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retired on February 27, 1987

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1-21-87

DRUG PREVENTION LITIGATION REPORT

ISSUE 5
January 16, 1987

U.S. Department of Justice
Civil Division

Executive Summary

As the litigation develops at the appellate level, there are growing indications that the Courts of Appeals will not be as hostile to various kinds of drug testing as several District Courts have been in recent opinions. In *McDonell v. Hunter*, the Eighth Circuit has essentially reversed one of the leading district court decisions holding random testing of public employees - in that case prison guards - to violate the Fourth Amendment. The Court noted that urinalysis was not as intrusive as a blood test, and, acknowledging the legitimate interest in prison security and the diminished expectation of privacy of prison employees, held that random testing of prison guards was a reasonable search. (A copy of the opinion is attached.)

Similarly, in *NTEU v. Von Raab*, the Fifth Circuit granted our motion for an expedited appeal and set oral argument for February 3. A stay panel of the Court took our motion for a stay pending appeal under advisement, and on January 14, ultimately denied the motion, but invited the merits panel to reconsider the matter. The *per curiam* opinion of the stay panel noted that "the Customs Service has presented a substantial case on the merits," and agreed with our characterization of the "unsettled state of the law." As the argument on the merits was only three weeks away, the panel felt that denying a stay for that period was not an undue hardship on Customs. One member of the panel, Judge Higginbotham, specially concurring, discussed the merits and raised serious questions about the correctness of the district court's holding. (A copy of the opinion is attached.)

Finally, the serious consequences of drug use to the public welfare was sadly suggested in the investigation of the fatal train wreck near Baltimore on January 4. Both the engineer and the brakeman of the Conrail locomotive that ran a stop signal tested positive for cannaboids in their urine. This testing was undertaken pursuant to FRA regulations that are presently being

defended by the Civil Division in the Ninth Circuit. We initially prevailed in the District Court, which refused to enter a stay pending appeal. The Ninth Circuit entered a stay, and the Supreme Court reversed, allowing continued testing under the regulations while the case on the merits proceeds. NTSB investigators had re-enacted the catastrophe earlier, and were able to stop a locomotive before collision by throwing on the emergency brakes at the same point the brakeman said he took that action before the crash. At this time, however, NTSB has not yet officially concluded that the crash was caused by drug-induced human error.

HIGHLIGHTS

PENDING CASES - Federal Participation

o *National Treasury Employees Union v. Von Raab, No. 86-3552 (E.D. La.), appeal pending, No. 86-3833 (5th Cir.)*

o *National Treasury Employees Union v. Reagan, No. 86-4058 (E.D. La.)*

On January 14, 1986, a panel of the Fifth Circuit denied the Custom Service's request for a stay pending appeal of District Judge Collins' order enjoining Customs' drug testing program. In a per curiam decision, the panel found that, although "the Customs Service has presented a substantial case on the merits," little purpose would now be served by granting a stay since the appeal was being expedited and argument would be heard in less than three weeks on February 3, 1986. The ruling was without prejudice to "full reconsideration" by the members of the different panel that would hear the merits of the appeal.

One member of the panel, Judge Higginbotham, specially concurred, pointedly noting that "the basis for the district court's ruling is, at best, problematic." Judge Higginbotham questioned the existence of a privacy interest in unobserved urination, adding that "[t]here is a substantial question whether requiring the samples as a condition of hire for the three job categories is a search or seizure at all." He further pointed out that:

> If the government has the right to insist upon proof that its policemen of drug dealers not be drug users, and surely it does, the reasonableness of any invasion of right and the correlative reasonableness of the expectation of privacy is a function of the relevance of the job requirement to the job to be done. Certainly it is permissible, even essential, that persons selected for these jobs not be users of illegal drugs. The decision by the executive branch that this testing is necessary is entitled to some deference and I find no record basis here for a substitution of judicial judgment.

The judge went on to state that the district court's Fifth Amendment ruling on self-incrimination was "in error," as was the court's ruling that the testing violated the Fifth Amendment because of alleged unreliability.

At the district court, on the same day as the Fifth Circuit's ruling, District Judge Collins found that there was no basis for a finding of contempt against the Customs Service in complying with his injunction enjoining the drug screening program.

In the Executive Order case, we have served discovery requests upon the plaintiffs and our answers to plaintiffs' discovery requests will be filed in the near future. In addition, on January 6, 1987, we withdrew our motion to dismiss the action for lack of ripeness with respect to any pure issues of law raised by a facial challenge to the Executive Order. With the substantial passage of time since the filing of the complaint and the likelihood that one or more agencies will finalize programs to implement the Executive Order in the near future, the ripeness argument was withdrawn but only as to issues that can be framed without the need to refer to a specific agency program.

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o *National Federation of Federal Employees v. Weinberger, 640 F. Supp. 642 (D.D.C.), appeal pending, No. 86-5432 (D.C. Cir.)*

Briefing of the appeal has now been concluded and argument is scheduled for February 24, 1987. Should the D.C. Circuit disagree with the district court on the jurisdictional issue, the court may reach the merits of Fourth Amendment challenge to the Army's civilian testing program which has been briefed by the parties.

* * *

NEW DECISIONS

o *McDonell v. Hunter, Appeal No. 85-1919 (8th Cir. Jan. 12, 1987)*

The Eighth Circuit has reversed one of the leading district court decisions holding random drug testing of public employees such as prison guards to violate the Fourth Amendment. Although the court of appeals held that drug testing was subject to the Fourth Amendment, the court found that "[o]fficials have a legitimate interest in assuring that the activities of those employees who come into daily contact with inmates are not inhibited by drugs or alcohol and are fully capable of performing their duties." The court then found that "the only way" this interest can be protected "in a satisfactory manner is to permit limited uniform and random testing" which is "the least intrusive" method available to assure a drug-free workplace. The court added that such testing should be conducted pursuant to

certain guidelines, including that the testing be unobserved, which are consistent with the requirements of the Executive Order.

