]

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86 *Id.* (citations omitted).

87 Custom employees testing positive for drugs are subject to removal from the Service. *Id.* at 1389.

88 *Id.* at 1396. The Court also stated that the precautions taken by the monitor at the test site were sufficient to prevent an employee from adulterating the urine sample. *Id.* For a discussion of the precautions employed by the sample collector, see *supra* notes 18-19 and accompanying text.

89 *Von Raab*, 109 S. Ct. at 1398.

90 *Id.* at 1396.

91 *Id.* at 1397. Justice Kennedy listed a number of positions which, based on the job titles, did not appear to have access to truly sensitive information but, nevertheless, were included in the urinalysis scheme. These positions include accountant, accounting technician, animal caretaker, attorney, baggage clerk, co-op student, electric equipment repairer, mail clerk/assistant, and messenger. *Id.*

92 *Id.*

93 Justice Marshall was joined by Justice Brennan.

94 109 S. Ct. 1402, 1422-33 (1989) (Marshall, J., dissenting); *see infra* notes 97-113 and accompanying text.

95 *Von Raab*, 109 S. Ct. at 1398-1402 (Scalia, J., dissenting); *see infra* notes 114-150 and accompanying text.

96 National Treasury Employees Union v. Von Raab, 816 F.2d 170, 182-84 (5th Cir. 1987) (Hill, J., dissenting); *see infra* notes 151-163 and accompanying text.

1. *Justice Marshall's Dissent*

In *Skinner*,[97] Justice Marshall began his dissent by flatly rejecting the majority's viewpoint that the constitutionality of any government search is appropriately analyzed under a balancing test when "special needs beyond the normal need for law enforcement makes the requirement of probable cause impracticable."[98] Moreover, with respect to the urinalysis scheme in question, Justice Marshall found the majority's use of the special needs exception to the probable cause requirement particularly egregious for two reasons.[99] First, Justice Marshall observed that the special needs balancing analysis had never been applied to highly intrusive searches aimed "at a person and not simply the person's possessions."[100] Justice Marshall criticized the majority's failure to set forth reasons justifying this unprecedented application of the special needs framework to a highly intrusive search. Justice Marshall contended that full-scale searches, like the urinalysis scheme in question, must adhere to the fourth amendment's textual requirement of probable cause.[101]

Secondly, even if the probable cause standard was correctly relaxed, Justice Marshall contended that some level of individualized suspicion is a prerequisite for a personal search to be deemed reasonable under the special needs analysis.[102] Justice Marshall con-

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97 109 S. Ct. at 1422 (Marshall, J., dissenting).

98 *Id.* at 1423 (Marshall, J., dissenting). The Court first applied the special needs exception to the usual warrant and probable cause requirements in New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). Since *T.L.O.*, the Court has applied the special needs balancing analysis five times. *See Von Raab*, 109 S. Ct. at 1384; *Skinner*, 109 S. Ct. at 1402; Griffin v. Wisconsin, 483 U.S. 868, 878 (1987); New York v. Burger, 482 U.S. 691, 699-703 (1987); O'Connor v. Ortega, 480 U.S. 709, 721-25 (1987). Justices Marshall and Brennan have joined dissenting opinions in each of these cases.

Justice Marshall noted that the majority's "special needs" exception is unsupported by the text of the fourth amendment. *Skinner*, 109 S. Ct. at 1423. In fact, the majority's use of a multifactor balancing test ignores "the only standard [probable cause] that finds support in the text of the Fourth Amendment." *Id.* Justice Marshall asserted that "without the content which those provisions [warrant and probable cause requirements] give to the Fourth Amendment's overarching command that searches and seizures be 'reasonable,' the Amendment lies virtually devoid of meaning, subject to whatever content shifting judicial majorities, concerned about the problems of the day, choose to give to that supple term." *Id.* Justice Marshall relied on the following cases to illustrate the dangers of deviating from textually based principles of the fourth amendment: Hirabayashi v. United States, 320 U.S. 81 (1943) (involving World War II relocation camps); Dennis v. United States, 341 U.S. 494 (1919) (involving internal subversion during the McCarthy-Era).

99 *Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting).

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

101 *Id.* at 1424-25 (Marshall, J., dissenting).

102 *Id.* at 1425 n.4 (Marshall, J., dissenting). Justice Marshall listed several cases sup-

ceded that the Court has upheld searches in the absence of individualized suspicion.[103] However, he argued that those searches were substantially less intrusive than urinalysis testing.[104] Justice Marshall pointed out that even the majority recognized the intrusiveness of urine testing in its explanation of why it constitutes a search under the fourth amendment.[105] In addition to disclosing drug use, urinalysis testing may also reveal personal information concerning medication, medical disorders, and in the case of a woman, pregnancy.[106] Justice Marshall disagreed with the majority's assertion that Customs employees subject to testing enjoy diminished expectations of privacy.[107] He contended that privacy expectations can only be reduced with respect to regulatory searches of property and not searches of the person.[108] Therefore, in light of the intrusiveness of urinalysis testing, Justice Marshall contended that the Customs Service's drug program must be based on individualized suspicion in order to be constitutional.[109]

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porting the principal that individualized suspicion is a prerequisite of reasonable searches under the special needs balancing analysis. These cases included *T.L.O.*, 469 U.S. at 346 (teacher's observation of student smoking provided reasonable suspicion that purse contained cigarettes), *O'Connor*, 480 U.S. at 726 (charges of various financial improprieties provided the employer with individualized suspicion of wrongdoing by the employee), and *Griffin*, 483 U.S. at 875 (tip to parole officer that probationer was storing firearms in his apartment provided reasonable suspicion).

103 *Skinner*, 109 S. Ct. at 1424 n.2 (Marshall, J., dissenting). Justice Marshall cited two cases where the Court upheld searches despite any evidence of wrongdoing by the person whose property was searched. *See* United States v. Martinez-Fuerte, 428 U.S. 523 (1976) (brief questioning at permanent border checkpoint to verify motorist's residence status upheld); Camara v. Municipal Court, 387 U.S. 523 (1967) (search by building inspectors checking for compliance with regulations upheld).

104 *Skinner*, 109 S. Ct. at 1427-30 (Marshall, J., dissenting). Many lower courts and commentators have noted that requiring a person to submit a urine sample "intrudes deeply on privacy and bodily integrity." *Id.* at 1428 (citing Taylor v. O'Grady, 669 F. Supp. 1422, 1433-34 (N.D. Ill. 1987); Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987); AFL-CIO v. Weinberger, 651 F. Supp. 726, 732-33 (S.D. Ga. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1514 (D.N.J. 1986); Fried, *Privacy*, 77 YALE L.J. 475, 487 (1968)).

105 *Skinner*, 109 S. Ct. at 1429 (Marshall, J., dissenting) (citing *Skinner*, 109 S. Ct. at 1413). Justice Marshall criticized the inconsistency between the majority's initial viewpoint and the majority's subsequent characterization of the interference with privacy interests, caused by urinalysis testing, as minimal. *Id.* The majority initially stated:

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

Id. at 1429 (Marshall, J., dissenting) (quoting *Skinner*, 109 S. Ct. at 1413 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987))).

106 *Id.* at 1429 (Marshall, J., dissenting).

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

108 *Id.* at 1429-30 (Marshall, J., dissenting).

109 *Id.* at 1430-32 (Marshall, J., dissenting).

