

## **TO TINKLE OR NOT TO TINKLE: THE SUPREME COURT CONFRONTS THE CONSTITUTIONALITY OF URINE TESTING**

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### **INTRODUCTION**

Traditionally, the common law placed a high regard on the physical person of another. Tort liability could be imposed, for example, for the mere involuntary touching of one person by someone else — or even placing another in apprehension or fear of immediate physical harm. We are all familiar with those ancient law school hypothetical chestnuts about body contacts in a crowded swimming pool or customer shoving during the holiday bargain basement sale. But the modern developments of science and technology have carried intrusiveness beyond the brutally blunt and directly brusque into a realm of scientific inquiry that pierces through the whole physical and psychical personality of an individual on the basis of a mere sample of blood or breath or urine. What could be more intrusive than such an examination and the information it can provide? The current public outcry over the drug crisis -- reaching into the very inaugural words of a new President - has led to the utilization of more and more tools of inspection to quarry this prey. Employees in the public sector or in those private industries that are especially involved with a public purpose are presently the objects of drug testing through a variety of means and measures. Railroad workers, for example, are made to undergo blood, breath, and urine analyses. The Supreme Court passed on their predicament in a decision to which only two Justices dissented.<sup>1</sup> Those two Justices have now retired. Constitutional questions of privacy were raised in that case - the whole issue of search and seizures, the thorny question of reasonableness. The Court majority came down solidly on

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<sup>2</sup>*Skinner v. Railway Labor Executives Ass'n*, 109 S. Ct. 1402 (1989).

the side of the authorities and the imposed tests. However, there has been a companion case involving a different set of works and a test strictly limited to the collection of urine samples.<sup>2</sup> The Supreme Court upheld this procedure by only a one vote margin. This case and the issues it settled by such a slim majority merit analysis in their own right: especially in what distinguishes it from situations in which the Court has acted with more unison.

#### DESCRIBING THE TESTING SYSTEM

The case had to do with the United States Customs Service, a branch of the Department of the Treasury. Besides checking our entrances back home from wearying international flights, the Customs Service is deeply involved with the interdiction and seizure of contraband, including illegal drugs. Upon advice from a Drug Screening Task Force, the Customs Service decided to establish a system of urinalysis for certain of its employees. Although all the evidence indicated that the Customs Service was practically drug free, it was, nonetheless, feared that customs officers were particularly vulnerable because of their handling of so much of the drug contraband. Additionally, many of these officers carried weapons of a lethal nature. There was consequently a safety consideration that those so entrusted with such weapons were not operating under the influence of drugs.

Thus, beginning in May of 1986, such urinalysis testing was made mandatory for placement or employment for a position in the Service that met one or more of three criteria. The first standard was whether the concerned individual had a direct involvement in drug interdiction or enforcement of related laws -- something the Customs management thought especially "fraught with obvious dangers to the mission of the agency and the lives of customs agents." The second norm was whether the person has to carry firearms, the use of which in split-second situations made it essential the agent be drug free. The last situation involved employees who had contact with "'classified' material which...might fall into the hands of smugglers if accessible to employees who...are susceptible to bribery or blackmail" because of their personal drug use. Once a Customs Service employee was required to be tested, the procedure would be carried out by an independent contractor. A time and place for the collection of the urine sample would be fixed. The employee would produce photographic identification at that time and remove any outer garment, such as a coat or jacket, and personal belongings. The sample would be produced behind a partition, or in the privacy of a bathroom stall if the employee had so chosen. To make sure there was no adulteration of the specimen or a substitution, it was provided that a monitor of the same sex as the employee would remain close at hand to listen for the normal

<sup>2</sup>National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

sounds of urination. Additionally, dye would be placed in the toilet water so that the employee would be unable to use it to dilute the sample. Once the sample is received, the monitor would examine it for proper temperature and color and place a tamper-proof custody seal over the container with a label listing the date and the specimen number. When the sample reaches the laboratory, it would be tested for traces of marijuana, cocaine, opiates, amphetamines, and phencyclidine. Anyone who tests positive and can offer no satisfactory explanation would be subject to dismissal from the Service. However, the test results could not be given to "any other agency, including criminal prosecutors" if the employee had not consented in writing to this being done.<sup>3</sup>