* * *

o *Richard Spence v. Hal Farrier, Appeal No. 85-1902 (8th Cir. Dec. 24, 1986)*

The Eighth Circuit affirmed a lower court judgment upholding random drug testing of state prisoners. The court of appeals found that random testing did not offend a prisoner's limited expectation of privacy, particularly as "unauthorized use of narcotics is a problem that plagues virtually every penal and detention center in the country." The court also rejected a due process challenge to the state's use of EMIT for both initial and confirmatory testing noting that "the margin of error [for EMIT] is insignificant in light of institutional goals."

* * *

o *William B. Kruger v. Department of Justice, Dkt. Nos. 7528510621, 7528510648-49 (Merit System Protection Board Jan. 8. 1987)*

On January 8, 1986, the Merit System Protection Board held that the job-relatedness requirement of "nexus" under the Civil Service Reform Act allowed disciplinary action to be taken against three Bureau of Prisons guards for off-duty drug use. The Board distinguished an earlier decision, Merritt v. Department of Justice, 6 M.S.P.R.585 (1981), on the ground that the drugs had been used in public, and overruled Merritt's limitation that discipline was authorized only when there was "an actual impairment in service efficiency." The MSPB held that illegal drug use for such law enforcement officers was incompatible with the employee's duties, the agency's mission and would impair public confidence in the agency. In so ruling, the Board modified the proposed sanction of removal to a 60 day suspension in light of the provisons of Executive Order 12564 and recent legislation encouraging rehabilitation of federal employees who use illegal drugs.

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 85-1919

Alan F. McDonell, M. Lee Curran; and Sally Phipps, Individually and on behalf of all others similarly situated, Appellees,	*	
v.	*	Appeal from the United States District Court for the Southern District of Iowa.
Susan Hunter; Jean Sebek; Russell Behrends and Harold Farrier, Appellants.	*	

Submitted: February 12, 1986

Filed: January 12, 1987

Before LAY, Chief Judge, ROSS and WOLLMAN, Circuit Judges.

ROSS, Circuit Judge.

This is a class action challenging the constitutionality of an Iowa Department of Corrections policy under 42 U.S.C. § 1983. This policy subjects the correctional institution employees to searches of their vehicles and of their persons, including urine, blood, or breath testing, upon the request of Department officials. The named plaintiffs are Alan McDonell, Lee Curran, and Sally Phipps. The certified class consists of all individuals employed by the Iowa Department of Corrections at its various institutions who are covered by the Department's search policy.

The district court[1] enjoined Department of Corrections officials and their agents from enforcing this search policy except in certain limited circumstances, unless the search is based upon a reasonable suspicion. We affirm the district court's order as herein modified.

I. Facts

Plaintiff McDonell was employed as a correctional officer first at the Men's Reformatory at Anamosa (Anamosa) and later at another correctional institution. Plaintiffs Curran and Phipps, at all times material to this action, were employed at the Iowa Correctional Institution for Women at Mitchellville (Mitchellville).

Defendant Hunter is the Superintendent and chief executive officer of Mitchellville. Defendant Sebek is the Security Director of Mitchellville, and is responsible for the implementation and enforcement of the Department's policy. Defendant Behrends is the Acting Deputy Warden of Anamosa, and is responsible for the implementation of the Department's policy.[2] Defendant Farrier is Director and chief administrative officer of the Iowa Department of Corrections, and is responsible for the supervision and operations of Anamosa, Mitchellville, and other correctional institutions.

When McDonell was employed at Anamosa in 1979, he signed a consent to search form.[3] In January 1984 the supervisory

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[1]The Honorable Harold D. Vietor, United States District Judge for the Southern District of Iowa.

[2]The policy in effect at the time of the district court's order is attached as Appendix A. The revised policy is attached as Appendix B.

[3]A copy of this form is attached to this opinion as Appendix C.

personnel at Anamosa requested McDonell to undergo urinalysis because he had been seen with individuals who were being investigated for possible drug-related activities. McDonell refused and as a result his employment was terminated. Shortly thereafter he was reinstated with loss of ten days' pay and was transferred to another institution.

In August of 1983, employees at Mitchellville were presented a search consent form[4] to sign. Plaintiffs Curran and Phipps refused to sign. While there was disputed evidence that these employees were told that if they did not sign, they would not receive their paychecks, they did in fact receive paychecks and they have not been discharged or disciplined for refusing to sign.

Plaintiffs sought declaratory and injunctive relief on behalf of themselves and the class[5] they represented, claiming the policy[6] violates the fourth amendment to the United States Constitution and plaintiffs' constitutional right to privacy.

A preliminary injunction was issued in February 1984. On appeal it was affirmed. McDonell v. Hunter, 746 F.2d 785, 787 (8th Cir. 1984). In July 1985, the district court issued its final order. The district court held that searches of correctional employees, including urinalyses, and of their

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[4]A copy of this form is attached to this opinion as Appendix D.

[5]The district court found that there were approximately 1750 correctional institution employees of the Department who are within the certified class.

[6]The district court noted that, although the Department's policy as written did not expressly mention submission of blood, urine and breath samples, there was no dispute that the policy was considered to include submission of such samples. The revised version of the Department's policy does mention urinalysis and blood tests.

vehicles may be made only on the basis of reasonable suspicion, with certain specified exceptions.[7] The district court found that the policy challenged here was designed to serve security requirements at the state's correctional facilities, but that the employees had legitimate, although diminished, expectations of privacy while in the correctional institution. The court balanced the state's interest in security against the infringement upon the individual employee's right to privacy and determined that reasonable suspicion, rather than probable cause, was the appropriate standard for conducting strip searches and urinalyses of employees. The district court order allows vehicle searches within the confines of the institution to be conducted randomly or by systematic random selection. Searches of employees' vehicles within the institution's confines, other than uniformly or by systematic random selection were permitted only on the basis of a reasonable suspicion.