Justice Marshall concluded by expressing concern for the possible ramifications of the Court's holding. He argued that the Court's attempt to limit its holdings in *Skinner*[110] and *Von Raab*[111] would prove ineffective since "principles of law, once bent, do not snap back easily."[112] Therefore, Justice Marshall concluded that the majority's replacement of the textually based fourth amendment warrant and probable cause requirements with a malleable special needs balancing analysis and the discarding of the individualized suspicion requirement will ultimately diminish the privacy enjoyed by all citizens.[113]

2. *Justice Scalia's Dissent*

Justice Scalia dissented from the *Von Raab* opinion.[114] In weighing the competing interests at stake, Justice Scalia found dispositive the absence of any evidence of widespread drug use within the Customs Service.[115] In addition, Justice Scalia argued that even if such drug use did exist, it did not pose such enormous risks to society to justify suspicionless urinalysis testing.[116]

Justice Scalia drew upon the Court's decisions in *New Jersey v. T.L.O.*,[117] *United States v. Martinez-Fuerte*,[118] and *Skinner*[119] to support

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110 *Id.* at 1423 (Marshall, J., dissenting) (citing *Skinner*, 109 S. Ct. at 1414).

111 *Id.* (Marshall, J., dissenting) (citing National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1397-98 (1989)).

112 *Id.* at 1432 (Marshall, J., dissenting).

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

114 *Von Raab*, 109 S. Ct. at 1398 (Scalia, J., dissenting). Justice Stevens joined in Justice Scalia's dissent. It is noteworthy that Justice Scalia and Justice Stevens concurred with the majority in *Skinner*, the companion case, decided the same day as *Von Raab*.

115 *Id.* at 1398-1401 (Scalia, J., dissenting).

116 *Id.* Justice Scalia stated:

> What is absent in the Government's justifications—notably absent, revealingly absent, and as far as I am concerned dispositively absent—is the recitation of *even a single instance* in which any of the speculated horribles actually occurred: an instance, that is, in which the cause of bribe taking, or of poor aim, or of unsympathetic law enforcement, or of compromise of classified information, was drug use.

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

117 469 U.S. 325 (1985) (search of student's purse in school upheld). The *T.L.O.* Court relied upon an agency report to Congress that drug use and violent crimes had become major social problems within schools. *Id.* at 339.

118 428 U.S. 543 (1976) (suspicionless search of cars for illegal aliens near the Mexican border upheld). The *Martinez Fuerte* Court noted a report by the Immigration and Naturalization Service which stated that " 'there may be as many as 10 or 12 million aliens illegally in the country,' and that, 'interdicting the flow of illegal entrants from Mexico poses formidable law enforcement problems.' " *Von Raab*, 109 S. Ct. at 1399 (Scalia, J., dissenting) (quoting *Martinez-Fuerte*, 428 U.S. at 551-52).

119 Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989) (suspicionless blood and urine testing of railroad employees involved in train accidents upheld). The *Skinner* Court stressed the long history of alcohol abuse in the railroad industry and noted that numerous drug and alcohol related accidents had occurred. *Id.* at 1407 n.1.

his contention that suspicionless urinalysis testing was unreasonable in the absence of an acute drug problem within the Customs Service.[120] Justice Scalia noted that in each of these cases, a well-documented problem existed among the class of individuals to be searched.[121] According to Justice Scalia, this generalized problem rendered the government's search a reasonable method of protecting society.[122]

Justice Scalia contended that the instant case was distinguishable since there was no evidence of a drug problem within the Customs Service.[123] In response to the majority noting that several Customs employees have been fired for accepting bribes or other integrity violations, Justice Scalia pointed out that "none of these incidents were related to drug use."[124] Moreover, Justice Scalia observed that even Commissioner Von Raab has stated that he " 'believe[s] that Customs is largely drug free,' [and] that '[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program.' "[125] Given the absence of widespread drug use within the Service, Justice Scalia argued that no special need existed for mass urinalysis testing.[126]

Justice Scalia criticized the majority's reliance on the prevalence of drug abuse in society at large to justify drug testing Customs employees.[127] He argued that such a generalization was inappropriate in the instant case.[128] According to Justice Scalia, a special need for suspicionless drug testing could exist without generalized suspicion, but only if the potential harm of a drug impaired employee is "catastrophic."[129] For example, Justice Scalia reasoned that a nuclear power plant was one situation where "no risk whatever is tolerable."[130] He argued that the potential harm prevented by drug testing Customs employees was clearly distinguishable from the "catastrophic" harm of a nuclear power plant accident.[131] In short, Justice Scalia contended that the potential harm prevented by drug

120 *Von Raab*, 109 S. Ct. at 1398-99 (Scalia, J., dissenting).
121 *Id.* at 1400 (Scalia, J., dissenting).
122 *Id.* at 1398 (Scalia, J., dissenting).
123 *Id.* at 1400 (Scalia, J., dissenting).
124 *Id.* (Scalia, J., dissenting).
125 *Id.* (Scalia, J., dissenting) (citation omitted).
126 *Id.* at 1398-1400 (Scalia, J., dissenting).
127 *Id.* at 1400 (Scalia, J., dissenting).
128 *Id.* (Scalia, J., dissenting).
129 *Id.* (Scalia, J., dissenting).
130 *Id.* (Scalia, J., dissenting). Justice Scalia cited Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988). In *Rushton*, the Court of Appeals for the Eight Circuit upheld suspicionless urine testing of nuclear power plant employees. *Id.* at 563.
131 *Von Raab*, 109 S. Ct. at 1400 (Scalia, J., dissenting).

testing Customs employees was insufficient to justify suspicionless urinalysis drug testing.[132]

The second premise of Justice Scalia's dissent concerned the relationship between drug abuse and the governmental interests allegedly furthered by urinalysis testing.[133] Justice Scalia stated that "the connection between whatever drug use may exist and serious societal harm [allegedly adverted by urinalysis testing] is entirely speculative."[134] Thus, even if widespread drug use existed within the Customs Service, Justice Scalia doubted that such use would pose sufficient dangers to warrant suspicionless urinalysis testing.[135]

Justice Scalia disagreed with the majority's contention that drug users are more susceptible to bribery.[136] He argued that a drug user is no more susceptible to being bribed by a drug smuggler than an employee wearing diamonds is to being bribed by a diamond smuggler.[137] Justice Scalia conceded that an addict would be more likely to accept a bribe in order to support his habit. Nevertheless, Justice Scalia asserted that any employee whose drug use was so severe would be detectable without the use of urinalysis testing.[138]

Justice Scalia also contended that drug users were not significantly more likely to be unsympathetic to their drug interdiction duties.[139] He likened a drug-using Customs employee to a police officer who speeds. Justice Scalia concluded that in both cases the employees would still perform their law enforcement duties despite their own breaking of the law.[140] Finally, Justice Scalia expressed doubt that the risk of testing positive for drugs would deter gun-carrying agents from using drugs.[141] He reasoned that any Customs Service employee who was willing to go to work impaired by drugs and risk being injured in combat with unimpaired smugglers would not be deterred by the risk of testing positive on a urine test.[142] Therefore, Justice Scalia concluded that urinalysis testing is unnecessary, and hence, unreasonable in the present context until evidence exists to support the majority's assertions that urinalysis testing will significantly reduce bribery, blackmail, and misuse of

132 *Id.* (Scalia, J., dissenting).
133 *Id.* at 1399-1400 (Scalia, J., dissenting).
134 *Id.* at 1400 (Scalia, J., dissenting).
135 *Id.* at 1399-1401 (Scalia, J., dissenting).
136 *Id.* at 1399 (Scalia, J., dissenting).
137 *Id.* (Scalia, J., dissenting).
138 *Id.* (Scalia, J., dissenting).
139 *Id.* (Scalia, J., dissenting).
140 *Id.* (Scalia, J., dissenting).
141 *Id.* (Scalia, J., dissenting).
142 *Id.* (Scalia, J., dissenting).

firearms.[143]

Justice Scalia argued that, in reality, the Customs Service's drug testing program would prevent little harm to society and would merely serve as a "symbolic opposition to drug use."[144] In support of this viewpoint, he referred to a statement by the Customs Service Commissioner that "implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security."[145] Justice Scalia contended that setting an important example is an insufficient justification for conducting a search which so significantly interferes with an individual's privacy interests.[146]

Justice Scalia concluded by discussing the possible ramifications of the Court's extremely broad holding.[147] He argued that under the majority's logic, any urinalysis drug testing program is reasonable where the employees may endanger themselves or others if impaired by drugs.[148] Similarly, the Court's holding, inasmuch as it expressed approval of drug testing employees who have access to confidential information, exposes a vast number of governmental employees to urinalysis testing.[149] Thus, Justice Scalia expressed doubt that the majority's attempt to limit the scope of its holding would be effective.[150]

3. Judge Hill's Dissent Below

Justice Marshall also dissented in *Von Raab* for the reasons stated in Judge Hill's dissenting opinion below.[151] Judge Hill initially noted that the reasonableness of a search depends on whether "the measures adopted will achieve the objectives of the search."[152] According to Judge Hill, if the program is ineffective in achieving its goals, there is no reason to interfere with employees' privacy interests.[153]

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143 *Id.* at 1398-1400 (Scalia, J., dissenting).