#### THE SYSTEM CHALLENGED

The plaintiff union brought suit in the Federal District Court challenging this whole procedure on the grounds that it violated the Fourth Amendment.<sup>4</sup> That court admitted the government did possess a significant interest in having drug-free employees but thought this testing intruded too far into their privacy and so issued an injunction against the program from being carried out. The Court of Appeals then overturned that order.<sup>3</sup> It decided the urinalysis was search within the Fourth Ammendment and this had to be reasonable. It stressed the fact that it did not require visual observation of the act of urination by the monitor and also afforded notice to the employee. The procedure also limited "discretion in determining which employees are to be tested" and was "an aspect of the employment relationship." The Court of Appeals likewise found a significant and compelling Government interest existed to sustain the program. Drug use by Customs Service agents would cast substantial doubts on their ability to discharge their duties honestly and vigorously. This would undermine public confidence in the integrity of the Service and impair its efforts to enforce the drug laws. Drug users were also found to be exposed to bribery and blackmail and pressured to divert for their own use portions of interdicted drug caches. Such users bearing firearms in the performance of their duties constituted a safety hazard to themselves and others as well. Thus the Court of Appeals deemed it reasonable to exact the consent of individuals to this urinalysis before being assigned to these particularly categorized duties. The one dissenting judge found the whole testing system unreasonable because it was unreliable. Since an employee was given five days' notice prior to the testing, only the individual need do was to abstain to pass. Those already ensconced in the listed sensitive positions were

<sup>3</sup> Id., at 1387-1389.

<sup>4</sup>National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (1986).

<sup>5</sup>National Treasury Employees Union v. Von Raab, 816 F. 2d- 170 (1987).

not even required to be tested. Where was the reasonableness in a system that just didn't work to produce the results claimed for it?<sup>6</sup>

#### BEGINNING THE MAJORITY ANALYSIS

Justice Anthony Kennedy delivered the majority opinion which upholds the urinalysis for those involved in drug interdiction or required to carry firearms but overturns it for those handling classified materials. He begins his analysis with the observation that earlier Supreme Court decisions had established that the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer. Because the Court was agreed that the urine tests were in fact searches, that meant they had to meet the reasonableness requirement of the Fourth Amendment. While the Court had "often emphasized...that a search must be supported, as a general matter, by a warrant issued upon probable cause," it was nonetheless "longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance." When, for example, a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it then becomes "necessary to balance the individual's privacy expectations against the Government's interests to determine" if it is impractical to require a warrant or some level of individualized suspicion in the particular context. Certainly the testing procedure was not designed to serve the ordinary needs of law enforcement. The results could not be used in a criminal prosecution absent consent. The whole aim of the urine collecting was to deter drug use among those eligible for promotion to sensitive positions within the service as well as to prevent promotion of drug users to those positions. These were truly "substantial interests" that presented "a special need" that may justify departure from the ordinary warrant and probable cause requirements.<sup>7</sup>

Nor had the union contended that a warrant was required by the balance of privacy and governmental interests in this context. No such argument would, according to Justice Kennedy, "withstand scrutiny." The Supreme Court had long acknowledged that it would be foolhardy to require the Government to procure a warrant for every work-related intrusion. Even though the Customs Service personnel were more likely to be familiar with the procedures required to obtain a warrant than most other Government workers, to require a warrant here would serve only to divert valuable agency resources from the Service's primary mission. Customs faced pressing responsibilities.

<sup>6</sup> National Treasury Employees Union, *op cit.* 109 S. Ct. at 1389.

<sup>7</sup> M. at 1389-1391 and citing to O'Connor v. Ortega, 480 U.S. 709, 107 S. Ct. 1492 (1987).

