

***National Treasury Employees Union v. Von Raab (1989)***

489 U.S. 656

*The United States Customs Service has as a primary enforcement mission the interdiction and seizure of illegal drugs smuggled into the country. It implemented a drug screening program requiring urinalysis tests from Service employees seeking transfer or promotion to positions having a direct involvement in drug interdiction or whose positions required them to carry firearms or handle classified material. Among other things, the program requires that applicants be notified that their selection depends on successful completion of drug screening, sets forth procedures for collection and analysis of the requisite samples and procedures designed both to ensure against adulteration or substitution of specimens and to limit the intrusion on employee privacy, and provides that test results may not be turned over to any other agency, including criminal prosecutors, without the employees' written consent. The National Treasury Employees Union filed suit against the Commissioner of the U.S. Customs Service on behalf of Customs employees seeking covered positions, alleging that the drug-testing program violated the Fourth Amendment. The District Court for the Eastern District of Louisiana agreed and enjoined the program. The Court of Appeals for the Fifth Circuit vacated the injunction, holding that, although the program amounts to a search within the meaning of the Fourth Amendment, such searches are reasonable in light of their limited scope and the Customs Service's strong interest in detecting drug use among employees in covered positions. The Supreme Court granted certiorari.*

Opinion of the Court: Kennedy, Blackmun, O'Connor, Rehnquist, White.

Dissenting opinions: Marshall, Brennan; Scalia, Stevens.

**MR. JUSTICE KENNEDY delivered the opinion of the Court.**

We granted *certiorari* to decide whether it violates the Fourth Amendment for the United States Customs Service to require a urinalysis test from employees who seek transfer or promotion to certain positions.... We now affirm so much of the judgment of the court of appeals as upheld the testing of employees directly involved in drug interdiction or required to carry firearms. We vacate the judgment to the extent it upheld the testing of applicants for positions requiring the incumbent to handle classified materials, and remand for further proceedings.

In *Skinner v. Railway Labor Executives Association*...decided today, we hold that federal regulations requiring employees of private railroads to produce urine samples for chemical testing implicate the Fourth Amendment, as those tests invade reasonable expectations of privacy.

... In view of our holding in *Railway Labor Executives* that urine tests are searches, it follows that the Customs Service's drug testing program must meet the reasonableness requirement of the Fourth Amendment.

While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, ...our decision in *Railway Labor Executives* reaffirms the 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.... *New Jersey v. T. L. O.*

... As we note in *Railway Labor Executives*, our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context....

It is clear that the Customs Service's drug testing program is not designed to serve the ordinary needs of law enforcement. Test results may not be used in a criminal prosecution of the employee without the employee's consent. The purposes of the program are to deter drug use among those eligible for promotion to sensitive positions within the Service and to prevent the promotion of drug users to those positions. These substantial interests, no less than the Government's concern for safe rail transportation at issue in *Railway Labor Executives*, present a special need that may justify departure from the ordinary warrant and probable cause requirements....

Petitioners do not contend that a warrant is required by the balance of privacy and governmental interests in this context, nor could any such contention withstand scrutiny. We have recognized before that requiring the Government to procure a warrant for every work-related intrusion "would conflict with 'the common-sense realization that government offices could not function if every employment decision became a constitutional matter.'" ...The Customs Service has been entrusted with pressing responsibilities, and its mission would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions.

Furthermore, a warrant would provide little or nothing in the way of additional protection of personal privacy. A warrant serves primarily to advise the citizen that an intrusion is authorized by law and limited in its permissible scope and to interpose a neutral magistrate between the citizen and the law enforcement officer "engaged in the often competitive enterprise of ferreting out crime." ...Under the Customs program, every employee who seeks a transfer to a covered position knows that he must take a drug test, and is likewise aware of the procedures the Service must follow in administering the test. A covered employee is simply not subject "to the discretion of the official in the field." ...The process becomes automatic when the employee elects to apply for, and thereafter pursue, a covered position. Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply "no special facts for a neutral magistrate to evaluate." ...

Even where it is reasonable to dispense with the warrant requirement in the particular circumstances, a search ordinarily must be based on probable cause.... Our cases teach, however, that the probable-cause standard "is peculiarly related to criminal investigations." ...In particular, the traditional probable-cause standard may be unhelpful in analyzing the reasonableness of routine administrative functions, ...especially where the Government seeks to prevent the development of hazardous conditions or to detect violations that rarely generate articulable grounds for searching any particular place or person.... Our precedents have settled that, in certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.... We think the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms.... The Government has a compelling

interest in ensuring that frontline interdiction personnel are physically fit, and have unimpeachable integrity and judgment. Indeed, the Government's interest here is at least as important as its interest in searching travelers entering the country. We have long held that travelers seeking to enter the country may be stopped and required to submit to a routine search without probable cause, or even founded suspicion, "because of national self-protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in." ... This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.