144 *Id.* at 1401 (Scalia, J., dissenting).

145 *Id.* (Scalia, J., dissenting) (citation omitted).

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

147 *Id.* at 1400-01 (Scalia, J., dissenting).

148 *Id.* at 1401 (Scalia, J., dissenting). Justice Scalia listed a number of diverse occupations which he believed could be drug tested under the *Von Raab* holding. These occupations included automobile drivers, operators of potentially dangerous equipment, construction workers, and even school crossing guards. *Id.* (Scalia, J., dissenting).

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

150 *Id.* at 1399-1402 (Scalia J., dissenting).

151 *Id.* at 1398 (Marshall, J., dissenting).

152 *Id.* (Marshall, J., dissenting) (citing National Treasury Employees Union v. Von Raab, 816 F.2d 170, 183 (5th Cir. 1987) (Hill, J., dissenting)).

153 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).

Judge Hill then contended that, for three reasons, the program is an ineffective method for accomplishing the Service's goals. First, Judge Hill argued that the urinalysis scheme is ineffective because it fails to test employees currently occupying sensitive positions even though this segment of the work force could include drug users.[154] Although the program is likely to be expanded in the future to include these agents, Judge Hill stressed that the present program must be examined on its own merits.[155] Second, he criticized the program because employees promoted to sensitive positions are never retested.[156] Judge Hill asserted that the program would not detect "clean" employees who become drug users after their promotion.[157]

Finally, Judge Hill argued that the program is ineffective since drug users can avoid detection by briefly abstaining from drug use prior to the test date.[158] Judge Hill conceded that an addict would be unable to abstain from drug use for even a brief period of time.[159] Nevertheless, he argued that an individual whose drug use was so severe would be detectable without the assistance of a urinalysis test.[160] Judge Hill disagreed with the contention that a drug user who briefly abstains from drug use still faces significant risks of testing positive because some drugs remain detectable for longer than the five day notification period.[161] Judge Hill reasoned that an employee can merely postpone applying for a promotion until he is certain that the drugs are no longer detectable. After promotion, the employee could resume using drugs without any possibility of being tested again.[162] Therefore, Judge Hill concluded that the Customs Service's drug program will not prevent the promotion of drug users to sensitive positions since it neither tests individuals currently employed in such positions nor retests employees after they have been promoted.[163]

IV. ANALYSIS

It is undisputed that drug abuse costs the United States billions of dollars each year in terms of lost wages, law enforcement ex-

154 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
155 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
156 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
157 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
158 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
159 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
160 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
161 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
162 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).
163 *Id.* (Marshall, J., dissenting) (citing *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting)).

penses, and treatment.[164] Indeed, drug use has reached such epidemic proportions that the country is waging a full-scale "war" on drugs.[165] Under the Court's *Von Raab* decision, it appears that suspicionless drug testing is a constitutionally "reasonable" weapon in the government's war against drugs.[166]

However, there are substantial consequences associated with suspicionless drug testing in terms of intrusions upon legitimate expectations of privacy and dignity traditionally afforded protection under the fourth amendment. The Supreme Court's decision in *Von Raab*, and perhaps more importantly its underlying reasoning, appears to afford little regard for drug testing's impact on these constitutionally protected liberties. In particular, the majority's conclusion is based upon three unsettling propositions. The first proposition is that under a "special needs" noncriminal category of searches, officials may discard the presumptive fourth amendment requirement of probable cause without demonstrating that the standard would impair the objectives of the search.[167] Second, a category of employees may be compelled to take urinalysis tests without any individualized suspicion or evidence of a generalized drug problem within that category.[168] Finally, a drug program is reasonable even though employees control the occurrence and timing of the test and, hence, can avoid detection by temporarily abstaining from drug use.[169] This Note will analyze each of these propositions as well as the ramifications of the *Von Raab* decision.

A. DISPENSING WITH THE REQUIREMENTS OF PROBABLE CAUSE AND INDIVIDUALIZED SUSPICION

The fourth amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause."[170] Ultimately, a court must determine whether a

164 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, 203 (1986).

165 In May 1988, the U.S. House of Representatives and Senate voted to give the military a major role in halting the influx of illegal drugs across the nation's border. *See House to Enlist Military in Drug War*, The Wash. Times, May 6, 1988; *Senate Votes Military Major Role in Drug War*, The Wash. Post, May 14, 1988.

166 *Von Raab*, 109 S. Ct. at 1397-98.

167 *See infra* notes 170-195 and accompanying text.

168 *See infra* notes 214-223 and accompanying text.

169 *See infra* notes 224-236 and accompanying text.

170 U.S. CONST. amend. IV. A threshold determination of any fourth amendment analysis is whether an individual is entitled to any protection in the first place. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1411 (1989); New Jersey v. T.L.O., 469 U.S. 325, 333-37 (1985). The *Von Raab* Court correctly found that urinalysis testing

search fulfills the amendment's dictate of reasonableness. In most cases, the amendment does not leave the selection of the appropriate standard of reasonableness to the judgment of the courts.[171] The framers of the fourth amendment have already balanced the competing interests and determined that in order for a search to be reasonable, it must be based on a warrant or probable cause.[172] However, in rare circumstances, where the search furthers special governmental interests beyond the ordinary needs of law enforcement *and* a warrant or probable cause requirement is likely to impair the governmental objectives behind the search, courts are entitled to substitute their own balancing test for that of the framers.[173] Identical requirements must be met before a court is entitled to discard an individualized suspicion standard.[174] If the government attempts to dispense with these usual standards, it bears the burden of establishing why it is necessary to do so.[175]

At the outset of its analysis, the majority correctly recognized that a balancing test may be employed to determine whether the urinalysis testing is reasonable if a special need exists and a warrant and probable cause requirement is impracticable.[176] Although the majority discussed the special governmental needs for drug testing,[177] the Court immediately turned to a balancing test without first addressing the necessity of discarding the probable cause or individualized suspicion standard. The majority stated that a probable cause standard is particularly "unhelpful in analyzing the reasona-

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was a "search" and hence within the protective ambit of the fourth amendment because employees have objectively legitimate expectations of privacy in their urine and the wealth of personal information it contains. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1390 (1989); *see Skinner*, 109 S. Ct. at 1411-13; Katz v. United States, 389 U.S. 347 (1967). *But see* Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1551-56 (6th Cir. 1988) (Guy., J., dissenting).

171 *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring) (citations omitted).

172 *Id.*; *see* O'Connor v. Ortega, 480 U.S. 709, 720 (1987).

173 *Von Raab*, 109 S. Ct. at 1390-91 (citing *Skinner*, 109 S. Ct. at 1413-14); *O'Connor*, 480 U.S. at 720; *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring)).