Ruling that it seek search warrants in connection with routine, yet sensitive, employment decisions would be to compromise its raison d'etre. Also, a warrant gave "little or nothing in the way of additional protection of personal privacy." The warrant requirement existed "primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope." The warrant also interposed "a neutral magistrate between the citizen and the law enforcement officer." But Justice Kennedy believed the urine testing here passed muster when one examined these factors that normally triggered the necessity to seek the issuance of a warrant. Under this program, all employees seeking transfers to the sensitive positions know they must take a drug test and are likewise aware of the procedures the Service must follow in administering the test. Since the process operated automatically when employees elect to apply for a covered position, the Service did not have to make a discretionary determination to search based on a judgment that certain conditions are present. So there was no cause here to interpose a neutral magistrate to see if discretion had been abused.<sup>8</sup>

#### DISPENSING WITH PROBABLE CAUSE

Justice Kennedy recognizes that even "where it is reasonable to dispense with the warrant requirement...a search ordinarily must be based on probable cause." But this probable-cause standard, Justice Kennedy thought, was primarily addressed to criminal prosecutions. Indeed, it might prove to be unhelpful in analyzing the reasonableness of routine administrative functions. This was especially the case when Government sought "to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person." Indeed, it had been established that when the Government needed to discover hidden conditions, that alone were "sufficiently compelling" to allow the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion. Justice Kennedy consequently decided that the Government's need to conduct the suspicionless searches involved in this case simply outweighed the privacy interests of employees.<sup>9</sup>

For Justice Kennedy that countervailing Governmental need was heavy indeed. The Customs Service stood as our Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population. The record was replete with the traffickers' seemingly inexhaustible repertoire of deceptive practices and elaborate schemes for importing narcotics. By adroit selection of source locations, smuggling routes, and increasingly elaborate methods of concealment, criminal elements have

<sup>8</sup> *Id.* at 1391.

<sup>9</sup> *Id.* Camaro v. Municipal Court, 389 U.S. 523, 875 S. Ct. 1727 (1967).

been able to import ever larger amounts of proscribed drugs. Nor did these individuals hesitate to use violence to protect their lucrative trade and avoid apprehension. Customs agents are frequently exposed to these kinds of evildoers and to the controlled substances they seek to smuggle into the country. Their duties entail physically perilous situations. Officers have been brutally murdered in the performance of their duties. The agents have often been the targets of bribery by drug smugglers with several being cashiered for accepting bribes and other integrity violations.<sup>10</sup>

It was readily apparent that the Government possessed a "compelling interest" in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Kennedy noted that the Government's interest here was at least as important as its interest in searching travelers entering the country. The Court had long recognized that such travelers may be stopped and required to submit to a routine search without probable cause, or even founded suspicion. The "national interest in self protection" which justified such searches of these travelers would be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of keeping such drugs out of our country. Such "indifference" on the part of the agent-drug user or "even worse...active complicity with the malefactors" would facilitate importations of sizable drug shipments or block apprehension of dangerous criminals. It was an over-paramount "public interest" which demanded effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.<sup>11</sup>

It was that same public interest which demanded equally effective measures to prevent the promotion of drug users to positions which required them to bear firearms. The public should not be forced to bear the risk that employees who may suffer from impaired perception or judgment can be promoted to positions in which it become necessary to employ deadly force. By taking action to avoid the creation of this dangerous risk, Justice Kennedy asserted the testing itself furthered Fourth Amendment values because the use of deadly force had been held to violate the Fourth Amendment in certain circumstances. With these "valid public interests" kept in mind, Kennedy proceeds to weigh the interference with individual liberty resulting from these urine tests for employees. He admits that the interference with privacy from the collection of a urine sample for subsequent chemical analysis could be "substantial" in some circumstances. But the Court had recognized that certain operational realities could make "entirely reasonable" certain work-related intrusions that might be viewed as unreasonable in other contexts. It may be

<sup>10</sup>*Id.* at 1392.