II. Searches

The fourth amendment to the United States Constitution provides that:

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The basic purpose of the fourth amendment, which is enforceable against the states through the fourteenth amendment, New Jersey v. T.L.O., 469 U.S. 325, 334 (1985), is "to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials," Camara v. Municipal Court, 387 U.S. 523,

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[7]The text of the district court's order entered July 9, 1985, is included as Appendix E to this opinion.

528 (1967). The fourth amendment imposes a "standard of 'reasonableness' upon the exercise of discretion by government officials." Delaware v. Prouse, 440 U.S. 648, 653-54 (1979). "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Bell v. Wolfish, 441 U.S. 520, 559 (1979). See also Illinois v. Lafayette, 462 U.S. 640, 644 (1983); Delaware v. Prouse, supra, 440 U.S. at 654.

A. Strip Body Searches

Defendants argue that to maintain security and intercept contraband it is necessary that they be allowed to request strip searches of corrections officers based on mere suspicion. Defendants also argue that plaintiffs have no reasonable expectations of privacy within the institutions in light of their signing consent forms.

Correctional institutions are unique places "fraught with serious security dangers." Bell v. Wolfish, supra, 441 U.S. at 559. Within the walls of the correctional institution, "a central objective of prison administrators is to safeguard institutional security." Hunter v. Auger, 672 F.2d 668, 674 (8th Cir. 1982). To achieve this goal prison administrators have the responsibility "to intercept and exclude by all reasonable means all contraband smuggled into the facility." Id.

In analyzing the intrusion on the individual's fourth amendment interests, there must be a legitimate expectation of privacy. To determine if an individual's expectation of privacy is legitimate, there must be both an actual subjective expectation and, even more importantly, Hudson v. Palmer, 468 U.S. 517, 525 n.7 (1984), that expectation must be one which

society will accept as reasonable.[8] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

While correction officers retain certain expectations of privacy, it is clear that, based upon their place of employment, their subjective expectations of privacy are diminished while they are within the confines of the prison. Security & Law Enforcement Employees, District Council 82 v. Carey, 737 F.2d 187, 202 (2d Cir. 1984). We believe that society is prepared to accept this expectation of privacy as reasonable although diminished "in light of the difficult burdens of maintaining safety, order and security that our society imposes on those who staff our prisons." Id.

The Supreme Court has held that warrantless searches "are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." Katz, supra, 389 U.S. at 357. Exceptions have been made "where a legitimate governmental purpose makes the intrusion into privacy reasonable." Carey, supra, 737 F.2d at 203.

In light of the legitimate governmental interest in maintaining security at correctional institutions, it is our view, as it is that of the Second Circuit, that a reasonable suspicion standard should be adopted for strip searches of correction officers while working in correctional facilities. Id. at 204. As this court stated in Hunter v. Auger, supra, "[w]e believe that this standard is flexible enough to afford the full measure of fourth amendment protection without posing an insuperable barrier to the exercise of all search and seizure powers." Hunter v. Auger, supra, 672 F.2d at 674.

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[8] In describing constitutionally protected privacy interests, the Supreme Court uses the words "reasonable" and "legitimate" interchangeably. California v. Ciraolo, ___ U.S. ___, ___, 106

A reasonable suspicion standard has been upheld as the appropriate standard for conducting body searches of (1) prison visitors: Thorne v. Jones, 765 F.2d 1270, 1277 (5th Cir. 1985), cert. denied, ____ U.S. ____ , 106 S.Ct. 1199 (1986); Hunter v. Auger, supra, 672 F.2d at 674; (2) persons at the country's borders: United States v. Ogberaha, 771 F.2d 655, 658 (2d Cir. 1985), cert. denied, ___ U.S. ____, 106 S.Ct. 887 (1986); United States v. Asbury, 586 F.2d 973, 975-76 (2d Cir. 1978); United States v. Afanador, 567 F.2d 1325, 1328 (5th Cir. 1978); (3) arrestees: Jones v. Edwards, 770 F.2d 739, 741 (8th Cir. 1985) (strip search conducted following arrest for animal leash law violation); Giles v. Ackerman, 746 F.2d 614, 615 (9th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2114 (1985) (strip search of one arrested for minor traffic offenses); Mary Beth G. v. City of Chicago, 723 F.2d 1263, 1273 (7th Cir. 1983) (strip search of women arrested for misdemeanor offenses, done while women were awaiting arrival of bail money); and (4) prison guards: Security & Law Enforcement Employees, District Council 82 v. Carey, supra, 737 F.2d at 203-04; accord Armstrong v. New York State Commissioner of Corrections, 545 F.Supp. 728, 731 (N.D.N.Y. 1982) (requiring "articulable facts" supporting belief that employee was concealing contraband on his person; cf. Gettleman v. Werner, 377 F.Supp. 445, 452 (W.D. Pa. 1974) (reasonable suspicion found, but a federal court should "be reluctant to intervene" in prison administration matters).

The reasonable suspicion standard requires officials to base strip searches on specific objective facts and rational inferences they are entitled to draw from those facts in light of their experience. It requires individualized suspicion specifically directed to the person who is targeted for the strip search. Hunter v. Auger, supra, 672 F.2d at 674-75. Without reasonable, articulable grounds to suspect an individual employee of secreting contraband on his person, a strip search of that

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S.Ct. 1809, 1816 n.4 (1986).

employee is unreasonable under the fourth amendment. We thus affirm the district court's order regarding strip searches of correctional facility employees.