174 *Skinner*, 109 S. Ct. at 1414; *Von Raab*, 109 S. Ct. at 1390.

175 National Treasury Employees Union v. Von Raab, 816 F.2d 170, 182-84 (5th Cir. 1987) (Hill, J., dissenting); Taylor v. O'Grady, 669 F. Supp. 1422, 1436 (N.D. Ill. 1987); *see Skinner*, 109 S. Ct. at 1420 (discussing why reasonable suspicion standard would impede employer's ability to obtain critical information concerning cause of serious train accident); *see also O'Connor*, 480 U.S. at 720 (discussing why requirement of probable cause is an inappropriate standard for evaluating the reasonableness of a public employer's search of an employee's desk). *But see* Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (upholding body-cavity searches of prison inmates in the absence of probable cause without discussing the necessity of dispensing with the probable cause requirement).

176 *Von Raab*, 109 S. Ct. at 1390-91.

177 *Id.*

bleness of routine administrative functions, especially where the Government seeks to *prevent* the development of hazardous conditions."[178] Nevertheless, the Court failed to focus on the facts of this case which rendered the probable cause standard impracticable. Instead, the majority unduly relied upon the civil nature of the urinalysis testing.[179] Justice Kennedy stated that simply because the drug testing occurs in a noncriminal context, it is appropriate to determine the search's reasonableness "without reference to our usual presumption in favor of the procedures specified in the Warrant Clause."[180]

Justice Kennedy's declaration that the program's reasonableness may be determined without any reference to the probable cause standard is incorrect. This standard cannot be discarded simply because there is a civil justification for drug testing.[181] A court must explain why adherence to the traditional standard is impracticable before substituting its own balancing of interests for that of the framers.[182]

The crucial question left unanswered by the majority is why individual suspicion is not necessary before every urine test.[183] Indeed, the only mention of individualized suspicion is when the Court concluded that the balance of interests did not warrant this requirement.[184] However, concluding that the government's interests in drug testing outweigh the test's interference with privacy interests does not justify dispensing with a requirement of individualized suspicion. If the standard of individualized suspicion is adequate for identifying substance-abusing employees, the Customs Service lacks an interest that justifies departing from this standard.[185] Thus, it is not the interest in a drug-free work force that should be weighed on the government's side of the balance, but

178 *Id.* at 1391-92 (emphasis in original) (citing Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967)).

179 *Id.* at 1391, 1397.

180 *Id.* at 1397.

181 The scope of protection under the fourth amendment is not limited to unreasonable criminal searches. The amendment also protects against unreasonable civil investigations conducted by the government. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1425 (1989) (Marshall, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 334-35 (1985); Michigan v. Tyler, 436 U.S. 499, 504-05 (1978); *Camara*, 387 U.S. at 528-30. Even in an employment context there is a strong presumption in favor of probable cause. O'Connor v. Ortega, 480 U.S. 709, 716-19 (1987).

182 *See supra* note 175.

183 For example, would a reasonable suspicion standard unduly impair the objectives of the search? *See Skinner*, 109 S. Ct. at 1417-19.

184 *Von Raab*, 109 S. Ct. at 1392.

185 W. LAFAVE, SEARCH & SEIZURE § 10.3[e], at 47-48 (Supp. 1988).

rather the cost of including an element of probable cause or even reasonable suspicion in the program.[186] Otherwise, the governmental interest in having probable cause or individualized suspicion standards would carry no weight at all in the balancing test.[187]

The majority cited three cases in which the Supreme Court has upheld searches in the absence of individualized suspicion.[188] In each case, the Court emphasized that an individualized suspicion requirement would impair the governmental purpose behind the search since articulable grounds for identifying violators were not generated.[189] In other words, a requirement of individual suspicion was impracticable.[190]

Although the majority neglected this crucial step, a careful analysis, nevertheless, reveals that an individualized suspicion requirement would frustrate the government's ability to achieve a drug-free Customs Service. First, as noted in the companion case of *Skinner*, "an impaired employee will seldom display any outward 'signs detectable by the lay person or, in many cases, even the physi-

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186 The cost of an individual suspicion requirement is the reduction in the deterrent effect of the drug testing program caused by fewer drug users being detected. *See* New Jersey v. T.L.O., 469 U.S. 325, 363 (1985) (Brennan, J., dissenting).

187 *Id.*

188 *Von Raab*, 109 S. Ct. at 1392 (citing Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1415-17 (1989); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976); Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967)).

189 *Skinner*, 109 S. Ct. at 1416-19; *Martinez-Fuerte*, 428 U.S. at 557; *Camara*, 387 U.S. at 535-36.

190 Two decisions illustrate this point. In *Camara*, the Court held that a warrant authorizing an area-wide inspection of houses for municipal housing code violations did not violate the fourth amendment. 387 U.S. at 536. Since most violations were not observable from outside the residences, the Court concluded that a reasonable suspicion requirement would be impracticable. *Id.* at 534-35. The Court stated that warrants based upon appraisals of the conditions of the area as a whole or simply the passage of time would be reasonable. *Id.*

On the other hand, in Delaware v Prouse, 440 U.S. 648, 659 (1978), the Court held that random spot checks by highway patrolman aimed at discovering unlicensed drivers were unreasonable. In reaching this result, the Court recognized the state's interest in promoting highway safety as "vital." *Id.* at 658. Nonetheless, the Court noted that stops based on reasonable suspicion were an effective means of guarding the public interests because drivers without licenses have a tendency to generate articulable grounds for identifying themselves, in part by violating other traffic regulations. *Id.* at 659-60; *see also* United States v. Brignoni-Ponce, 422 U.S. 873, 881-84 (1975)(random stops by border patrol held invalid because "the nature of illegal alien traffic tend to generate articulable grounds for identifying violators . . . [and therefore] a requirement of reasonable suspicion for stops allows the government adequate means of protecting the border").

The facts of *Von Raab* are similar to *Camara* and distinguishable from *Prouse*. In *Prouse*, the wrongdoing which the government sought to avoid, driving without a license, generated articulable grounds for identifying violators. Here, in contrast to *Prouse*, the wrongdoing which the government seeks to avoid, illicit drug use, cannot be detected by an observer. *See infra* notes 191-94 and accompanying text.

cian.' "[191] Secondly, many Customs employees, as well as their work-product, are not subject to daily observation by their supervisors and co-workers.[192] Thus, while an employee's use of illicit drugs may give rise to suspicion in a traditional office environment, such frequent contact is absent between Customs Service supervisors and their subordinates.[193] Finally, neither supervisors nor fellow employees likely will be aware of an employee's off-duty drug use.[194]

In sum, the Court failed to emphasize whether the impracticability of a probable cause or even individualized suspicion requirement was an essential element of a constitutional suspicionless drug testing program. While Supreme Court precedent indicates that this is of overriding significance, the *Von Raab* Court devoted sparse attention to this issue. This may mislead subsequent courts to erroneously conclude that the practicality of a reasonable suspicion standard is only one of several factors to be weighed in the balance.[195]

B. THE GOVERNMENT'S SIDE OF THE BALANCING TEST: BENEFITS OF URINALYSIS TESTING—A FUNCTION OF TWO VARIABLES

After establishing that the Customs Service's purpose behind urinalysis testing is beyond the ordinary needs of law enforcement and that the probable cause and individualized suspicion requirement are impracticable, the Court must turn to a balancing test to determine whether the search is reasonable.[196] The balancing test requires the Court to weigh the privacy expectations of the individ-

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191 *Skinner*, 109 S. Ct. at 1419 (quoting 50 Fed. Reg. 31,526 (1985)); *see* Amalgamated Transit Union v. Cambria City Transit Auth., 691 F. Supp. 898, 905 (W.D. Pa. 1988); Mullholland v. Department of the Army, 660 F. Supp. 1565, 1569 (E.D. Va. 1987). *But see* Taylor v. O'Grady, 669 F. Supp. 1422, 1438 (N.D. Ill. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1518 (D.N.J. 1986).