<sup>11</sup>*Id.* at 1393 and citing to *Carroll v. United States*, 267 U.S. 132, 455 S. Ct. 280 (1925) and *United States v. Montoyz de Hernandez*, 473 U.S. 531, 105 S. Ct. 3304 (1985).

true that these realities would rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects that the employee may bring to the workplace. Yet it was "plain" to Justice Kennedy and the majority at least that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Workers at the United States Mint expected to be subject to certain routine personal searches when they leave the workplace every day. Members of the military and intelligence bureaus as well could be required to provide what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity and also expect intrusive inquirers in to their physical fitness for these special positions.<sup>12</sup>

Justice Kennedy likewise affirmed that agents directly involved in the interdiction of illegal drugs or those required to carry firearms in the line of duty have a "diminished" expectation of privacy as to tests like urinalysis. These employees should anticipate inquiry into their fitness and probity. Since their responsibilities depend uniquely on their judgment and dexterity, such agents should not expect to keep from the Service personal information that bears directly on their fitness. It may well be that these tests "infringe some privacy expectations." But Justice Kennedy decided that these expectations were outweighed by the Government's compelling interests in safety and in the integrity of our borders. He also determined that these procedures significantly minimize the program's intrusion on privacy interest. There was, for example, no direct observation of the act of urination since the agent provided specimen in the privacy of a stall. The samples collected could only be analyzed for the specified drugs. A person tested did not have to reveal "personal" medical information. This would be sought only if the tests turned out positive.<sup>13</sup>

#### THE NECESSITY AND EFFECTIVENESS OF THE TESTS

The union, however, raised two other issues by way of attacking these procedures. It first contended that the testing was unwarranted since it is not based on a belief that testing will reveal any drug use by covered employees. Thus, the testing was initiated without any perceived drug problem among Customs employees. Nor has its implementation brought about the discovery of a significant number of drug users. Indeed, only five out the three thousand and six hundred tested have proven positive. The union also argued that the whole testing mechanism is hopelessly flawed because detection can

<sup>12</sup>*Id.* at 1393-1394, citing to *Tennessee v. Gamer*, 471 U.S. 1, 105 S. Ct. 1694 (1985) and to *Snepp v. United States*, 444 U.S. 507, 100 S. Ct. 763 (1980); *Parker v. Levy*, 417 U.S. 733, 94 S. Ct. 2547 (1974); and *Committee for G.I. Rights v. Callaway*, 171 U.S. App. D.C. 73,518 F. 2d 466 (1975).

<sup>13</sup>*Id.* at 1394.

be easily avoided by temporary abstinence or by surreptitious adulteration of their urine specimens. Justice Kennedy was convinced the first contention evinced "an unduly narrow view of the context in which the...program was implemented." Everyone concedes drug use is one of the most serious problems confronting our society today. There existed no reason to think American workplaces are immune from this pervasive social problem. Detection of drug use in the Customs Service was unusually difficult because most agents were not subject to the "kind of day-to-day scrutiny" normal "in more traditional office environments." Because of the Service's almost unique mission, the Government had a "compelling interest" to make sure these employees were not using drugs even off-duty since this would create high risks of bribery and blackmail against which the Government had to guard. Viewed from this perspective, the deterrence to drug users against applying for promotion can be reckoned as reasonable. The "mere circumstance" that only a few of the thousand tested showed up positive did not impugn the program's validity. The same result would be true of "householders...required to submit to suspicion-less housing code inspections...and...motorists...stopped at checkpoints." This whole testing system the Service devised was as much aimed to prevent the promotion of drug users as much as it sought to discover such users. The possible harm the Government seeks to insure against is a "substantial one." Then, the need to prevent its occurrence gives "an ample justification" for these "reasonable searches calculated to advance" these wholly valid Governmental purposes.<sup>14</sup>

Justice Kennedy thought this "point...well illustrated" by taking note of the Federal requirement to "search...all passengers seeking to board commercial airliners, as well as...their carry-on luggage." All this was conducted without any basis for suspecting any particular passenger of an untoward motive. It had been suggested that these measures had been instituted in response to an observable national and international hijacking crisis. But Justice Kennedy would not suppose that, granted the validity of such searches, the Government could not execute them "absent demonstration of danger as to any particular airport or airline." It was constitutionally sufficient that Government held "a compelling interest" to prevent an otherwise pervasive societal problem from spreading to the particular context.<sup>15</sup>

As for the allegation that the tests were ineffective due to abstinence or adulteration, Justice Kennedy observed this charge simply overstates the case. It had been noted that addicts may be unable to abstain even for a limited period of time. The evasion devices described were too fraught with uncertainty and risks for those employees who venture to attempt them. An

<sup>14</sup> *Id.* at 1394-1395.