B. Urinalysis

Urinalysis has been determined to be a search and seizure within the meaning of the fourth amendment. Capua v. City of Plainfield, No. 86-2992, slip op. at 7-8 (D. N.J. Sept. 18, 1986); Jones v. McKenzie, 628 F.Supp. 1500, 1508-09 (D. D.C. 1986); Allen v. City of Marietta, 601 F.Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F.Supp. 1214, 1217 (S.D.N.Y. 1984); In re Patchogue-Medford Congress of Teachers v. Board of Education, 505 N.Y.S.2d 888, 889 (N.Y. App. Div. 1986); City of Palm Bay v. Bauman, 475 So.2d 1322, 1325-27 (Fla. Dist. Ct. App. 1985); cf. Everett v. Napper, 632 F.Supp. 1481, 1484 (N.D. Ga. 1986) (no search occurred and there was no fourth amendment violation where employee refused to take urinalysis test). In addition, the Third Circuit has implicitly held that the fourth amendment applies to urinalysis. Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir. 1986).

In Allen v. City of Marietta, supra, and Capua, supra, the courts compared urine testing to the involuntary taking of a blood sample. "Though urine, unlike blood, is routinely discharged from the body so that no actual [physical] intrusion is required for its collection," both can be "analyzed in a medical laboratory to discover numerous physiological facts about the person from whom it came." Capua, supra, slip op. at 7. The Supreme Court has held that the involuntary administration of a blood test "plainly involves" the fourth amendment, which provides that "'the right of the people to be secure in their persons * * * shall not be violated.'" (Emphasis added). Schmerber v. California, 384 U.S. 757, 767 (1966) (quoting the fourth amendment in part). We agree with those courts which have held that urinalysis is a search and seizure within the meaning

of the fourth amendment.

Having determined that urinalysis is a search and seizure, we look to a balancing of "the need to search against the invasion which the search entails." Camara, supra, 387 U.S. at 537. Iowa Department of Corrections officials assert a strong need to see that prison guards are not working while under the influence of drugs or alcohol. Officials argue that prison security demands that those who have contact with inmates must be alert at all times. They also urge that the use of drugs by a correction officer is some positive indication that such officer may bring drugs into the prison for the use of the inmate.

Urinalysis properly administered is not as intrusive as a strip search or a blood test. While the prison officials have the same legitimate interest in maintaining prison security discussed supra, the infringement upon the privacy interest of correctional institution employees, already diminished, is lessened. Officials have a legitimate interest in assuring that the activities of those employees who come into daily contact with inmates are not inhibited by drugs or alcohol and are fully capable of performing their duties.

In Shoemaker v. Handel, supra, the Third Circuit upheld random selection by lot for urine testing of jockeys as well as daily breathalyzer testing. The court said the state had a "strong interest in assuring the public of the integrity of the persons engaged in the horse racing industry." Shoemaker v. Handel, supra, 795 F.2d at 1142. In approving this administrative search exception to the warrant requirement, the court looked first to a strong state interest in conducting an unannounced search and second, to a reduction in the justifiable privacy expectation of the subject of the search. Id. We believe the state's interest in safeguarding the security of its correctional institutions is at least as strong as its interest in safeguarding the integrity of, and the public confidence in,

the horse racing industry. On December 1, 1986, the Supreme Court denied certiorari in this case. ____ U.S.L.W. ___.

Warrantless searches of government employees have been found reasonable where the searches were directly relevant to the employee's performance of his duties and the government's performance of its duties. See United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951); Allen v. City of Marietta, supra, 601 F.Supp. at 489-90, and cases cited therein. We agree with the Allen court that urinalyses are not unreasonable when conducted for the purpose of determining whether corrections employees are using or abusing drugs which would affect their ability to safely perform their work within the prison, "a unique place fraught with serious security dangers." Bell v. Wolfish, supra, 441 U.S. at 559. In our opinion the use of drugs by employees who come into contact with the inmates in medium or maximum security facilities on a regular day-to-day basis poses a real threat to the security of the prison. The only way this can be controlled in a satisfactory manner is to permit limited uniform and random testing. The least intrusive method of doing so is through use of urinalyses. In our opinion it is also logical to assume that employees who use the drugs, and who come into regular contact with the prisoners, are more likely to supply drugs to the inmates, although the trial court did not agree with this observation.

Because the institutional interest in prison security is a central one, because urinalyses are not nearly so intrusive as body searches, Shoemaker v. Handel, 608 F.Supp. 1151, 1158 (D.C. N.J. 1985), aff'd, 795 F.2d 1136 (3d Cir. 1986), and because this limited intrusion into the guards' expectation of privacy is, we believe, one which society will accept as reasonable, we modify the district court's order and hold that urinalyses may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons.

Selection must not be arbitrary or discriminatory.

Urinalysis testing within the institution's confines, other than uniformly or by systematic random selection of those employees so designated, may be made only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of drugs or alcohol or that the employee has used a controlled substance within the twenty-four hour period prior to the required test. The demand for a urine, blood, or breath specimen should be made only on the express authority of the highest officer present in the institution, and the specific, objective facts should be disclosed to the employee at the time the demand is made. Strict guidelines should be established and followed to assure confidentiality of the results of urinalysis testing. Whether the testing is on the limited random basis approved above or on the basis of reasonable suspicion, the equipment and procedure to be used must provide sufficient guarantees of trustworthiness to permit the authorities to accurately determine the presence or absence of both drugs and alcohol in the urine. The equipment and procedure to be used shall conform to those described and approved by this court in Spence v. Farrier, No. 85-1902 (8th Cir. December 24, 1986).