192 *Von Raab*, 109 S. Ct. at 1395.

193 *Cf.* Harmon v. Thornburgh, 878 F.2d 484, 489 (D.C. Cir. 1989).

194 For a discussion of why the government's interest encompasses an employee's off-duty drug use, see *infra* note 201. *See* City of Palm Bay v. Bauman, 475 So. 2d 1322, 1326 (Fla. Dist. Ct. App. 1985) ("marijuana causes severe long and short term physical, mental and psychological effects" and thus the relevant time frame of drug use includes one's off-duty drug use) (citations omitted); *see also* Yesavage, Leirer, Denari & Hollister, *Carry-Over Effects of Marijuana Intoxication on Aircraft Pilot Performance: A Preliminary Report*, 142 AM. J. PSYCHIATRY 1325-29 (1985) (contending that marijuana users may be unable to perform complex tasks 24 hours after using the drug).

195 *E.g.*, *Harmon*, 878 F.2d at 489. *Harmon*, decided after *Von Raab*, upheld a urinalysis drug testing program similar to that involved in *Von Raab*. However, the *Harmon* employees worked in traditional office environments. Consequently, the court concluded that "drug use is presumably more easily detected by means other than urine testing." *Id.* Nevertheless, based on the holding in *Von Raab*, the court concluded that this factor was merely relevant and not essential to a constitutional drug-testing plan. *Id.*

196 *See supra* note 173.

ual employees against the governmental interests furthered by suspicionless urinalysis testing.[197] If the employee's privacy interests are outweighed by the government's asserted interests, the search is deemed reasonable.[198]

The balancing inquiry has two reference points: the Court must determine whether the search is 1) "justified at its inception"[199] and 2) "reasonably related in scope to the circumstances which justified the interference in the first place."[200] The search is considered reasonable if it satisfies both prongs of this test. In *Von Raab*, the debate between the majority and Justice Scalia centered on whether the government's urinalysis test was "justified at its inception." Accordingly, this Note will focus exclusively on the first, reasonableness at inception, prong.[201]

Historically, a search was justified at its inception where reasonable grounds existed for suspecting that the search would turn up the evidence sought.[202] Although such suspicion must generally be directed toward a particular individual,[203] the Court has held that a

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197 O'Connor v. Ortega, 480 U.S. 709, 719 (1987) (citing United States v. Place, 462 U.S. 696, 703 (1983)); *see* Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1414 (1989) (citing Delaware v. Prouse, 440 U.S. 648, 654 (1978)).

198 *Skinner*, 109 S. Ct. at 1421; *Von Raab*, 109 S. Ct. at 1397-98.

199 *O'Connor*, 480 U.S. at 726; New Jersey v. T.L.O., 469 U.S. 325, 341-42 (1985) (citing Terry v. Ohio, 392 U.S. 1, 20 (1968)).

200 *O'Connor*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 341-42 (citing *Terry*, 392 U.S. at 20).

201 Under the second prong of the reasonableness test, the measures adopted must be reasonably related to the objectives of the search and not excessively intrusive. *T.L.O.*, 469 U.S. at 341-42. The Customs Service's drug program is reasonably related in scope to its objectives. The Service has an interest in ensuring that employees who carry guns will not be impaired by drugs while at work. Thus, the relevant question is whether urinalysis testing can identify employees who are more likely to use drugs in a fashion which impairs their on the job performance.

A positive urine test need not conclusively establish that an applicant will use drugs while at work. *Skinner*, 109 S. Ct. at 1421; *see supra* note 194. Instead, the test results need only indicate that drug-impaired job performance is more or less probable. *Skinner*, 109 S. Ct. 1421. An employee who tests positive is more likely to use drugs in a fashion which impairs his job performance than an employee who has never used drugs. Amalgamated Transit Union v. Cambria City Transit Auth. 691 F. Supp. 898, 907 (W.D. Pa. 1988) (citations omitted). *But see* Taylor v. O'Grady, 669 F. Supp. 1422, 1431 (N.D. Ill. 1987). The program is also reasonable in scope insofar as it covers applicants for interdiction positions. Any drug use by a drug interdiction officer raises doubts concerning the employee's integrity. *Id.* at 1437-39.

The drug program is not excessively intrusive since the method of conducting the urine tests is generally reasonable. For a discussion of the factors which reduce the testing's intrusiveness as much as is practicable, see *supra* note 69 and accompanying text.

202 *O'Connor*, 480 U.S. at 726; *T.L.O.*, 469 U.S. at 342.

203 Ybarra v. United States, 111 U.S. 85, 92-93 (1979); *see* Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) (tip to police officer that probationer was violating his parole by storing guns in his apartment gave officer reasonable suspicion); *O'Connor*, 480 U.S. at 726 (charges of various financial improprieties provided employer with individualized

generalized problem among the targeted class is sufficient to justify a search at its inception.[204] Thus, under Supreme Court precedent, urinalysis testing would be justified at its inception if either individual suspicion existed or there was an acute drug problem within the particular work force subject to testing.

However, in *Von Raab*, the Supreme Court implicitly incorporated a new factor into the determination of whether a search is justified at its inception.[205] Instead of focusing exclusively on whether individual or generalized suspicion of drug use existed, the Supreme Court inquired into the potential societal harm sought to be prevented by drug testing.[206] Under the *Von Raab* logic, the government's interest in conducting suspicionless searches is afforded more weight in cases where the potential harm to society is great.[207]

The majority was correct in considering the potential harm of a drug-impaired Customs Service when determining whether the benefits of drug testing outweigh its interference with an employee's privacy interests.[208] However, the Court failed to assess the extent to which the drug testing program in question would actually decrease the threat of such harm to society.[209] In essence, the benefit to society of urinalysis testing is a function of two variables. First, the potential societal harm of a drug user occupying a sensitive position must be determined.[210] Second, the drug program's effective-

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suspicion of wrongdoing by the employee); *T.L.O.* 469 U.S. at 346 (teacher's report that a student had been smoking provided reasonable suspicion that the student's purse contained cigarettes).

204 *Skinner*, 109 S.Ct. at 1407 n.1; United States v. Martinez-Fuerte, 428 U.S. 543, 551-52 (1976); Camara v. Municipal Court, 387 U.S. 523, 536 (1967); Jones v. McKenzie, 833 F.2d 335, 340 (D.C. Cir. 1987).

205 National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1395 & n.3. (1989).

206 *Id.*

207 *See* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (enormous dangers associated with placing a drug user in the control room of a nuclear power plant warrants random urinalysis drug testing).

208 *See* New Jersey v. T.L.O., 469 U.S. 325, 377-79 (1985) (Stevens, J., dissenting); State v. Garcia, 500 N.E.2d 158, 161 (Ind. 1986) (citing Brown v. Texas, 443 U.S. 47, 50 (1979); *see also* Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[A]n important factor to be considered when determining whether any exigency exists [to justify dispensing with the warrant requirement] is the gravity of the underlying offense.").

209 Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1547 (6th Cir. 1988); *see also* Brief of the American Federation of Labor and Congress of Industrial Organizations, The Public Employee Department, AFL-CIO and The American Federation of Government Employees, AFL-CIO as Amici Curiae in support of Petitioners at 14, *Von Raab* (No. 86-1879) (" 'Consideration of the constitutionality' of a search 'involves a weighing' not only of 'the gravity of the public concerns served by the [search],' but also of 'the degree to which the [search] advances the public interest.' ") (quoting *Brown*, 443 U.S. at 50).

210 For a discussion of the potential harm to society of promoting a drug user to a sensitive position, see *infra* note 223.

ness at reducing this risk of harm must be analyzed.[211] The *Von Raab* majority neglected this second factor. Therefore, the next portion of this Note will focus primarily on the effectiveness variable and how it relates to the drug testing program in question.