The public interest likewise demands effective measures to prevent the promotion of drug users to positions that require the incumbent to carry a firearm, even if the incumbent is not engaged directly in the interdiction of drugs. Customs employees who may use deadly force plainly "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." ... We agree with the Government that the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force. Indeed, ensuring against the creation of this dangerous risk will itself further Fourth Amendment values, as the use of deadly force may violate the Fourth Amendment in certain circumstances....

Against these valid public interests we must weigh the interference with individual liberty that results from requiring these classes of employees to undergo a urine test. The interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial in some circumstances....

... It is plain that certain forms of public employment may diminish privacy expectations even with respect to such personal searches. Employees of the United States Mint, for example, should expect to be subject to certain routine personal searches when they leave the workplace every day. Similarly, those who join our military or intelligence services may not only be required to give what in other contexts might be viewed as extraordinary assurances of trustworthiness and probity, but also may expect intrusive inquiries into their physical fitness for those special positions....

We think Customs employees who are directly involved in the interdiction of illegal drugs or who are required to carry firearms in the line of duty... have a diminished expectation of privacy in respect to the intrusions occasioned by a urine test. Unlike most private citizens or government employees in general, employees involved in drug interdiction reasonably should expect effective inquiry into their fitness and probity. Much the same is true of employees who are required to carry firearms. Because successful performance of their duties depends uniquely on their judgment and dexterity, these employees cannot reasonably expect to keep from the Service personal information that bears directly on their fitness.... While reasonable tests designed to elicit this information doubtless infringe some privacy expectations, we do not believe these expectations outweigh the Government's compelling interests in safety and in the integrity of our borders.

Without disparaging the importance of the governmental interests that support the suspicionless searches of these employees, petitioners nevertheless contend that the Service's drug testing program is unreasonable in two particulars. First, petitioners argue that the program is unjustified because it is not based on a belief that testing will reveal any drug use by covered employees. In pressing this argument, petitioners point out that the Service's testing scheme was not implemented in response to any perceived drug problem among Customs employees, and that the program actually has not led to the discovery of a significant number of drug users.... Counsel for petitioners informed us at oral argument that no more than 5 employees out of 3,600 have tested positive for drugs.... Second, petitioners contend that the Service's scheme is not a "sufficiently productive mechanism to justify [its] intrusion upon Fourth Amendment interests," ... because illegal drug users can avoid detection with ease by temporary abstinence or by surreptitious adulteration of their urine specimens.... These contentions are unpersuasive.

Petitioners' first contention evinces an unduly narrow view of the context in which the Service's testing program was implemented....

The mere circumstance that all but a few of the employees tested are entirely innocent of wrong doing does not impugn the program's validity.... The Service's program is designed to prevent the promotion of drug users to sensitive positions as much as it is designed to detect these employees who use drugs. Where, as here, the possible harm against which the Government seeks to guard is substantial, the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government's goal.

We think petitioners' second argument—that the Service's testing program is ineffective because employees may attempt to deceive the test by a brief abstention before the test date, or by adulterating their urine specimens—overstates the case. As the Court of Appeals noted, addicts may be unable to abstain even for a limited period of time, or may be unaware of the "fade-away effect" of certain drugs.... More importantly, the avoidance techniques suggested by petitioners are fraught with uncertainty and risks for those employees who venture to attempt them. A particular employee's pattern of elimination for a given drug cannot be predicted with perfect accuracy, and, in any event, this information is not likely to be known or available to the employee.... Thus, contrary to petitioners' suggestion, no employee reasonably can expect to deceive the test by the simple expedient of abstaining after the test date is assigned. Nor can he expect attempts at adulteration to succeed, in view of the precautions taken by the sample collector to ensure the integrity of the sample....

In sum, we believe that Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions that directly involve the interdiction of illegal drugs or that require the incumbent to carry a firearm. We hold that the testing of these employees is reasonable under the Fourth Amendment.

We are unable, on the present record, to assess the reasonableness of the Government's testing program insofar as it covers employees who are required "to handle classified material." ...

It is not clear, however, whether the category defined by the Service's testing directive encompasses only those Customs employees likely to gain access to sensitive information. Employees who are tested under the Service's scheme include those holding such diverse positions as "Accountant," "Accounting Technician," "Animal Caretaker," "Attorney (All),"

“Baggage Clerk,” “Co—op Student (All),” “Electric Equipment Repairer,” “Marl Clerk/Assistant,” and “Messenger.” ... Yet it is not evident that those occupying these positions are likely to gain access to sensitive information, and this apparent discrepancy raises in our minds the question whether the Service has defined this category of employees more broadly than necessary to meet the purpose of the Commissioner's directive.

