THE FOURTH AMENDMENT AND EMPLOYEE DRUG TESTING: CURBING THE RIGHT OF PRIVACY WITHOUT PROBABLE CAUSE

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INTRODUCTION

With a pace ever more quickening, a new constitutional jurisprudence is being established in this generation. It is one that easily and conveniently approves the arguments of the business community whether in antitrust or race and sexual harassment suits.[1] It is one that with an unseemly haste accommodatingly defers to governmental authority - especially in its administrative or military manifestations.[2] And it is one that is dangerously eroding and eradicating those guarantees of individual liberties enshrined in our Bill of Rights through the use of ready-made abstractions like "compelling state interests" or "overriding governmental concern." Embarked on a vendetta to wreak revenge on the liberal jurisprudence of the Warren era, this new system should not be designated conservative when it evinces so little concern for the rights of individual citizens. Carrying on its struggle under the banner of judicial self-restraint, this new system nonetheless engages in egregious ventures of judicial activism and even repudiates the principles of *stare decisis*. So much for traditionalism! And this new system has a constituency of devotees — those never comfortable with racial integration, those still seething over the Court's vindication of a woman's right to choose, those still hankering for compulsory prayer in our public schools, and all those who place property above people. These groups stand in reverential awe as

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'For example. Business Electronics Corp. v. Electronics Corp., 485 U.S. 717,108 S. Ct. 1515 (1988) and Meritor Savings Bank v. Vinson, 477 U.S. 57, 106, S.Ct. 2399 (1986).

Tor example, Goldman v. Weinberger, 106 S. Ct. 1310 (1986) and Boyle v. United Technologies Corp. 108 S. Ct. 2510 (1988).

the new system begins to dominate our constitutional thought -- and as they realize fulfillment in its victories.

The operation of this new system has been no more graphically illustrated than in cases challenging employee drug testing. There were a number of suits brought in a number of employment contexts having to do with this issue.

This paper will concentrate on that case which best assembles as much of the constitutional controversy as possible: deference to authority, disregard of employee privacy, and the more than ominous reasoning that blazed a path for other incursions on the constitutional right. *Skinner* v. *Railway Executives Association*[3] serves these purposes well. And by also analyzing the dissent we can readily understand how this case represents a harbinger of peril for the future.

PRELIMINARIES TO THE SKIRMISH

Acting under the provisions of the Federal Railroad Safety Act of 1970, the Secretary of Transportation can issue "appropriate rules, regulations, orders and standards for all areas of railroad safety."[4] Proceeding under this authorization, the Federal Railroad Administration compelled blood and urine tests for all railroad employees involved in a certain class of accident. It also authorized but did not order breath and urine tests for employees who broke certain safety rules. These regulations were challenged as violative of the Fourth Amendment. Justice Anthony Kennedy began his majority opinion by noting how the Federal Railroad Administration justified the imposition of these tests. Almost six years before, it had observed that "industry efforts were not adequate to curb alcohol and drug abuse by railroad employees" and "pointed to evidence that on-the-job intoxication was a significant problem in the railroad industry."[5] The Agency reviewed the occurrence of such accidents with their deaths, bodily injuries and extensive property damage. Some of them caused "the release of hazardous materials" and "in one case, the ensuing pollution required the evacuation of an entire Louisiana community." In reviewing the rules, Justice Kennedy noted that testing was required for any "major train accident"[6] defined as involving:

(i) a fatality,

(ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or

(iii) damage to railroad property of $500,000.[7]

’Skinner v. Railway Labor Executives Association, 109 S. Ct. 1402 (1989).

[4]84 Fed Sut. 971, 45 U.S.C 51431(a).

’Skinner *supra* note 3 at 1407.

**Ii.* at 1408.

’49 CFR 5219.201(a)(1).

When the accident occurs, the railroad is required to transport "all crew members and other covered employees" to an "independent medical facility, where both blood and urine samples must be obtained from each employee." Primary evidentiary reliance will be placed on the blood samples. However, the urine samples were also mandated because "drug traces remain in the urine longer than in blood." And the time factor of transporting to a medical facility.might mean evidence might be eliminated from the bloodstream. The railroads could also require breath tests where a supervisor has a "reasonable suspicion" that an employee is "under the influence of alcohol, based upon specific, personal observations concerning the appearance, behavior, speech, or body odors of the employee."* The labor organizations initially challenged this scheme of testing in the Federal District Court for the Northern District of California. The District Court found the employees privacy interest was outweighed by the competing governmental interest in railroad safety. The Ninth Circuit Court of Appeals[9] reversed this holding. It decided there was "sufficient governmental action to implicate the Fourth Amendment" and that the tests constituted "Fourth Amendment searches." These searches could be legitimate if deemed reasonable. But for that reasonableness justification to be applied "particularized suspicion is essential." Such a "requirement of individualized suspicion" did not place an undue burden on the government. Because in most instances, these tests required no showing of such individualized suspicion, the Court of Appeals threw them out. The dissenting judge would have followed the reasoning of the District Court and weighed the balance as tilting towards the government's side on the scale of competing interests.[10]