The magnitude of the reduction in risk attributable to a drug testing program depends on two factors: 1) the current level of drug use within that employment sector,[212] and 2) the efficacy of the particular program at detecting and thereby deterring drug users from seeking promotions.[213] The Customs Service's drug testing program was not implemented in response to any significant level of drug use among its employees. Moreover, the advance notification of when an employee will be tested allows substance-abusing employees to avoid detection by briefly abstaining from drug use. Therefore, the program is not effective in the sense of reducing risk of harm to society.

1. Lack of Evidence of Drug Use by Customs Employees

The first factor concerns the number of drug users who would have sought promotions but for the drug screening program. Essentially, this factor involves rudimentary cause-in-fact analysis. If no drug users would have sought promotions in the absence of a drug testing program, then such program has not reduced any potential harm to society. Instead, the drug testing program has needlessly interfered with the privacy interests of many applicants. Thus, it is important to assess the probability of detecting or deterring a drug user from seeking a sensitive position in addition to considering the benefit to society of preventing such an employee's promotion.

The majority unpersuasively argued that reasonable grounds exist for suspecting a drug problem among Customs employees.[214]

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211 If risk of the potential harm is not significantly decreased by the search, there is no justification for the government interfering with employees' privacy interests. No benefits, in the form of reduced risk of harm, ensue to society as a result of the government conducting the search.

212 For a discussion of the lack of evidence of an existing drug problem in the Customs Service work force, see *infra* notes 214-223 and accompanying text. In essence, this factor is the reasonable suspicion standard which the Court relied upon in previous decisions to determine whether a search was justified at its inception. For a discussion of the reasonable suspicion standard, see *supra* notes 202-204 and accompanying text.

213 Employees who test positive for use of illicit drugs are subject to dismissal. *Von Raab*, 109 S. Ct. at 1389. However, this administrative penalty will only deter drug users from seeking promotions if the program actually detects illicit drug use. For a discussion of why the Customs Service's program will not detect drug users, see *infra* notes 224-236 and accompanying text.

214 *Von Raab*, 109 S. Ct. at 1395.

The Court reasoned that the widespread use of illegal drugs in society at large leads to the "logical" inference that some users may end up employed in the Customs Service.[215]

However, there is no evidence which indicates that the prevalence of drug abuse in the general citizenry is also a problem in the Customs Service.[216] It is inappropriate to resort to national statistics of a widespread societal problem to justify searching a particular group, such as Customs employees.[217] This is particularly true where the group has chosen a career in federal law enforcement and has been singled out as deserving of promotions.[218] Even the Commissioner of the Customs Service has repeatedly emphasized that the Customs Service work force "is largely drug-free," and that "[t]he extent of illegal drug use by Customs employees was not the reason for establishing this program."[219] Based on the lack of evidence of on-the-job accidents or integrity violations attributable to employee drug use, a more "logical" conclusion is that the Customs Service's work force is largely drug-free.[220]

Individuals are promoted to sensitive positions from the current Customs Service work force. Since there is no evidence of widespread drug use among current Customs employees,[221] it is unlikely that a drug user would be promoted to a sensitive position even in the absence of any drug testing. The potential gains to society of mandatory drug testing are substantially lower than if there had been a serious drug problem. Unfortunately, the majority failed to adequately discount the potential societal benefit of urinalysis testing by the lack of evidence that a substantial number of Customs Service personnel use drugs.[222] Thus, the majority has inflated the

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215 *Id.*

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

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

218 *But see* Taylor v. O'Grady, 669 F. Supp. 1422, 1427 (N.D. Ill. 1987).

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

220 *See* Amalgamated Transit Union v. Cambria City Transit Auth., 691 F. Supp. 898 (W.D. Pa. 1988).

221 *See supra* notes 214-223 and accompanying text.

222 The analogies drawn by the majority between suspicionless magnetometer searches at airports and the Customs Service suspicionless urinalysis testing is flawed. *See Von Raab*, 109 S. Ct. at 1395 n.3. Magnetometers were installed in airports in response to a national hijacking crisis. *Id.* The majority responds that magnetometers searches could rightfully be installed at any airport even if that particular facility had not previously experienced hijacking problem. *Id.* This is undoubtedly correct. However, the majority fails to recognize that airports are to some extent fungible when it comes to being the victim of acts of terrorists. In this regard, the airline cases are analogous to Delaware v. Prouse, 440 U.S. 648 (1978). In *Prouse*, the Court based its determination that Delaware had a "vital interest" in promoting public safety upon its roads on statistics concerning motor vehicle accidents occurring throughout the United States. *Id.* at

potential gains to society of implementing suspicionless drug testing in this context.[223]

2. *Degree to Which the Customs Service's Testing Program Detects Drug Users*

The second factor in assessing the benefits of urinalysis testing concerns whether the Customs Service's program will actually detect drug users who seek promotions to sensitive positions. Implicit in this inquiry is the question of how often the drug tests will register negative even though the employee uses illicit drugs. If users can avoid detection, they will not be deterred from seeking promotions. Therefore, without disparaging the gravity of the potential

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658. The *Prouse* Court's reliance on national statistics was correct because there was no reason to believe that Delaware drivers are more or less prone to be involved in an automobile accident than residents of other states. Drivers in different states are fungible.

The instant case is unlike the airline hijacking cases and *Prouse*. Customs employees are a unique subpopulation of the United States public. These individuals have chosen a career in law enforcement. Moreover, the Customs work force is known throughout the law enforcement community as having "noteworthy integrity." Brief for Petitioner at 7, *Von Raab* (No. 86-1879) (citation omitted). Finally, only employees who have been deemed worthy of promotions are subject to being tested. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177 (5th Cir. 1987). For these reasons, the possibility of a Customs Service employee using illicit drugs is significantly less than that of the average citizen. Customs employees and private citizens, unlike airports or automobile drivers, are not fungible. Therefore, the majority's analogy to suspicionless magnetometer searches at airports is critically flawed.

223 This Note does not assert that urinalysis drug testing can never be reasonable in the absence of individualized or generalized suspicion of drug use. However, as the level of suspicion of a drug problem decreases, the requisite potential harm to society of a drug impaired employee increases. Lovvorn v. City of Chattanooga, 846 F.2d 1539, 1545 (6th Cir. 1988). The danger to society of an impaired Customs agent is insufficient to warrant suspicionless drug testing in the absence of reasonable suspicion of drug use.

The harm to society of drug users being promoted to sensitive positions may be significant. This is especially true in the instance of a Customs employee carrying a firearm. However, the risk of immense losses being imposed upon society is clearly not present. For example, the risks imposed upon society by an impaired Customs officer are not on the same level as exists with certain nuclear power plant employees. Rushton v. Nebraska Public Power Dist., 844 F.2d 562 (8th Cir. 1988). The same is true with air traffic controllers. National Ass'n of Air Traffic Specialists, No. a87-073 unpublished slip op. (D.C. Alaska 1987).