<sup>15</sup> *Id.* at 1395 and citing to *United States v. Edwards*, 498 F. 2d 496 (CA2 1974) and *United States v. Skipwith*, 482 F. 2nd 1272 (CA5 1973).

agent could not "reasonably...expect to deceive the test by simple expedient of abstaining after the test date has been assigned." Nor would attempts to adulterate the sample be successful in light of the precautions taken to ensure the integrity of the sample. The Government's compelling interests in safeguarding our borders and the public safety overcame any privacy expectations of employees who seek promotions. Justice Kennedy decided, then, that these tests were "reasonable under the Fourth Amendment."<sup>16</sup>

#### REJECTING THE CLASSIFIED MATERIALS GROUP

But on the basis of the present record, Justice Kennedy pronounced himself "unable...to assess the reasonableness of the...testing program" as applied to employees handling classified materials. He readily agreed that Government here too had a compelling interest in protecting truly sensitive information. He also agreed that employees seeking promotions to situations that entailed the handling of such "sensitive information...be required to submit to a urine test." He considered this more than appropriate where the positions sought required background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test. Yet it remained unclear to Justice Kennedy if the category defined by Customs as subject for such tests only encompassed those likely to gain access to sensitive information. There was great concern on his part that the category reached too far in an unconstitutional overbreadth. Thus, the Service ordered accountants, attorneys, co-op students, baggage clerks, messengers, and animal caretakers among others to take the test. But it was "not evident" that all those individuals occupying these positions are likely to gain access to sensitive information. Such an apparent discrepancy raised in Justice Kennedy's mind the "question whether the Service-defined this category...more broadly than necessary to meet the purposes" it sought to achieve. Justice Kennedy simply could not resolve this ambiguity on the record before him and so remanded the case. On remand, the court below should examine the criteria used by the Service to determine "what materials are classified and...whom to test under this rubric." That court must also take into consideration the employees' privacy expectations as well as the supervision to which they are already bound.<sup>17</sup>

There was no question that this whole system of urinalysis involved those kind of "searches that must meet the reasonableness requirement of the Fourth Amendment." Since these tests were not devised to serve the ordinary needs of law enforcement, Justice Kennedy found it proper to balance "the public interest in the...testing program against the privacy concerns...without

<sup>16</sup> Id. at 1396.

<sup>17</sup> Id. at 1396-1397.

reference to our usual presumption in favor of the procedures specified in the Warrant Clause." This is what would determine the reasonableness of these tests. Under that standard, the suspicionless testing of those who apply for promotions to situations that deal with the interdiction of illegal drugs or the bearing of firearms was reasonable. The compelling interest in preventing the promotion of drug users to where they might endanger the integrity of our Nation's borders or the life of the citizens simply counterbalanced "the privacy interests of those who seek promotion to these positions" and who enjoyed "a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of these positions." But Kennedy would not now decide if such testing of applicants for positions that possibly came into contact with classified information was reasonable because the record before the Court was inadequate for this purpose.<sup>18</sup>