INITIATING THE MAJORITY'S ANALYSIS

Before he would pass on the reasonableness of these tests in his majority opinion, Justice Kennedy wanted to determine whether they were "attributable to the Government or its agents, and whether they amount to searches or seizures." These threshold inquiries would decide if the constitutional guarantees applied. For while the Fourth Amendment was not relevant to a 'search or seizure, even an arbitrary one, effected by a private party on his own initiation," the Amendment did apply if the "private party acted as an instrument or agent of the Government." In the present case, the railroads acted under "compulsion of sovereign authority" and were "controlled by the Fourth Amendment." The key to analysis rests on "the degree of the Government's participation in the private party's activities." Even if the Government did not require the private party to conduct the search, did not

*Skinner *supra* note 3 at 1409. ♦839 F. 2d. 575 (1988). '"Skinner *supra* note 3 at 1410.

mean it was a "private one". The whole scheme of regulation here convinced Kennedy that the "Government did more than adopt a passive position toward the underlying private conduct."[11] The regulation expressly pre-empted all state involvement in the same area. They authorized the Federal Agency to receive the samples. Employees could not refuse to take the test. And if they did, they were removed from that field of endeavor. Thus, Justice Kennedy found "clear indices of the Government's encouragement, endorsement, and participation" sufficient to "implicate the Fourth Amendment."[12] Likewise, the taking of the blood sample must be "deemed a Fourth Amendment search."[13] It was "obvious" to Kennedy that "this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable." Requiring an individual to undergo "a breathalyzer test, which generally requires the production of alveolar, or 'deep lung' breath for chemical analysis" involved "similar concerns about bodily integrity." Both kinds of examinations had nonetheless been scrutinized in a previous decision. Indeed, the urine test in the present case did not "entail a surgical intrusion into the body." But such a urine analysis can expose "a host of private medical facts about an employee, including whether she is epileptic, pregnant, or diabetic." Nor can it be denied that privacy interests are implicated when such urine tests entail "visual or aural monitoring of the act of urination." Because these factors intrude upon "expectations of privacy," these test must be considered Fourth Amendment searches and seizures. Consequently, Kennedy did not think it necessary to categorize management's "antecedent interference with the employee's freedom of movement as a "separate Fourth Amendment issue." It was enough in the present circumstances to notice that "any limitations on an employee's freedom of movement" incident to the testing had to be taken into consideration in "assessing the intrusiveness of the searches effected by the Government's testing program."[14]

But for Justice Kennedy the application of the Fourth Amendment to the Agency's testing was only to "begin the inquiry into the standards governing such intrusions." After all, the Amendment did not ban every search and seizure but only ones that were "unreasonable."[15] Citing to authority,[16] Justice Kennedy believed such reasonableness rested on an analysis of the circumstances surrounding the intrusion and on the balancing of the privacy of the individual against the countervailing governmental interest. Normally, the Court would decide that such an invasion could be considered reasonable

[l] *IdM* 1411.
[2] *IdM* 1412.
"*Id.* al 1412 and dting to Schmerber v. California, 384 U.S. 757, 86 S. Q 1826 (1966) [l] *Id.* at 1412-1413. [u] *U.* at 1414.
"United States v. Montoya de Hernandez, 473 U.S. 531,105 S. Ct. 3304 (1985).

unless "it is accomplished pursuant to a judicial warrant issued upon a probable cause." There were, however, certain "recognized exceptions to this rule."[17] For example, when special needs existed "'beyond the normal need for law enforcement,'"[18] the Court had allowed for warrantless searches and seizures. This "special needs" exception discovered by Justice Kennedy for the majority had permitted warrantless intrusions into an probationer's home,[19] the premises of certain highly regulated businesses,[20] student's property by school officials,[21] body cavities of prison inmates,[22] and the desks and offices of employees.[23] So, too, Justice Kennedy holds the governmental interest "in regulating the conduct of railroad employees to ensure safety" constituted such a special need that would legitimize "departures from the usual warrant and probable cause requirements." For the duties of these railroad employees had to do with "safety-sensitive tasks." Indeed, the Agency had promulgated the testing not to further criminal prosecution but as a means of accident prevention. There could be no argument that the "governmental interest" to insure "the safety of the traveling public and of the employees themselves" justified the alcohol and drug prohibitions. As a result, the only issue that remained for Kennedy was whether the governmental "need to monitor compliance with these restrictions" justified "the privacy intrusions absent a warrant or individualized suspicion.[24]

DISPOSAL OF THE WARRANT REQUIREMENT

Search warrants are required to make sure that such invasions of privacy are not "the random or arbitrary acts of government agents." They assure our citizens that the search is "authorized by law, and...is narrowly limited in its objectives and scope." The search warrant procedure also entailed "the detached scrutiny of a neutral magistrate" which guaranteed "an objective determination whether an intrusion is justified in any given case." But Justice Kennedy thought that to require such a procedure in the present situation did "little to further these aims." The regulations issued for the testing "narrowly and specifically" denoted the conditions for "such intrusions." And these were "well known to covered employees." Also, since these tests were of a "standardized nature" which left "minimal discretion" with the administrator, there remained "virtually no facts for a neutral magistrate to evaluate." And

''Skinner, *supra* note 3 at 1414.