The trial court limited the right to test on reasonable suspicion to those employees who are "then under the influence of alcoholic beverages or controlled substances." We do not agree with this limitation and hold that urinalyses testing should also be permitted where there is a reasonable suspicion (as defined herein) that controlled substances have been used within the twenty-four hour period prior to the required test.

There was evidence that employees may have been asked to strip before giving a urine specimen, and there was some evidence submitted as to the reason for this requirement but it was not

conclusive. We hold that the search policy should not require an employee to strip in connection with giving a urine or blood specimen. Other less intrusive measures can be taken to insure the validity of the specimen. We affirm the district court's order as to urine, blood, or breath specimens with the modifications set forth above.

C. Vehicle Searches

The motor vehicle parking lot for employees at Mitchellville is within the area where inmates are confined. The parking lots at other correctional facilities are on property outside the area within which inmates are confined. Defendants argue that they have a significant interest in assuring that inmates do not have access to contraband hidden in vehicles.

The search of a vehicle is much less intrusive than a search of one's person. Almeida-Sanchez v. United States, 413 U.S. 266, 279 (1973) (Powell, J., concurring). Cases involving vehicle searches have recognized that an individual's expectation of privacy in his vehicle is less than in other property. United States v. Chadwick, 433 U.S. 1, 12 (1977); United States v. Michael, 645 F.2d 252, 257 (5th Cir.) (en banc), cert. denied, 454 U.S. 950 (1981). Likewise, any expectation of privacy as to packages or containers within a vehicle is diminished. See United States v. Ross, 456 U.S. 798, 820 n.26 (1982). By the same balancing of individual rights against the interests of the correctional institution in maintaining security, we find that it is not unreasonable to search vehicles that are parked within the institution's confines where they are accessible to inmates. Such searches may be conducted without cause but must be done uniformly or by systematic random selection of employees whose vehicles are to be searched. It also is not unreasonable to search on a random basis, as described supra, employees' vehicles parked outside the institution's confines if it can be shown that inmates have unsupervised access to those vehicles. Any other

vehicle search may be made only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience, that the vehicle to be searched contains contraband. We believe this is reasonable in light of Hudson v. Palmer, supra, in which the Supreme Court granted prison officials "unfettered access" to prisoners' cells as places where inmates can conceal contraband. Hudson v. Palmer, supra, 468 U.S. at 527. We affirm the district court's order as to vehicle searches with the above modifications.

III. Consent Forms

Defendants argue that employees who signed consent forms have no legitimate expectation of privacy on correctional institution property.

If a search is unreasonable, a government employer cannot require that its employees consent to that search as a condition of employment. Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Frost Trucking Co. v. Railroad Commission, 271 U.S. 583, 593-94 (1926). Armstrong v. New York State Commissioner of Corrections, supra, 545 F.Supp. at 731. A legal search conducted pursuant to voluntary consent is not unreasonable and does not violate the fourth amendment. Consent must be given voluntarily and without coercion determined from the totality of the circumstances. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973); United States v. Oyekan, 786 F.2d 832, 838 (8th Cir. 1986). The district court here specifically made no finding as to the voluntariness of the signing of the consent forms. The district court did hold that "[a]dvance consent to future unreasonable searches is not a reasonable condition of employment." McDonell v. Hunter, 612 F.Supp. 1122, 1131 (S.D. Ia. 1985). We agree. The state may only use a consent form which delineates the rights of the employees consistent with the views of this opinion and which does not require the waiver of

any of those rights.

For the above reasons, the district court's order is affirmed as modified.

LAY, Chief Judge, concurring in part and dissenting in part.

I would affirm the decision of the district court in full.

I concur with the majority to the extent that it upholds the district court's application of the reasonable suspicion standard to employees of the state prison system. I do so because the district court made factual findings that justify application of that standard to strip searches and to requiring some employees to undergo urinalysis. However, to the extent that the majority sets aside the factual findings of the district court, substitutes assumptions which are not supported by the record, and modifies the district court's order, I respectfully dissent.

As the district court recognized, the fourth amendment's warrant requirement was established by the founders because of the colonists' bitter experiences with random searches conducted by authorities who believed that the interests of the monarch were paramount to the rights of individual citizens. See McDonell v. Hunter, 612 F. Supp. 1122, 1130 (S.D. Iowa 1985). When individual citizens who work for the state are told that to remain employed they must subject themselves to urinalyses and to vehicle searches because of the state's asserted security interests, without a demonstration of substantial facts underlying those assertions of need, that precious freedom to be secure from unwarranted searches and seizures is similarly implicated.

The fundamental principles surrounding the fourth amendment still serve us well. Only with the greatest caution should we whittle away basic constitutional rights, for we often come to regret the unfortunate rulings we have made in times of hysteria in the past. Compare, e.g., Korematsu v. United States, 323 U.S. 214, 217-19 (1944) (exclusion from areas of the west coast during World War II of all persons of Japanese ancestry held constitutional on grounds of military necessity) and Hirabayashi v. United States, 320 U.S. 81, 101 (1943) (finding curfew regulations imposed against citizens of Japanese ancestry not unconstitutionally discriminatory), with Hohri v. United States, 782 F.2d 227, 231-39 (D.C. Cir.), cert. granted, 107 S. Ct. 454 (1986) (in treating statute of limitations issues raised by money damages claims filed by Japanese-American World War II internees or their representatives, court discusses history of litigation surrounding their internment and notes that the "military necessity" grounds to which the Supreme Court deferred in Hirabayashi and Korematsu were found by a subsequent congressional commission to be without factual foundation). Neither the environment of the prison workplace nor a well-meant desire to stem the use of illicit drugs should be used to tip the balance of Fourth Amendment interests in favor of the state without factual findings on the record to prove the institution's real needs.