#### JUSTICE SCALIA INITIATES HIS DISSENT

The main burden of the dissent in this case was borne by Justice Scaia's opinion in which Justice Stevens joined. It merits close scrutiny and careful attention because on the very same day Justices Scalia and Stevens would help form the heavy majority that upheld drug testing for railroad workers. The distinctions and analyses Scalia makes here then are important in differentiating those two decisions that applied the regimen of the tests. Justice Scalia began by asserting that the issue before the Court was not whether agents can be constitutionally denied promotion or even dismissed because of a single instance of unlawful drug use, at home or at work. Justice Scalia believed they most "assuredly can" be so disciplined. Rather the real issue in this case was "what steps can constitutionally be taken to detect such drug use." The Government had presented a whole system of urine collection and inspection. The entire Court had agreed that this system constitutes a search for the purpose of the Fourth Amendment. But Justice Scalia finds it "obvious" it is a kind of search "particularly destructive of privacy and offensive to personal dignity." Up to the present moment, the Court had permitted a bodily search separate from arrest and without individualized suspicion of wrongdoing only for prison inmates relying upon the uniquely dangerous nature of that environment. Now the Court also will allow less intrusive bodily search of railroad employees involved in train accidents." Justice Scalia joined the majority in that decision because of "the demonstrated frequency of drug and alcohol abuse by the targeted class of employees" on the railroad and "the demonstrated connection between such use and grave harm." But he would not approve the similar tests here for Customs officers since neither frequency of use nor connection to harm is demonstrated or even likely.

<sup>18</sup> Id. at 1397-1398.

Instead he denounces these tests as a "kind of immolation of privacy and human dignity" in symbolic opposition to drug use.<sup>19</sup>

While there exist "some absolutes in Fourth Amendment law," once these have been left behind, the issue is resolved into whether a particular search has been reasonable. But the answer to whether it has been reasonable or not rests largely upon the social necessity that prompts the search. Thus, when the Court legitimized the administrative search of a student's purse in school, it took note of the documentation describing the increase of violence and crime in the school environment. Likewise, when the Court legalized fixed checkpoints near the Mexican border to stop and search cars for illegal aliens, it alluded to the presence of several millions of such illegals already in the country. In the companion decision upholding these tests for railroad workers, the Court had evidence of the historic abuse of alcohol among such workers and statistics indicating that over a fifth of them were problem drinkers. But Scalia laments that here one searched "in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees." Instead, the majority depicts a melodrama about the Customs Service holding the thin front line against drug smugglers: How these nefarious elements attack the agents and subject them to bribery. How our agents must be physically fit and psychically alert to counter these hideous forces of evil. How the public must be protected against dangerous rogue agents.<sup>20</sup>

Justice Scalia found this tale of horrors contained much that is obviously true and much that is relevant. Nonetheless, he observes that "unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true." Instead he maintains that the "only pertinent points...are supported by nothing but speculation, and not very plausible explanation at that." It was not so apparent to him that a drug user in Customs was significantly more likely to be bribed by a drug smuggler than a diamond-wearer in Customs was more likely to be bribed by a diamond-smuggler. This could only be the case "perhaps" where the user's addiction was so severe, and requires so much money to maintain, it would be detectable even without a test." Neither was it so apparent that agents using drugs will be appreciably less sympathetic to their drug-interdiction mission than traffic police who exceed the speed limit in their private cars would be appreciably less sympathetic to their mission of enforcing the traffic laws. The "only difference" Scalia could discover was that the Customs agent's individual efforts, if they are irreplaceable, can theoretically affect the availability of his own drug supply. But he deemed this "prospect so remote as to be an absurd

<sup>19</sup> *Id.* at 1393 and citing to *Bell v. Wolfish*, 441 U.S. 520, 99 S. Ct. 1861 (1979).

<sup>20</sup> *Id.* at 1398-1399 and citing to *New Jersey v. T.L.O.*, 469 U.S. 325, 105 S. Ct. 733 (1985) and *United States v. Martinez Fuerte* 428 U.S. 543, 96 S. Ct. 3074 (1976).

basis of motivation." Finally it was again not so apparent that this urinalysis "will be even marginally more effective in preventing gun-carrying agents from risking" impairment than would be their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers. This held true unless their addiction was also so severe that no urine need be sampled to detect it.<sup>21</sup>