"M. at 1414 and citing Griffin v. Wisconsin, 483 U.S. 868, 107 S. Ct 3164 (1987).

''Griffin v. Wisconsin, *supra.*

"New York v. Burger, 482 U.S. 691,107 S. Ct. 263 (1987).

"New Jersey v. T.LO., 469 U.S. 325,105. S. a. 733 (1985).

"Bell v. Wolfish, 441 U.S. 520, 99 S. a. 1861 (1979).

"O'Connor v. Ortega, 480 U.S. 709,107 S. Ct. 1492 (1987).

"Skinner, *supra* note 3 at 1414-1415.

Justice Kennedy emphasized that the Court had found "dispensing with the warrant requirement" easiest when the burden of seeking a warrant was "'likely to frustrate the governmental purpose behind the search.'" Thus, alcohol and drug traces would be eliminated from the blood stream. And the same held true for the sampling of urine which might retain the traces even longer. Compounding this difficulty was the fact that it might be the private railroad company that was administering the test and thus would have to go to the police authority to initiate such search warrant procedures. So, in the present case, the search warrant requirement added "little to the assurances of certainty and regularity already" contained in the procedure and "significantly" hindered and frustrated the Government's purpose to achieve safety. Thus, Justice Kennedy held the "intrusions here" were "reasonable under the Fourth Amendment."[23]

NO NEED FOR PROBABLE CAUSE

Nonetheless, even such warrantless searches could be conducted only "on probably cause to believe that the person to be searched has violated the law." This was the usual rule. When, however, "the balance of interests" precluded "insistence on a showing of probable cause," the Court had ordinarily prescribed "'some quantum of individualized suspicion'" before upholding the search as reasonable. But Justice Kennedy is at pains to quickly point out that such "a showing of individualized suspicion" was not a "constitutional floor, below which a search must be presumed unreasonable" A trap door existed for the speedy disappearance of constitutional rights in the drama of this litigation. For Kennedy remarked that under "limited circumstances," as when "the privacy interests implicated by the search are minimal" and when "an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individual suspicion," then the search would be held reasonable even without "such suspicion." And that, Justice Kennedy asserted, was the present case.[26]
Also, employees consent to "significant restrictions" in their physical movement during employment. Not many were "free to come and go as they please during working hours." Surely, then, some "additional interference" with movement due to the administration of these tests cannot be held to "infringe significant privacy interests." The Court had already sanctioned blood tests for motorists. The breath test under the Agency's rules was "even less intrusive." Nor did such examinations reveal "other facts in which the employee has a substantial privacy interest." Kennedy readily conceded that testing which necessitated "employees to perform an excretory function

[a]M. at 1415-1416.

**Id.* at 1416-1417 and citing to United States v. Martinez-Fuerte, 428 U.S. 543,560,96 S. Ct. 3074, 3084 (1976).

traditionally shielded by great privacy" did raise "concerns not implicated by blood or breath tests." But even here the Agency's rule did not mandate "the direct observation of a monitor." And, additionally, any employee expectation of privacy was "diminished" because of "participation in an industry...regulated pervasively to ensure safety, a goal dependent...on the health and fitness of covered employees." Justice Kennedy admits that a privacy interest in such regulated industries must not "always be considered minimal." But in the railroad context both "logic and history" led him to conclude there was a "diminished expectation of privacy." He also found that the governmental interest in the tests even without a "showing of individualized suspicion" was "compelling." These railroad employees performed duties "fraught with such risk of injury to others" where "even a momentary lapse of attention can have disastrous consequences." Their situation was analogous to those who had "routine access to dangerous nuclear power sites." The unions might argue for "less drastic alternatives." But in a classic example of judicial deference to the administrative agency, Kennedy refuses to "second guess" their "reasonable conclusions drawn...after years of investigation and study."[27]

DETERRENCE, SAFETY AND OTHER JUSTIFICATIONS

Justice Kennedy also thought the testing procedure was "an effective means" to create a deterrent for the workers in these "safety-sensitive tasks from using controlled substances or alcohol in the first place." Because they know they will be tested at a time uncertain, the employees are most likely to "forego using drugs or alcohol while subject to being called for duty." These tests will also assist the industry in analyzing "the causes of major accidents" as well as assist it in establishing "appropriate measures to safeguard the general public." If the results were positive, the railroads could decide whether the dnig use was the cause of the accident or, if not directly so, whether such use substantially contributed to its occurrence. Negative results would suggest other causes ranging from "equipment failure" to "inadequate training." Requiring a "particularized suspicion" would significantly "impede" management's "ability to obtain this information despite its obvious importance." The immediate accident scene was always "chaotic." And those immediately investigating it would find it "difficult" to particularize their suspicions. Indeed, making them do so would predictably "result in the loss or deterioration of evidence." So it was "unreasonable" and "inimical" to the important governmental goal of transportation safety to demand "a showing of individualized suspicion in these circumstances." If urine tests showed only "recent use of controlled substances," that would be sufficient "information" to "provide the basis for further investigative work...to determine whether the