Searches of the Person -- Urinalyses

I join the majority in holding that urinalysis is a search under the fourth amendment. However, the majority's reliance on Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986), to hold that urinalysis is a less intrusive search than a blood test is misplaced. Although the court in Capua did observe that no intrusion into the body is required to collect a urine sample, it also stated that urine "is normally discharged and disposed of under circumstances that merit protection from arbitrary interference." 643 F. Supp. at 1513. Then, quoting from the

district court's opinion in this case, the court in Capua stated that "[o]ne does not reasonably expect to discharge urine under circumstances making it available to others to collect and analyze in order to discover the personal physiological secrets it holds." Id. (quoting McDonell, 612 F. Supp. at 1127). A search's intrusiveness does not hinge merely upon whether or not a person's skin is punctured or body touched in some way, but must be evaluated in terms of the individual's legitimate expectations of privacy in the context in which the search is conducted. Cf. Kirkpatrick v. City of Los Angeles, 803 F.2d 485, 489-90 (9th Cir. 1986) (in concluding the strip searches of police officers for investigative purposes are governed by the reasonable suspicion standard, the Ninth Circuit found that the fact that a search is conducted reasonably, without touching and outside the view of all persons other than the party performing the search, does not negate the fact that the search may be a significant intrusion on the person searched). As the court in Capua recognized, "[a] urine test done under close surveillance of a government representative, regardless of how professionally or courteously conducted, is likely to be a very embarrassing and humiliating experience." Capua, 643 F. Supp. at 1514.

Moreover, in extending the scope of the district court's order delineating the circumstances under which the Iowa Department of Corrections may require that its employees undergo urinalysis, the majority engages in de novo fact finding contrary both to Fed. R. Civ. P. 52(a) and to the Supreme Court's guidelines for appellate review set out in Anderson v. City of Bessemer City, 470 U.S. 564 (1985). As the Supreme Court stated in Anderson, the clearly erroneous standard "plainly does not entitle a reviewing court to reverse the finding of the trier of fact simply because it is convinced that it would have decided the case differently." Anderson, 470 U.S. at 573. "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Id. at 574 (citations omitted).

The majority modifies the district court's opinion to hold that urinalyses need not be conducted on a reasonable suspicion basis but rather "may be performed uniformly or by systematic random selection of those employees who have regular contact with the prisoners on a day-to-day basis in medium or maximum security prisons." Ante at 10. In support of this holding, the majority states that "it is * * * logical to assume that employees who use the drugs, and who come into regular contact with the prisoners, are more likely to supply drugs to the inmates, although the trial court did not agree with this observation." Id. The majority is plainly aware that the district court's findings after reviewing all the evidence are to the contrary. The district court specifically found that conducting urinalyses with the object of "possib[ly] * * * discovering who might be using drugs and therefore [who] might be more likely than others to smuggle drugs to prisoners is far too attenuated to make seizures of body fluids constitutionally reasonable." McDonell, 612 F. Supp. at 1130. Whether identification of employees whose urine tests positively for use of controlled substances also indicates which employees are engaged in smuggling contraband into the prison is precisely the sort of choice between views of the evidence which the Court in Anderson counseled should be left in the hands of the trial court. The majority's modification of the district court's order to allow random searches of the urine of prison employees who come into contact with inmates, based not on facts in the record but on de novo findings at the appellate level, is improper and unsupportable.

The majority again engages in impermissible factfinding when it disagrees with the district court's limitation of the institution's right to conduct urinalyses on a reasonable suspicion basis to only those employees "then under the influence of alcoholic beverages or controlled subtances." See McDonell, 612 F. Supp. at 1130. In place of the standard established by the district court, the majority extends the scope of permissible testing to situations where there is reasonable suspicion "that

controlled substances have been used within the twenty-four hour period prior to the required test." Ante at 11. Not only is this precisely the sort of trial court finding to which an appellate court is instructed under Anderson to give deference, but the majority states no reasons why the district court's order as originally phrased is clearly erroneous on this point. In making this modification, the majority apparently assumes that use of controlled substances within twenty-four hours before a test indicates that the individual employee's ability to perform his or her job is impaired. If so, then the district court's order as originally phrased seems to cover all security risks that might arise and needs no modification by this court.

Vehicle searches

The majority also improperly modifies the district court's order to extend the prison officials' ability to search employee vehicles to include those vehicles parked outside the prison confines. Although no one wants prison employees to act as couriers for contraband onto prison property, the fact that these vehicle searches might be effective in identifying and halting such smuggling does not make those searches reasonable under the fourth amendment. Moreover, the record indicates that the prison administration has been less than diligent in taking adequate precautions to prevent the inflow of contraband onto prison grounds by other means. Surely it is desirable that the institution be required to take all less intrusive steps possible to secure its buildings and grounds before it may take the more intrusive action of randomly searching its employees' vehicles. Nor does Hudson v. Palmer, 468 U.S. 517 (1984), provide support for the majority's modification of the district court's order. Although Hudson does hold that searches of prisoner cells are an exception to the fourth amendment, see 468 U.S. at 530, it is crucial to remember that what is to be searched here are not prisoner cells, but employee vehicles.

I fully appreciate that the constitutional rights of inmates must be curtailed to some extent based upon perceived institutional needs to maintain discipline and security. See, e.g., Block v. Rutherford, 468 U.S. 576 (1984); Bell v. Wolfish, 441 U.S. 520 (1979). It is understandable that certain restrictions must also be imposed on civilian employees working within the prison itself in order to assure the orderly conduct of the inmates. Obviously, utmost loyalty to the institution is required from the prison staff and any employee's failure to comply with necessary rules or actions which are otherwise harmful to the purpose of this institution should lead to some sort of sanction. However, the mere fact that a person works for a state prison system does not in itself justify depriving that individual of the constitutional right to be secure in the privacy of his or her person or property.