We cannot resolve this ambiguity on the basis of the record before us, and we think it is appropriate to remand the case to the court of appeals for such proceedings as may be necessary to clarify the scope of this category of employees subject to testing.... The judgment of the Court of Appeals for the Fifth Circuit is affirmed in part and vacated in part, and the case is remanded for further proceedings consistent with this opinion.

**MR. JUSTICE MARSHALL, with whom MR. JUSTICE BRENNAN joins, dissenting.**

For the reasons stated in my dissenting opinion in *Skinner v. Railway Labor Executives Association*,... I also dissent from the Court's decision in this case. Here, as in *Skinner*, the Court's abandonment of the Fourth Amendment's express requirement that searches of the person rest on probable cause is unprincipled and unjustifiable. But even if I believed that balancing analysis was appropriate under the Fourth Amendment, I would still dissent from today's judgment, for the reasons stated by Justice Scalia in his dissenting opinion.

**MR. JUSTICE SCALIA, with whom MR. JUSTICE STEVENS joins, dissenting.**

Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment.

... Today, in *Skinner*, we allow a less intrusive bodily search of railroad employees involved in tram accidents. I joined the Court's opinion there because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society. I decline to join the Court's opinion in the present case because neither frequency of use nor connection to harm is demonstrated or even likely. In my view the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use.

The Fourth Amendment protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.” While there are some absolutes in Fourth Amendment law, as soon as those have been left behind and the question comes down to whether a particular search has been “reasonable,” the answer depends largely upon the social necessity that prompts the search....

The Court's opinion in the present case, however, will be searched in vain for real evidence of a real problem that will be solved by urine testing of Customs Service employees.... It is not apparent to me that a Customs Service employee who uses drugs is significantly more likely to be bribed by a drug smuggler, any more than a Customs Service employee who wears diamonds is significantly more likely to be bribed by a diamond smuggler— unless, perhaps, the addiction to drugs is so severe, and requires so much money to maintain, that it would be detectable even without benefit of a urine test. Nor is it apparent to me that Customs officers who use drugs will be appreciably less “sympathetic” to their drug—interdiction mission, any more than police officers who exceed the speed limit in their private cars are appreciably less sympathetic to their mission of enforcing the traffic laws. (The only difference is that the Customs officer's individual

efforts, if they are irreplaceable, can theoretically affect the availability of his own drug supply—a prospect so remote as to be an absurd basis of motivation.) Nor, finally, is it apparent to me that urine tests will be even marginally more effective in preventing gun-carrying agents from risking “impaired perception and judgment” than is their current knowledge that, if impaired, they may be shot dead in unequal combat with unimpaired smugglers—unless, again, their addiction is so severe that no urine test is needed for detection.

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

... In *Skinner*, ...we pointed to a long history of alcohol abuse in the railroad industry, and noted that in an 8-year period 45 train accidents and incidents had occurred because of alcohol and drug impaired railroad employees, killing 34 people, injuring 66, and causing more than \$28 million in property damage.... In the present case, by contrast, not only is the Customs Service thought to be “largely drug-free,” but the connection between whatever drug use may exist and serious social harm is entirely speculative....

Today's decision would be wrong, but at least of more limited effect, if its approval of drug testing were confined to that category of employees assigned specifically to drug interdiction duties. Relatively few public employees fit that description. But in extending approval of drug testing to that category consisting of employees who carry firearms, the Court exposes vast numbers of public employees to this needless indignity....

There is only one apparent basis that sets the testing at issue here apart from all these other situations—but it is not a basis upon which the Court is willing to rely. I do not believe for a minute that the driving force behind these drug testing rules was any of the feeble justifications put forward by counsel here and accepted by the Court. The only plausible explanation, in my view, is what the Commissioner himself offered in the concluding sentence of his memorandum to Customs Service employees announcing the program: “Implementation of the drug screening program would set an important example in our country's struggle with this most serious threat to our national health and security.” ... Or as respondent's brief to this Court asserted: “[I]f a law enforcement agency and its employees do not take the law seriously, neither will the public on which the agency's effectiveness depends.” ... What better way to show that the Government is serious about its “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? To be sure, there is only a slight chance that it will prevent some serious public harm resulting from Service employee drug use, but it will show to the world that the Service is “clean,” and—most important of all—will demonstrate the determination of the Government to eliminate this scourge of our society! I think it obvious that this justification is unacceptable; that the impairment of individual liberties cannot be the means of making a point; that symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search.