[r] *Id.* at 1417-1419.

employee used drugs at the relevant times." There was enough data in the trial record to indicate how such testing procedures allowed the Agency to make an "informed judgment as to how a particular accident occurred." And that record likewise refuted the Court of Appeals's contention that the "tests might be quite unreliable." Thus Kennedy inevitably concluded that the "compelling government interest" which the Agency's regulations furthered "would be significantly hindered" if the administration was forced to "point to specific facts giving rise to a reasonable suspicion of impairment" prior to testing an employee. Nor did this testing constitute "an undue infringement on the justifiable expectations of privacy of covered employees." So the "Government's compelling interests" more than outweighed countervailing constitutional "privacy concerns." Mere possession of unlawful drugs was a punishable criminal offense. But Kennedy pronounced the performance of safety-sensitive work while under their influence "a separate and far more dangerous wrong." He believed the present case established "the necessity" for a "regulatory function" with regard to such workers and the "reasonableness of the system" adopted for doing so. Since the procedure under present examination was not mere "private action outside the reach of the Fourth Amendment," it had to meet that Amendment's "reasonableness requirement." Because of the "limited discretion exercised by" management, the "surpassing safety interests served" by the tests and the "diminished expectation of privacy" attaching to the information relevant to the worker's fitness, Justice Kennedy held that it was "reasonable" to carry on the testing "in the absence of a warrant or reasonable suspicion that any particular employee may be impaired." And being reasonable under these circumstances, the tests passed constitutional muster under the Fourth Amendment.[2]*

A VERY BRIEF CONCURRENCE

Justice John Paul Stevens concurred in a short opinion that took issue only with the deterrent rationale Justice Kennedy had used. Stevens believed that the "public interest" in searching for the causes of serious railroad accidents justified the testing. But he thought it a "dubious proposition" that the testing had a deterrent effect on covered employees. He thought that if the "risk of serious physical injury" while on the job did not keep such employees from using these illicit substances, it was "highly unlikely" that a threatened loss of the job would make "any effect on their behavior."[29]

"*Id.* at 1419-1422. For an interesting discussion of the impact of military concepts like deterrence on our legal culture and political discourse, see: Richard Delgado, *'The Language of the Arms Race. Should the People Limit Government SpeechT* in RICHARD O. CURRY, editor, FREEDOM AT RISK (Philadelphia, 1988) pp. 224-244.

**Id.* at 1422.

BEGINNING THE DISSENT

Justice Thurgood Marshall's dissent was joined only by Justice William Brennan. Marshall began his opinion by observing that the issue before the Court was not if "declaring a war on illegal drugs is good public policy." It was rather whether one of the "particularly draconian" weapons deployed by the Government in that struggle "comports with the Fourth Amendment." Because the necessity for drastic measures "against the drug scourge is manifest" was all the more reason for "vigilance against unconstitutional excess." It was especially "in times of urgency" when our "constitutional rights seem too extravagant to endure"[30] that the gravest perils to our heritage of civil liberties arise. And here Marshall instanced the shameful precedents of the Japanese internment,[31] the Red Scare,[32] and later Cold War internal subversion cases.[33] These were but "the most extreme reminders" of how even the Supreme Court itself permitted the Bill of Rights to be "sacrificed in the name of real or perceived exigency." Marshall believed that the present decision was like those others which callously licensed "basic constitutional rights to fall prey to momentary exigencies." The majority had flagrantly ignored both "the text and the doctrinal history of the Fourth Amendment" which required that "highly intrusive searches of this type be based on probable cause" and "not on the evanescent cost-benefit calculations of agencies or judges." And Marshall asserts that the majority was mistaken in even applying its "own utilitarian standards" by "trivializing the raw intrusiveness of, and overlooking serious conceptual and operational flaws" involved with this testing. The majority had attempted to explicitly limit these tests to railroad workers. But such exceptions - with their "damage done to the Fourth Amendment" - could not be so "easily cabined." Marshall identified the "precious liberties of our citizens" as the "first, and worst, casualty of the war on drugs." Indeed, the Court was taking "its longest step" in "reading the probable cause requirement out of the Fourth Amendment." Its formulations of the "special needs" exception to meet the exigencies of time and place was a "process" that remained "elusive" to Marshall. For the majority left the Amendment's "overarching command that searches and seizures be 'reasonable'...devoid of meaning." It was now to be "subject to whatever content shifting judicial majorities, concerned about the problems of

[M] *Id.* at 1422. To place Justice Marshall's comments on the drug scare in coateit, see: Harry G. Levine and Craig Reinerman *The Politics of America's Latest Drug Scare* in CURRY, *supra* note 28 at, pp. 251-258.

"Hirabayashi v. United States, 320 U.S. 81, 63 S. Ct. 1375 (1943) and ROGER DANIELS, CONCENTRATION CAMPS U.S.A, (New York, 1971).

"Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247 (1919) and ROBERT K. MURRAY, RED SCARE, (New York, 1964).