What we achieve here is simply to drive another nail into the coffin of discarded individual constitutional rights. If a prison guard is transferring weapons or drugs within the confines of the prison to prison inmates, it is difficult to believe that the well-established principles of the fourth amendment cannot achieve the necessary discipline and security interests now deemed compelling enough to justify limitation of state employees' privacy rights in the prison workplace. To urge that lessened privacy standards will prevent rule violations by prison employees is on this record only a conclusory assumption -- a poor replacement for rigorous legal reasoning based on facts proved in front of a district court. The district court found, based on the record, that the need to maintain prison discipline and security justifies urinalysis only on grounds of reasonable suspicion and uniform systematic random searches only of vehicles parked within the institution's confines. Because I believe that we should defer under the clearly erroneous rule to the district court's evaluation of the record and to its findings of fact, I dissent.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-3833

NATIONAL TREASURY EMPLOYEES UNION
and ARGENT ACOSTA, President, Chapter
168, National Treasury Employees Union,

Plaintiffs-Appellees,

v.

WILLIAM VON RAAB, Commissioner,
United States Custom Service,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Louisiana

(January 14, 1987)

Before RUBIN, RANDALL and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:

This action was commenced on August 12, 1986, by the National Treasury Employees Union and an employee of the United States Customs Service seeking declaratory and injunctive relief against implementation of the Customs Service's "plan to require its current employees to submit to mandatory collection of their

urine to screen for the use of illegal drugs as a condition of obtaining promotions and advancement in their careers."[1] Complaint for Declaratory and Injunctive Relief at 1-2. Under the drug testing program, persons tentatively selected for positions that (1) directly involve drug interdiction, (2) require the carrying of firearms, or (3) involve access to classified information, are required to submit to urinalysis. Final selection and placement into one of the covered positions are contingent upon successful completion of drug screening through urinalysis.[2]

On October 27, 1986, plaintiffs moved for a preliminary injunction "suspending Customs' urine collection and analysis program, pending final disposition of this complaint." On November 14, 1986, the district court, finding that "numerous

[1] The plan was outlined in the "Drug Screening Program" Customs Directive issued on August 4, 1986 with an effective date of August 11, 1986 ("Customs Directive of August 4, 1986").

[2] The Customs Directive detailing the drug testing plan states that "[d]rug screening is required for any change in position, and any competitive staffing action, when such action would result in placement in a position covered by the program." Customs Directive of August 4, 1986 at 2. Current incumbents of covered positions are not subject to drug testing. A covered position comes under the drug screening program only as it becomes vacant, at which point the tentative selectee is subject to drug screening. Id. Accordingly, both Customs' employees selected for promotion or placement to a covered position and applicants for a covered position who apply from outside the Customs Service are subject to drug testing.

constitutional infirmities" plagued the Customs Service's drug testing program,[3] permanently enjoined the program[4] and granted a declaratory judgment that the program was unconstitutional.

On November 21, 1986, the Customs Service filed a notice of appeal of the district court's judgment and moved in the district court for a stay pending appeal. The district court denied the stay request on December 3, 1986.

The Customs Service has come to this court seeking an expedited appeal and a stay pending appeal; briefing was completed and the motions submitted on December 30, 1986. We granted the Customs Service's motion for an expedited appeal and have scheduled oral argument for the week of February 2, 1987. For the reasons set forth below, we deny the motion for a stay pending appeal, subject to its reconsideration by the panel hearing oral argument in this case.

In order to obtain a stay pending appeal the moving party must demonstrate: (1) that it is likely to succeed on the merits; (2) that it would suffer irreparable injury if the stay were not

[3] The court found, among other things, that the drug testing plan was violative of the fourth amendment, the "penumbral rights of privacy," and of due process.

[4] The Customs Service was enjoined from conducting urinalysis drug testing in the absence of probable cause. National Treasury Employees Union & Argent Acosta v. Rabb, No. 86-3522, slip op. at 27 (E.D. La. Nov. 14, 1986).

granted; (3) that granting the stay would not substantially harm the other parties; and (4) that granting the stay would serve the public interest. See, e.g., United States v. Baylor University Medical Center, 711 F.2d 38, 39 (5th Cir. 1983), cert. denied, 469 U.S. 1189 (1985). However, this court has not applied these factors in a rigid, mechanical fashion. See Baylor University Medical Center, 711 F.2d at 39. "Indeed, in Ruiz v. Estelle, 650 F.2d 555 (5th Cir. 1981), this Court held that the movant 'need only present a substantial case on the merits when a serious legal question is involved and show that the balance of equities weighs heavily in favor of granting the stay.'" Baylor University Medical Center, 711 F.2d at 39 (citing Ruiz, 650 F.2d at 565).

We note first that the legal questions presented by this case are serious questions of substantial import to the Customs Service and its employees and to the citizens of this country. Further, the Customs Service has presented a substantial case on the merits.

Balanced against the facts that serious legal questions are presented by this case and that the Customs Service has presented a substantial case on the merits are the equities. Bearing on the equities are two different considerations. First, as the government states, "[t]his appeal presents questions of first impression for this Court . . .." Brief for Appellant and

Memorandum in Support of Motion for Stay Pending Appeal at i. The government further emphasizes "the unsettled state of the law and the complexity of the constitutional issues presented." Id. The correctness of the government's view is amply evidenced by the diverse analyses applied and divergent conclusions drawn by the many courts that have been confronted with the same or similar questions.[5]