#### THE WEAKNESS OF THE JUSTIFICATIONS

Justice Scalia found something absent in the Government's justifications. This was something that was "notably... revealingly...and...dispositively absent." What he was precisely referring to was the lack of mention of "even a single instance in which any of the speculated horrors actually occurred." The Government had simply not provided any evidence that drug use had caused "bribe-taking...poor aim...unsympathetic law enforcement, or...compromise of classified information." It had been pointed out that a number of agents had been discharged for bribe-taking and other trust violations. Some officers had even lost their lives in the performance of their dangerous mission. But there was actually no indication whatever that drug use had anything to do with these tragedies. Justice Scalia admits it might be unnecessary to present concrete evidence of the severity of a problem when it is so well known that courts can almost take judicial notice of it. But that was surely not the case here. Testimony had been given that the Service was largely drug free and that illegal drug use was not the reason for the establishment of the tests. Indeed, the results of the urinalysis taken have fulfilled those hopes and expectations. There were only five individuals out of three thousand and six hundred who tested positive.<sup>22</sup>

The majority had countered this lack of evidence by remarking that illegal drug use had come to be common in the American workplace. But Justice Scalia opined that such a generalization might be sufficient if the workplace...could produce such catastrophic social harm that no risk whatever is tolerable. The Courts had already decided, for example, that "the secured areas of a nuclear power plant" constituted such a kind of ultrahazardous workplace. But when such a generalization is sufficient to allow demanding bodily searches, without particularized suspicion to prevent the bribery or blackmailing of an agent or the careless use of firearms, then he believed the Fourth Amendment had "become frail protection indeed." It is true the Court had expounded a "special need" exception for the probable cause requirement. But this justificatory need did not rest upon the existence of a pervasive social problem combined with speculation as to the effect of that problem in the

<sup>21</sup>Id. at 1399.

<sup>22</sup>Id. at 1399-1400.

field at issue. Rather it was based upon "well known or well demonstrated evils in that field with well known or well demonstrated consequences." In the testing for railroad workers a long history of substance abuse as the cause of severe accidents was what created the valid special need. But here, the connection between whatever drug use may exist and serious social harm was entirely speculative. Putting aside momentarily the fact that the search of a person is much more intrusive than the stop of a car, Justice Scalia thought the present situation resembled the random stops to check drivers' licenses and motor vehicle registration. The Court had held such stops violated the Fourth Amendment. Their "contribution...to highway safety" was at most marginal because the "number of licensed drivers... stopped...to find one unlicensed" was very large indeed. A fortiori, should not the Court make the same response to the non-productive searches here which were much more physically intrusive?<sup>23</sup>

Likewise, Justice Scalia believed the majority's holding would be wrong, but at least of more limited effect had its validation of these tests been "confined to that category of employees assigned specifically to drug interdiction." But few agents fitted that description. So by "extending approval of...testing to...employees who carry firearms," the Court was exposing vast numbers of public employees to this needless indignity. If the individuals who carry guns can be treated so, then it followed that all others whose work, if performed under the influence of drugs, may endanger others should also be tested in similar fashion. Inevitably, this includes automobile drivers, operators of other potentially dangerous equipment, construction workers and others. Justice Scalia also asserted a similarly broad scope attaches to the application of these tests to those having access to classified information. This classification was again not restricted to agents with drug interdiction duties nor to sensitive data specifically relating to drug traffic. Consequently, this urinalysis could apparently be made to apply to "all federal employees with security clearances -or, indeed...all federal employees with valuable confidential information to impart." Since drug use was not a particular problem in Customs, all other governmental employees were no less likely to take bribes to feed their drug habit or to yield to blackmail. Why limit such a "super-protection against harms...from drug use" only to government workers? A like system of urinalysis for private citizens who use dangerous instruments such as guns or cars or possess access to classified information would also be constitutional under the majority's line of reasoning.<sup>24</sup>

<sup>23</sup>Id. at 1400 and citing to *Rushton v. Nebraska Public Power District*, 844 F. 2d 562 (CA8 1988) and to *Delaware v. Prouse*, 440 U.S. 648. 99 S. Q. 1391 (1979).

<sup>24</sup>Id. at 1400-1401.