''Dennis v. United States, 34 N.S. 494, 71 S. Ct. 857 (1951) and DAVID CAUTE, THE GREAT FEAR, (New York, 1978).

the day, choose to give that supple term." Constitutional mandates like probable cause must not be turned into "fair weather friends" only "present when advantageous" but "conveniently absent" in times of "special needs." The Court had always treated probable cause as the "indispensable prerequisite for a full scale search." And this held true whether such an intrusion was instituted "pursuant to a warrant or under one of the recognized exceptions to the warrant requirement." It was only if the Government conduct had a slighter "impact on privacy" and so "clearly fell short of a full scale search" that the Court had relaxed the probable cause rule. But even then the authorities had to "show some individualized suspicion to justify the search." Those "few searches" permitted without "individualized justification" really occurred only in "nonintrusive encounters conducted pursuant to the regulatory programs which entailed no contact with the person." Now the Court had extensively expanded these narrow openings to fit in its novel, massive "special needs" exception which has "badly distorted" the Fourth Amendment and "eclipsed" the probable cause requirement "in a patchwork quilt of settings."[34] Justice Marshall notes that he had vigorously dissented in each of those earlier "special needs" exception cases for they "portended" an inevitable erosion of the Bill of Rights guarantees. He had predicted then that the Court was engineering another one of its balancing tests on which the liberties of the citizen would be outweighed by the needs of the State. And Marshall now firmly avers that the case presently before the Court bears out "that prophecy." The testing scheme under examination here constituted the "deepest incursion yet into the core protection of the Fourth Amendment." Up until now, it had been "conceivable" to maintain that the balancing test analysis had "no place" when the intrusion was "aimed at a person" and not merely the property of the citizen. This was no longer to be the case after this decision. For the majority had now vastly extended the "special needs" exception to "compulsory blood withdrawal and urinary excretions, and chemical testing of the bodily fluids" the testing gathered. It had likewise been "conceivable" that the "existence of individualized suspicion" was to be a "prerequisite" to applying any exception at all. But that was no longer to be the case in the future as well. For the testing procedure challenged in this case applied to *"all* covered employees — even if every member of this group gives every indication of sobriety and attentiveness." Thus the majority had widely broadened the exception so as to allow "searches of the human body unsupported by *any* evidence of wrongdoing." And so the majority opinion had established "a manipulable balancing inquiry" that "upon the mere assertion of a 'special need'" would make "even the deepest dignitary and privacy

''Skinner, *supra* note 3 at 1422-1424 and citing to United States v. Martinez-Fuerte, *supra* note 26 at 428 U.S. 543, 96 S. Ct. 3074 and Camara v. Municipal Court, 387 U.S. 523,87 S. Ct. 1727 (1967). And for general abandonment of probable cause requirement, see Nat Hentoff, *Presumption of Guilt* in RICHARD O. CURRY, *supra* note 28 at 245-250.

interests...vulnerable to governmental incursion." And this, even though the Fourth Amendment *expresses verbis* made no distinction between "either criminal or civil actions." Instead, it meant to protect the people "generally." This "malleable" new balancing test of special needs can only be "justified" because it "allows the majority to reach" those public policy goals it deems desirable. If the majority's concern for railroad safety due to substance abuse was thought "laudable," the majority's "cavalier disregard for the text of the Constitution" was not so praiseworthy. There was no "drug exception" to be read into that revered charter of our liberties - just as there was no "communism exception" or one for "other real or imagined sources of domestic unrest." Justice Marshall summarily denounced the majority's justification of the "special needs" exception as simply "unprincipled and dangerous."[35]

AFFIRMING THE FOURTH AMENDMENT

Justice Marshall believed that the only "proper way to evaluate" the Agency's testing regimen was to apply the "same analytical framework...traditionally used to appraise Fourth Amendment claims involving full-scale searches"[36] before the Court carved out its new exception. Under traditional rubrics, the Court would have serially inquired as to the following questions: Had a search actually "taken place"?[37] Was such a search carried out on the basis of "a valid warrant or undertaken pursuant to a recognized exception to the warrant requirement"?[38] Was the search justified on the basis of "probable cause" or on "lesser suspicion because it was minimally intrusive?"[39] And — just as important — was the search conducted in "a reasonable manner?"[40] Justice Kennedy's "threshold determination" that the present testing procedure entailed a search was "certainly correct." Were there any "among us" not ready to think "reasonable" an individual's "expectation of privacy with respect to the extraction of his blood, the collection of his urine, or the chemical testing of these fluids"? While Marshall recognized that the collection of blood and urine samples was allowed under the "narrow 'exigent circumstances' exception" enuntiated in *Schmerber,* he did not think "such exigency" existed here to prevent railroad management from "securing a warrant before chemically testing the samples they obtain." There was no spoliation of blood and urine if "properly collected and preserved." Nor could one doubt the "ability of railroad

**Id.* at 1425-1426 and citing Coolidge v. New Hampshire, 403 U.S. 443,91 S. Ct. 2022 (1971).

**Id.* at 1426.

"Katz v. United States, 389 U.S. 347, 88 S. Q. 507 (1967).