In addition, an impaired Customs employee's activities do not routinely involve the use of a gun. *See* Penny v. Kennedy, 846 F.2d 1563, 1567 (6th Cir. 1988). A Customs agent will only need to discharge a firearm on rare occasions. In contrast, the daily responsibilities of air traffic controllers, bus drivers, and train conductors bear directly on a substantial number of public lives. *See Skinner*, 109 S. Ct. at 1384; Amalgamated Transit Union v. Cambria City Transit Auth., 691 F. Supp. 898, 905 (W.D. Pa. 1988). Given the lower potential harm associated with promoting drug users to sensitive positions, some degree of suspicion of drug use is necessary in order for a drug testing program to be reasonable. *See Lovvorn*, 846 F.2d at 1547. However, no evidence of such a problem exists here. *See supra* notes 216-220 and accompanying text.

harm of a drug impaired Customs officer, it is also necessary to consider the program's effectiveness.[224]

Judge Hill's dissent below raised relevant arguments which the *Von Raab* majority did not address.[225] In essence, the drug testing program's inefficacy stems from the employee's ability to predict, with certainty, the timing and the occurrence of his or her urine test. Therefore, employees can abstain from using drugs to avoid any possibility of detection. It is noteworthy that Judge Hill's arguments are based entirely on the particular procedures the Customs Service adopted and therefore do not address the constitutionality of suspicionless urinalysis testing in general.[226]

The majority specifically discussed the urinalysis scheme's efficacy in addressing the petitioner's second contention.[227] The majority argued that users will be unaware of the fadeaway effect of certain drugs.[228] This assumption is tenuous at best. Indeed, in *Skinner,* the Court implicitly recognized that urinalysis cannot serve as an effective deterrent if employees are able to predict when they will be tested.[229] Customs Service employees are not only aware of when they will be tested but actually control the occurrence of the event by applying for promotions to sensitive positions.[230]

The majority responded that since some drugs remain detectable in urine for up to twenty-two days, employees cannot avoid detection by simply abstaining from drugs after the test date is assigned.[231] However, the majority's use of a twenty-two day fadeaway period is misleading. Many highly addictive drugs such as cocaine, amphetamines, barbiturates, and heroin can only be detected for up to five days after ingestion.[232] Thus, the more dangerous drugs, which pose the greatest risks of employee corruption and job

224 *See, e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985). The Court must weigh the "government's need for *effective* methods" to promote public order. *Id.* at 337 (emphasis added).

225 *Von Raab*, 816 F.2d at 182-84 (5th Cir. 1987) (Hill, J., dissenting). For a discussion of Judge Hill's dissent, see *supra* notes 151-163 and accompanying text.

226 For example, Judge Hill's arguments cannot be extended to the companion case of *Skinner* because in *Skinner,* employees did not know when they would be tested. 109 S. Ct. at 1420. In *Skinner*, employees were tested after a serious train accident "which no employee could predict with certainty." *Id.* The *Skinner* Court expressly recognized that the inability of an employee to predict when he or she would be tested was crucially important to increasing the deterrent effect of urinalysis testing. *Id.*

227 *Von Raab*, 109 S. Ct. at 1396. *See supra* notes 82-88 and accompanying text.

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

229 *Skinner*, 109 S. Ct. at 1420; *see also supra* note 226.

230 *Von Raab*, 816 F.2d at 177.

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

232 Joint Appendix of Petition for Certiorari to the United States Court of Appeals for the Fifth Circuit at 7, *Von Raab* (No. 86-1879).

impairment, have fadeaway periods considerably less than twenty-two days.

Moreover, the majority completely failed to consider the realistic possibility of users abstaining from drugs *before the test date is assigned.* Employees are generally notified of vacancies over a month before a selection for a replacement is made.[233] Thus, employees can abstain from drug use for a brief period of time before submitting their applications for promotions. Since employees are never tested again, users can resume taking drugs immediately after a urine sample is submitted.[234]

The majority's conclusion that "avoidance techniques . . . are fraught with uncertainty"[235] is clearly erroneous. Drug users can avoid any possibility of detection. The employees control whether they will be tested, and if so, when the testing will occur. Therefore, urinalysis drug testing will not reduce the risk of harm to society because the procedures adopted by the Custom Service allow users to avoid detection.[236]

C. THE RAMIFICATIONS OF *VON RAAB*

Von Raab suggests that public as well as private employees may be required to submit to drug testing whenever the government has a compelling interest in ensuring that such employees do not use illicit drugs.[237] The *Von Raab* decision has eliminated reasonable suspicion of drug use as a prerequisite of a constitutional drug testing program.[238] The relevant inquiry is the prevalence of drug abuse in society at large.[239] If the current level of illicit drug use in the United States is sufficient to warrant drug testing Customs employees, it likewise justifies testing other employees.

In determining the possible ramifications of the *Von Raab* decision, it is most important to assess the governmental interests in conducting the drug test. The privacy interests of individuals occu-

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233 *Id.*

234 *Von Raab*, 816 F.2d at 184 (Hill, J., dissenting).

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

236 The majority correctly concluded that chronic drug users will be unable to abstain from drugs for even a brief period of time. Thus, urinalysis will detect these drug users. Nevertheless, individuals whose drug use is so severe will be detectable even without the aid of urinalysis testing. *See Von Raab*, 109 S. Ct. at 1399 (Scalia, J., dissenting); *accord* Taylor v. O'Grady, 669 F. Supp. 1422, 1437-38 (N.D. Ill. 1987).

237 Although *Von Raab* involved public employees, the majority's analysis can logically be extended to include private employees. *E.g.*, Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1384 (1989) (federal regulations mandating suspicionless drug testing of privately owned railroad employees upheld).

238 *See supra* notes 202-211, 214-220 and accompanying text.

239 *See supra* notes 214-15 and accompanying text.

pying positions in which the government has a weighty interest are likely to be comparable to the interests of Customs employees in *Von Raab*. These individuals, like the Customs employees seeking transfers, will have a diminished expectation of privacy by virtue of their employment in positions where the government has such a weighty interest in drug testing.[240] Thus, subsequent adjudication will predominately focus on the government's interest in conducting a search as opposed to the search's interference with privacy interests of individuals.[241]

1. Integrity

In *Von Raab*, the government's first asserted interest was maintaining the integrity of its work force.[242] In discussing this interest, the Supreme Court emphasized that Customs employees who were unsympathetic to the war on drugs because of their own drug use could jeopardize the Service's interdiction mission.[243] This reasoning applies equally to anyone involved in apprehending and prosecuting drug offenders. Thus, under the Court's analysis, drug testing can legitimately be required of police officers,[244] judges, legislators, and attorneys who prosecute drug cases[245] since these individuals all have substantial roles in the country's war on drugs. Indeed, the downside risk of judges or legislators who are unsympathetic to the war on drugs is disproportionately large and may pose even greater risks than unsympathetic interdiction agents at issue in *Von Raab*.[246]

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240 For a discussion of the Customs Employee's diminished expectation of privacy, see *supra* notes 65-69 and accompanying text.

241 *See, e.g.*, Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989). *Harmon*, which specifically relied on *Von Raab*, focused exclusively on the governmental interests alleged to justify a suspicionless urinalysis testing program. Although the court determined that the drug testing program was constitutional, it never mentioned the test's interference with an individual's privacy interests.

242 *Von Raab*, 109 S. Ct. at 1392.

243 *Id.*

244 Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989).

245 *See Harmon*, 878 F.2d at 490-91.

246 An unsympathetic judge may pose greater risks than a compromised Customs agent for three reasons. First, in the case of a compromised Customs agent, the losses, although significant, are not irretrievable since a smuggler may still be arrested by other law enforcement personnel. *See* Penny v. Kennedy, 846 F.2d 1563, 1567 (6th Cir. 1988). A judge's bias will influence the trial of an accused drug offender. The losses are irretrievable since double jeopardy will prevent a drug trafficker from being tried again. Second, at the trial level, more resources have been devoted in terms of prosecutors obtaining additional evidence and preparing for trial. Finally, judges as well as legislators are subject to considerable scrutiny by the press. The ensuing publicity could be substantial if a judge or legislator was found to be an illicit drug user. The government's efforts to eliminate the use of illicit drugs depends on convincing the public that drugs

The fact that many of these positions involve substantial responsibilities unrelated to the country's war on drugs is irrelevant.[247] Although the national crisis caused by illicit drug use is important,[248] it is clearly not the only threat to national security which the United States faces. Judges and legislators deal with a large variety of equally important issues. For example, the majority's reasoning applies with equal force to these individual's duties which affect the nation's economy or military. Thus, the integrity rationale adopted by the *Von Raab* majority may logically be extended to encompass the drug testing of any individual who, if corrupted by drugs, could raise comparable risks to national security.