#### REAL REASON FOR THIS PROGRAM

Justice Scalia stated there was only one apparent basis that set these particular tests apart. But it was not the basis upon which the Court is willing to rely. He did not think that the rationale for them was really "any of the feeble justifications put forward by counsel here and accepted by the Court." He could discern "the only plausible explanation" for this system to be the Agency's statement that it wanted to set an example for the American people. Could there be a better way to show that the Government was serious about the war on drugs than to subject its employees on the front line of that war to this invasion of their privacy and affront to their dignity? There was but a slight chance the tests would prevent some serious public harm. But they would "show to the world that the service is 'clean,' and...demonstrate the determination of the Government to eliminate this scourge of our society." Scalia thought it was obvious that such a justification is unacceptable. One cannot infringe upon our civil liberties just to make a point. Nor can "symbolism, even symbolism for so worthy a cause" be used to validate an otherwise unreasonable search.<sup>25</sup>

Justice Scalia also espied an irony in the Government's use of an opinion by Justice Brandeis to support its program. It had cited his description of Government in the role of teacher setting an example for the people by what it did. But Justice Scalia is at pains to point out that Brandeis had in fact been "there dissenting from the Court's admission of evidence obtained through an unlawful wiretap." He concludes his own dissent by noting that the losers in this case were not just the affected Customs officers but all of us -- who suffer a "coarsening of our national manners" that ultimately give the Fourth Amendment its content. Little hope can remain for any of us who "become subject to...federal officials whose respect for our privacy can hardly be greater than the small respect they have been taught to have for their own." So the civility of our society and the privacy of our citizens are both injured in the long run.<sup>26</sup>

Justice Brennan joined Justice Marshall in his brief dissent. They argued that the Court's abandonment of the Fourth Amendment's express requirement for probable cause was both unprincipled and unjustified. Justice Marshall would expand this analysis at length in the dissent he filed this same day in Skinner. Here he simply notes that even if the balancing test was appropriate under the Fourth Amendment, he still would dissent here for the reasons enunciated by Justice Scalia and for the observation of Judge Hill on

<sup>25</sup>*Id.* at 1401.

<sup>26</sup>*Id.* at 1402 and citing to *Olmsted v. United States*, 277 U.S. 438, 485, 48 S. Ct. 564, 575, (1928).

the Court of Appeals as to "the inadequate tailoring" of the present procedures.<sup>27</sup>

#### PERSONAL OBSERVATIONS

Unlike its companion case that upheld testing for the railroad workers, this decision was rendered by a Court very closely divided. There was only a bare majority to sustain this system of urinalysis. But two of the dissenters -- Brennan and Marshall — are now gone. Only two remain: Scalia and Stevens. No doubt the majority will be larger the next time such a testing system makes its way to the Supreme Court. More likely than not, the testing will be upheld. But as Justice Scalia pointedly asks here, how far can this go? Or, as appropriately, will there be any limits to the Government's testing power?

First, there was the hysteria over the drug war - and we have blood and urine and breath tested. Now there is a growing fear generated by the AIDS crisis. Should there be tests of saliva and sperm as well? With the increase of technology, will there be genetic testing to forecast the hale and healthy and well-adapted in the brave new world of our brave new society? One might suggest that the government's use of overly broad language - something that caused discomfiture for both the majority and the dissenters - was merely accidental: something done in the haste of the moment and the passion of the crisis.

But can the concerned citizen be that sure and certain that this was that much of happenstance? Does not power always seek to reach its outermost parameters and go beyond them? Does not authority always reach with a grasp clasp all it can? Perhaps the indefinite language was chosen deliberately. If so, it is not only overly broad, but also warning and admonition to all Americans to take good care and vigilantly guard their liberties. For if Government is indeed setting an example, will the private sector be so slow to follow? Justice Scalia with his dissent here makes that warning and admonition even louder and more ominous. He is not usually identified with the jurisprudence of former Justices Brennan and Marshall. So when a jurist of his particular predilections and personal ideology makes such statements about the liberties of us all, his words should attract special note and concern. They are not the words of the overwrought or overwhelmed. They are the conservative words of a most conservative justice speaking to the best in that tradition: the preservation of individual freedom.

<sup>27</sup>*Id.* at 1398 and citing to *National Treasury Employees Union v. Von Raab*, 816 F. 2d 170, 182-184 (CA5 1987).