"Welsh v. Wisconsin, 466 U.S. 740,104 S. Ct. 2091 (1984).

"Dunaway v. New York, 442 U.S. 200, 99 S. Q. 2248 (1979).

"Winston v. Lee, 470 U.S. 753,105 S. Q. 1611 (1985).

officials" to carry out "the relatively simple procedure of obtaining a warrant" that authorized "chemical analysis of the extracted fluids." Therefore, there existed no justification whatsoever to "dispense with the warrant requirement for this final search." But it remained the probable cause requirement which this testing system "most egregiously" violated and also explained the majority's so "ready acceptance and expansion" of their new special needs exception. A "showing of probable cause" was "clearly required" before the Agency could conduct its "highly intrusive" searches. And even if the present procedures were deemed "minimally intrusive," they had to be based "on individualized suspicion." The only real exception for intrusions without such particularized suspicion was made in the case of "routinized and fleeting regulatory interactions." That is why the majority had drawn an analogy between these tests and those "brief automobile stops at the border" to determine "the validity of motorists' residence in the United States." But Marshall pronounced such a comparison to be "absurd" - and asserted "the constitutional imperative" of abiding with and applying the probable cause standard to the Agency in "multifarious full scale searches." Ordering an individual to "submit to the piercing of...skin by a hypodermic needle so that...blood may be extracted" was a significant violation of the privacy protected by the Fourth Amendment. The Court had previously decided that taking a "suspect's fingernail scrapings" amounted to such an invasion of privacy and was allowable only upon the showing of probable cause. Then "government-compelled withdrawal of blood" with its "added aspect of physical invasion" was "surely no less an intrusion." Nor was such a "surrender of blood on demand" the kind of "quotidian occurrence" of a border auto stop.[41]

Even in the *Schmerber* precedent, which the majority had made so much of, the Court had required the police to "have evidence of a drunk-driving suspect's impairment before forcing him to endure a blood test." Indeed, the decision "clearly" prohibited compulsory blood testing "on any lesser showing than individualized suspicion." And the majority does not tell us how individualized suspicion can be a requirement for one system of blood tests and not for another. Compulsory urine testing also intruded "deeply on privacy and bodily integrity." Was not "urination...among the most private of activities"? Was it not "generally forbidden in public, eschewed as a matter of conversation, and performed in places designed to preserve this tradition of personal seclusion"? But the present testing provided for the urine collection to be made *'under the direct observation"*[2] of the attendant. Indeed, in another era, the former Solicitor General of the United States, Charles Fried, had written that such "excretory functions" were "shielded by

"Skinner, *supra* note 3 at 1226-1227 and citing Schmerber, *supra* note 13 at, 384 U.S. 770,86 S. Ct. 1835 and United Statei v. Martinez-Fuerte, *supra* note 26 at 428 U.S. 557, 96 S. Ct. 3082. "*Id.* at 1227-1228.

more or less absolute privacy."[43] Justice Marshall considered the majority's labelling of the privacy injury done by urinanalysis as minimal to be "nothing short of startling." And in reaching that conclusion the majority demonstrated "the shameless manipulability of the balancing approach." Nor was the chemical analysis of the blood and urine samples once collected that innocent an investigation. For modern technology was such, that these tests revealed not only evidence of substance abuse but also the existence of "medical disorders such as epilepsy, diabetes, and clinical depression." The Court of Appeals for the District of Columbia had called such chemical analysis "'a periscope through which they can peer into an individual's behavior in her private life, even in her own home.'"[44] The railroads even required the employees to reveal the use of any medication thirty days prior to the tests - and so "further" impinged "upon the confidentiality customarily attending personal health secrets." And so, because of the privacy-destroying intrusiveness of these tests, the probable cause requirement had to be maintained here as well. Nor was the fact that railroads were heavily regulated able to extinguish employees' rights under the Fourth Amendment. For any allowance for intrusive searches in the area of intensively regulated industries only applied to searches of "*property*" and did not justify searches that reduced "employees' rights of privacy in their *persons."***

Fourth Amendment rights are not relinquished at "the workplace gate...the schoolhouse door...or the hotel room threshold."[46] The Fourth Amendment would be rendered meaningless if "having passed through these portals" a person remained "subject to a suspicionless search of his person justified solely on the grounds" that the Government already is allowed to carry on "a search of the inanimate contents of the surrounding area." Nor would Justice Marshall accept the argument that since the workers undergo "periodic fitness tests" requiring the similar taking of samples, then the present procedures posed not difficulty. The fact of the matter happened to be that railroad workers were*"not* routinely required to submit to blood or urine tests to gain or maintain employment." Nor did management "ordinarily have access" to such samples - and "certainly not for the purpose" of determining substance use or abuse. Simply because "eyesight, hearing skill, intelligence and agility" may all be "sometimes" tested does not prepare the workers "to submit to the extraction of blood, to excrete under supervision, or to have these bodily fluids tested for the physiological and psychological secrets they

"Charles J. Fried, *Privacy,* 77 YALE L. J,, 475, 487 (1968).