2. *Public Safety*

An even broader scope attaches to the public safety rationale adopted by the majority.[249] The requisite level of "safety interests" to warrant suspicionless urinalysis testing of public employees is determined by reference to the Court's approval of testing Customs agents who carry firearms. Undoubtedly, a number of duties raise comparable public safety concerns if performed by a drug impaired employee. For example, drug impaired fire fighters,[250] police officers,[251] civilians employed at military weapons plants,[252] school crossing guards,[253] construction workers,[254] and employees involved in mass transportation[255] pose similar risks to public safety.

Moreover, many categories of employees pose greater potential harm to society than Customs agents carrying firearms for two reasons. First, Customs officers will seldom use their firearms.[256] Thus, an impaired Customs officer will rarely jeopardize anyone's

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are extremely dangerous. *Harmon*, 878 F.2d at 497-98 (Silberman, J., dissenting). When a high ranking official, such as a judge or a legislator, is found to be a drug user, the government looses credibility and the probability of eliminating drugs from society is decreased. *Id.* (Silberman, J., dissenting).

247 *But see Harmon*, 878 F.2d at 490-91.

248 *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1392 (1989); United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985); United States v. Mendenhall, 446 U.S. 544, 561-62 (1980) (Powell, J., concurring).

249 For a discussion of the public safety rationale, see *supra* notes 63-64 and accompanying text.

250 Brown v. Winkle, 715 F. Supp. 195 (N.D. Ohio 1989).

251 Guiney v. Roache, 873 F.2d 1557 (1st Cir. 1989).

252 Thompson v. Marsh, 884 F.2d 113 (4th Cir. 1989).

253 *Von Raab*, 109 S. Ct. at 1401 (Scalia, J., dissenting).

254 *Id.*

255 Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989) (train conductors); Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989) (bus drivers).

256 *See* Hartness v. Bush, 712 F. Supp. 986, 988 (D.D.C 1989); Penny v. Kennedy, 846 F.2d 1563, 1566-67 (6th Cir. 1988).

safety. In contrast, society depends on the daily unimpaired judgment of bus drivers and train conductors, for example.[257] Secondly, the magnitude of potential losses resulting from a drug-related bus or train accident is also substantially larger than the damage resulting from a poorly used firearm.[258] Therefore, under the public safety rationale, several categories of employees may be required to submit to urinalysis drug testing.

3. Sensitive Information

The government may conduct suspicionless drug testing in order to prevent the unauthorized disclosure of "truly sensitive information."[259] Unfortunately, the Court did not indicate what level of sensitivity is a sufficient predicate for drug testing.[260] Nevertheless, the level of national security interest contemplated by the *Von Raab* Court can be estimated by reference to the cases which the majority chose to cite.[261]

Department of the Navy v. Egan[262] was the principal case cited in support of the confidentiality rationale. In *Egan*, the Court upheld the Navy's denial of the security clearance of a civilian employee seeking employment as a machinist at a nuclear submarine repair facility.[263] The unauthorized disclosure of information at issue in *Egan* posed a potential threat to national security since the submarines played a crucial role in the nation's defense system. The Court's selection of *Egan* in addition to its emphasis that the material must be "truly sensitive" indicates that the information at issue must pose potential risks to national security in order to justify drug testing every employee with access to such information.[264] Therefore, although Justice Scalia was correct in asserting that other federal employees may be required to submit to urinalysis testing

257 Amalgamated Transit Union, v. Cambria City Transit Auth., 691 F. Supp. 898, 904 (W.D. Pa. 1988); *see Penny*, 846 F.2d at 1566-67.

258 *Amalgamated Transit*, 691 F. Supp. at 904; *see Penny*, 846 F.2d at 1566-67.

259 National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1396-97 (1989).

260 *Id.* at 1401 n.1 (Scalia, J., dissenting); Harmon v. Thornburgh, 878 F.2d 484, 491-92 (D.C. Cir. 1988).

261 *Harmon*, 878 F.2d at 491-92; Hartness v. Bush, 712 F. Supp. 986, 991-92 (D.D.C. 1989).

262 484 U.S. 518 (1988).

263 The navy revoked the security clearance after discovering that Egan had been convicted for assault and for carrying a loaded firearm. *Id.* at 521.

264 *See Harmon*, 878 F.2d at 491-92; *Hartness*, 712 F. Supp. at 991-93. Many government employees have access to some confidential information. However, if this was a sufficient predicate for a drug testing program, the *Von Raab* Court would have employed a broader rationale. *Harmon*, 878 F.2d at 496 (Silberman, J., dissenting).

under the confidentiality rationale, the extension to such employees is clearly not as broad as he contends.[265]

V. CONCLUSION

In *Von Raab*, the Supreme Court significantly limited the role of probable cause and individual suspicion in determining the reasonableness of searches conducted for noncriminal purposes. The majority unduly relied on the noncriminal purpose of the urinalysis drug testing in justifying its use of the balancing of interests test. The Court did not clearly articulate its reasons for replacing the usual fourth amendment standards with a balancing test. However, this step determines whether a court is entitled to substitute a balancing test for the traditional probable cause standard. Although such reasons did exist in the instant case, the Court's conclusion that the balancing test is the rule as opposed to the exception is clearly erroneous.

In assessing the benefits of the Customs Service's drug testing program, the majority failed to consider the extent to which urinalysis testing will actually decrease the risk of any potential societal harm. There is no evidence of an existing drug problem within the Customs Service. Furthermore, the employees' ability to control the occurrence and timing of the testing enables users to abstain and thereby cleanse their systems of drugs before taking the test. Both factors indicate that the Customs Service's program will at best only minimally reduce any risk of harm to society. Even if promoting a drug user to a sensitive position endangers governmental interests, these dangers are not of sufficient magnitude to justify drug testing in the absence of any evidence of drug use among Customs employees.

Undoubtedly, the *Von Raab* decision will be heavily relied upon to determine whether other categories of employees can be constitutionally drug tested. The integrity rationale adopted by the *Von Raab* majority may logically be extended to encompass drug testing any individual, who if corrupted by drugs, could raise comparable risks to national security. Risks to national security which are unrelated to the government's war on drugs may still justify the implementation of suspicionless drug testing. Urinalysis drug testing is also a reasonable method of enhancing public safety whenever drug impaired employees may endanger themselves, co-workers, or the

265 In short, Justice Scalia predicted that "vast numbers of public employees" could be required to take urinalysis tests under the majority's reasoning. *Von Raab*, 109 S. Ct. at 1400-01 (Scalia, J., dissenting).

public at large. Moreover, drug testing is reasonable even though an employee will seldom perform duties which require unimpaired judgment. Finally, the Supreme Court expressed approval of drug testing individuals with access to confidential information. The information at issue must pose potential risks to national security in order to justify drug testing every employee with access to such information.

This Note has adopted an extremely analytical approach in reviewing the Supreme Court's *Von Raab* decision. Libertarians, like Justices Marshall and Brennan, are quick to criticize such cost-benefit calculations when considering an individual's fourth amendment rights.[266] While such arguments clearly have some merit, a balancing of interests test, which now appears well-entrenched in fourth amendment jurisprudence, requires such an analysis: does the end (reducing risk of drug users occupying sensitive positions) justify the means (urinalysis testing and its corresponding intrusion on privacy interests of individual workers). This Note concludes that even under the utilitarian standards inherent in the majority's balancing test, the Customs Service's drug testing program is a constitutionally "unreasonable" weapon in the nation's war on drugs.

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266 *See* Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1423 (1989) (Marshall, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 369-70 (1985) (Brennan, J., dissenting).