"Skinner, *supra* note 3 at 1229 and citing to Jones v. McKenzie, 266 U.S. App. D.C 85, 89, 833 F.2d. 335, 339 (1982).

[5]Id. at 1229 and citing to Marshall v. Barlow's, Inc. 436 U.S. 307, 313, 98 S. Ct. 1816,1821 (1978).

"Cf. Oliver v. United Stales, 466 U.S. 170,104 S. Ct. 1735 (1984) and Hoffa v. United Slates, 385 U.S. 293, 87 S. a. 408 (1966).

may contain." And if employees allow the release of "basic information about their financial and personal history" to establish their "'ethical fitness,'" that does not mean they surrender "their expectation of privacy" in regard to "their personal letters and diaries, revealing though these papers may be of their character." It may very well be that to declare this testing procedure to be violative of the Fourth Amendment would "hinder the Government's attempts to make rail transit as safe as humanly possible." But observing constitutional guarantees, has never made for efficiency - especially of the sort defined by a cost-benefit analysis. Any program, "no matter how well-intentioned," can only be implemented "within constitutional boundaries." Justice Marshall wryly notes that if the police were "freed from the constraints of the Fourth Amendment for just one day," who could doubt that "the resulting convictions and incarcerations would probably prevent thousands of fatalities?" But because Americans refuse to "tolerate this spectre" means that there must be observance of constitutional safeguards no matter the beneficence of the proposed government action to "save money, save lives, or make the trains run on time."[47]

HOISTING THE MAJORITY ON ITS OWN ANALYSIS

But even if one applied the majority's balancing test, Marshall believed that the "benefits of suspicionless..testing are far outstripped by such sweeping searches." There was "nothing minimal about the intrusion on individual liberty" in this coercive testing regimen. And there were several factors in it that compounded the "intrusiveness of these procedures." Justice Marshall pointed out that one of the most egregious examples was that these regulations, "not only do not forbid, but, in fact, appear to invite criminal prosecutors to obtain the...samples..and use them as the basis of criminal investigations and trials." Justice Marshall condemned this practice as "unprecedented" and "leaving open the possibility of criminal prosecutions based on suspicionless searches of the human body." Though the majority opinion recognized "the possibility of criminal prosecutions," it blithely refused to "factor this possibility into its...balancing process." Marshall believed their "demurrer" to be "highly disingenuous." The fact that there may have been no such prosecutions so far hardly established that "prosecutors will not avail themselves of the...invitation in the future." If the majority thought this possibility of prosecution so remote so as to have minimal effect, then Marshall asserted "it should say so." But if the potential use of the samples by prosecutors caused the majority to "reassess" its position, it again "should say so, too" or else "condition its approval of that program on the nonrelease of test results to prosecutors." Indeed, their whole "ducking this important

[4/] Skinner, *supra* note 3 at 1230.

issue" throws "considerable doubt" that their only concern is railway safety. The majority also ignored the "needlessly intrusive aspects" of the tests. If the Agency is only seeking to find out "current impairment" with no aim of identifying those who "used substances in their spare time sufficiently in advance of their railroad duties to pose no risk," then the testing seemed "wholly excessive" to Marshall. He likewise thought that the Court's "trivialization of the intrusion on worker privacy" was only "matched at the other extreme by its blind acceptance" of the Government's deterrence argument. It was "simply implausible" that testing "after major accidents occur" would make employees think twice about using the proscribed substances. Marshall sarcastically remarks that under this line of reasoning "people who skip school or work to spend a sunny day at the zoo" will not tease "the lions because their truancy or absenteeism" would be discovered with their mauling! Rather, Marshall affirms it was the "fear of the accident" and "not the fear of a post accident revelation" that worked as a deterrent. And the majority's "credulous acceptance" of that argument was further weakened by the Agency's neglect to present "in an otherwise ample...record, *any* studies explaining or supporting its theory of accident deterrence."[44]

With its deterrent justification thus disposed of, all the Government was left with was its concern for "diagnosing the causes of major accidents." While not denigrating this rationale, Marshall found it "a slender thread from which to hang such an intrusive program." And to rely on the factor was "especially hard to square" with the Court's "frequent admonition" against using "the interest in ascertaining the causes of a criminal episode" as a justification to depart from the Fourth Amendment. Marshal was compelled to conclude that the Court, "swept away by society's obsession with stopping the scourge of illegal drugs" had succumbed to the "popular pressures described by Justice Holmes" in the passions of another era. The majority was manipulatively bending and twisting "time-honored and textually-based principles of the Fourth Amendment" - the very ones "the Framers designed to ensure Government has a strong and individualized justification" when it sought to invade the privacy of the citizen. The authors of the Bill of Rights must be "appalled by the vision of mass governmental intrusions upon the integrity of the human body" that the Court was now legitimizing. Nor should one take satisfaction that the "immediate victims of the majority's constitutional timorousness" are railroad workers now forced to undergo these tests. Marshall forcefully predicts that "ultimately" the present decision gravely diminished "the privacy all citizens may enjoy" For once the Court stretches principles in this fashion, they do "not snap back easily."[49]

"*Id.* at 1230-1232 and citing 49 CFR {219.211 (d)(1987).

n*Id.* at 1232-1233 and citing Northern Securities Co. v. United States, 193 U.S. 197,400-401, 24 S. a. 436, 468 (1904).

PERSONAL OBSERVATIONS

Thus the issues surrounding this particular mode of drug-testing were presented and analyzed by Justices Kennedy and Marshall. Now the author of this paper would like to present some observations of his own. There seemed to be an overwhelming propensity in the majority opinion - and in the Agency rules that it upheld — to lay the responsibility of any serious accident to the charge of the workers. The speed with which the samples were to be extracted points to the belief of both the Agency and the majority that there existed an automatic suspicion that the working people were at fault. Not the engines. Not the tracks. Not the signalling equipment. But always the worker. The author suggests that this assumption rests on a most bigoted and dangerous class bias[50] -- which can effect both Supreme Court justices and federal managerial types as well. Why always look to blue-collar workers as the culprits? Why assume they were using drugs — or were drug-impaired? Could there be a remote possibility that the equipment was faulty? And is that possibility so remote an explanation when more and more cutbacks are made into public support for mass transportation? Is the system _ — at least, the system of track, cars, engines and computers that faultless? Or is it that well-funded to be that well-maintained? And could it be the Agency must needs have a scapegoat in these parsimonious and pennypinching times? And how easy and convenient it is to scapegoat on the fantasy of reefer-mad blue-collar track handlers! After all one cannot place the blame where it does belong: on a President of the United States who doesn't believe in mass transportation to begin with or on his Secretary of Transportation precisely chosen to make the trains <u>not</u> run on time and so discourage their use. Let them ride BMW's and Jaguars! But if one is going to argue public policy instead of the law — and that is what the majority opinion in this case does - under our system of government isn't that public policy defined and delimited in the Budget? And when you cut out money for safety, maintenance, and improvement, then what really is the cause of these horrendous railroad mishaps? One can point across the Atlantic to the series of recent accidents on British Railways, the once well known system of safety now left dangerously embarrassed by its defects and neglect. After all, Thatcherism is but twin sister to Reagan/Bushism.

And before one dismisses this accusation of class bias, one may be allowed to wonder if Justice Kennedy would be so willing to allow blood and urine samples to be drawn from his colleagues on the Supreme Court, if, *arguendo,* there was a shrill outcry in the press that certain Justices were using psychotropic medication to function on the Court? Would Justice Kennedy

[50] "Some would argue the same class bias legitimized segregation by economic condition in San Antonio School District v. Rodriguez, 411 U.S. 1 (1973).

then so freely allow, let us speculate, Justices Rehnquist and O'Connor to be examined in the same degrading fashion as railroad workers -- and in like callous disregard of their Fourth Amendment rights? And would the majority prescribe these same demeaning tests for members of the Joint Chief of Staff, or the Cabinet, or the Congress? After all, these are all involved in life and death decisions that affect everyone of us. Of course, Justice Kennedy and his brothers and sister in the majority would dismiss this thought as absurd. But why when applied to human beings - our fellow citizens - who do not enjoy such position or such privilege, do these tests become so reasonable?

Then there is the issue of the right of privacy and the Fourth Amendment itself. This decision on drug testing certainly attenuates any protection the latter gives the former. Did that occur so fortuitously? Was there not a purpose, well thought out and deliberatively executed? For has it not been the jurisprudence of the New Right to deny the very notion that privacy is protected by the Fourth Amendment. Who can forget how then- self-immolated guru, Professor Bork kept denouncing *Griswold v. Connecticut*[11] as unprincipled ~ the very case in which Justice William O. Douglas laid the foundation for the Fourth Amendment's protection of privacy? For once deny that constitutional protection for privacy, a woman's right to choose will be eradicated — along with unnumbered protections thrown about the identity and integrity of the citizen.[52] But why are these Justices of the New Right so fearful about restricting the powers of Government in the realm of personal liberties? Why are they so timorous here? What do they fear in acknowledging the freedom, the dignity, and the liberty of the individual? Or has it come about that in moments and matters of passion, this New Right Supreme Court has passed beyond the point of following the election returns, as Peter Finley Dunne described it in the early years of this century, and is now just following the latest public opinion polls of people's fears and faintness of heart. What a weak reed would the Bill of Right then be in such blasts of the hysterical winds of opinion.

And when Government has acquired the information these blood and urine samples provide through modem technology, will it then punish for pregnancy, or depression, or other human situations[53] they will establish? For it is not with simple statutes or mere regulations that this case deals. No matter how slight Justice Kennedy and his compeers think the constitutional intrusion, there still remains the Fourth Amendment and its mandates so callously ignored. And let no one think that one can be imposed on a railroad worker, cannot be applied also to many others who call themselves citizens and Americans.

[5.]381 U.S. 479, 85 S. Ct. 178 (1965).

[12]herman Schwartz. Packing the courts, (New York, 1988). "S"€ WILLIAM SHAKESPEARE MEASURE FOR MEASURE.