[5] See, e.g., Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.) (finding that administrative search exception to fourth amendment warrant requirement applied to urine testing by racing commission of plaintiff jockeys in heavily regulated racing industry since the state had strong interest in assuring public of integrity of persons engaged in racing industry and since regulation of the industry had reduced the justifiable privacy expectation of those engaged in it), cert. denied, 107 S.Ct. 577 (1986); Division 241 Amalgamated Transit Union (AFL-CIO) v. Suscy, 538 F.2d 1264 (7th Cir.) (finding no fourth amendment violation in urine testing of bus drivers who were involved in "serious accidents" or suspected of being under influence of drugs or alcohol because, in view of transit authority's paramount interest in protecting public by ensuring bus operators' fitness to perform jobs, plaintiff bus drivers had no reasonable expectation of privacy with respect to submitting to urinalysis and further, because conditions of testing were reasonable), cert. denied, 429 U.S. 1029 (1976); American Federation of Government Employees, AFL-CIO v. Weinberger, No. CV486-353 (S.D. Ga. Dec. 2, 1986) (determining that in light of fourth amendment considerations, plaintiffs were entitled to injunctive relief against periodic drug testing of civilian employees occupying "critical" positions with Department of Army; "reasonable suspicion" standard applies); Lovvorn v. City of Chattanooga, No. CIV-1-86-389 (E.D. Tenn. Nov. 13, 1986) (finding that drug testing by urinalysis of all firefighters is violative of fourth amendment because "reasonable suspicion" on which testing could be based could not be said to exist and rejecting city's suggestion that court carve out exception to reasonable suspicion requirement akin to administrative search exception because clearly defined standards to protect an individual's privacy expectation that exist in administrative

search cases were absent in this case); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (finding mass urine testing of fire and police department employees unreasonable and thus, violative of fourth amendment because there was high degree of intrusion, no safeguard of confidentiality, plaintiffs had reasonable expectation of privacy, and there was no individualized basis or even general job related basis for instituting mass urinalysis; under fourth amendment, urinalysis can be required only on basis of "reasonable suspicion" which "requires individualized suspicion, specifically directed to the person who is targeted for the search."); Mack v. United States, No. 86-Civ.-5764 (S.D.N.Y. Apr. 21, 1986) (determining that urinalysis of FBI agent suspected of drug use did not violate fourth amendment because collecting urine is minimally intrusive, this search was not conducted in public view, plaintiff had a diminished privacy expectation as an FBI agent, and FBI has far more compelling interest in having drug-free employees than do other employers because drug involvement of FBI employee jeopardizes national security); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (finding fourth amendment violation in drug testing of plaintiff school bus attendant pursuant to drug testing program initiated as result of increase in traffic accidents and absenteeism and discovery of syringes in restrooms used by transportation employees because there was no probable cause and defendants had no particularized reason to believe plaintiff was a drug user; plaintiff had reasonable expectation of privacy from search which is not, in case of the school bus attendant, outweighed by public safety considerations); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa 1985) (finding fourth amendment violation in urinalysis drug testing of corrections department employees and concluding that fourth amendment allows government to conduct urinalysis "only on the basis of a reasonable suspicion, based on specific objective facts and reasonable inferences drawn from those facts in light of experience that the employee is then under the influence of alcoholic beverages or controlled substances;" possibility of discovering drug use by employees is too attenuated to make testing constitutionally reasonable); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (finding no fourth amendment violation in urinalysis drug testing of "electrical" workers suspected of drug use because although government employees do not surrender their fourth amendment rights by virtue of government employment, government has same right as private employer to oversee its employees and investigate potential misconduct relevant to employee's performance of duties and

implementation and subsequent suspension of the Customs Service's drug testing program, in combination with the imminence of oral argument, militate against the granting of a stay at this particular juncture. The drug testing program was in place for three months before it was enjoined. The program has been stayed by the district court's order for two months. To prevent the Customs Service from reinstituting its drug testing program for another three weeks is not, in our view, hardship sufficient to warrant our action when plenary consideration of the motion can be afforded by the oral argument panel concurrently with its consideration of the merits of this case. There is, of course, always the possibility that any order that this panel might enter today, based on its conclusions about the factors governing the issuance of a stay, might be superseded by a contrary decision of the oral argument panel. An on-again, off-again approach to the Customs Service's drug testing program is certainly not in the public's interest, at least not when the lapse of three weeks may eliminate further undesirable turmoil.

We therefore deny the stay, subject to its full reconsideration by the panel hearing the merits of this case.

therefore, employee cannot claim legitimate expectation of privacy from searches of that nature; here, tests were administered in employment context as part of government's legitimate inquiry into drug use by employees rather than for law enforcement purposes).

HIGGINBOTHAM, Circuit Judge, specially concurring:

I join in the denial of a stay for the sole reason that a panel will hear oral argument in this case in three weeks, and we do no more than delay full consideration of the application for a stay until that argument. Even so, it bears emphasis that the basis for the district court's ruling is, at best, problematic.

I

As the record demonstrates, and as the whole nation knows, traffic in illegal drugs with its enormous destruction of life is a national problem. Congress recently responded in a manner not unlike a response to a military threat, appropriating over $1 billion (an increase of 26.4% from the last fiscal year) to the Customs Service for fiscal year 1987 with funding for 1000 additional Customs Service personnel. This means that, with turnover, the Customs Service must recruit 3,000 new employees, and most hiring will be for sensitive positions of trust.

The Customs Service requires drug screening for applicants tentatively selected for positions that (1) directly involve drug interdiction, (2) require the carrying of firearms, or (3) involve access to classified information. No screening of incumbents or applicants for other positions is required. All

plaintiffs in this case are applicants who assert a constitutional right to be considered for the three categories of sensitive jobs without a test conceded to be 100% accurate in proving that they are not themselves users of drugs. It is undisputed that applicants for the sensitive positions requiring the screening are given notice that they will be asked to furnish a urine sample, may withdraw their application for the sensitive job, and are allowed to provide the sample in the privacy of a closed bathroom stall after removing outer garments in which a false sample or adulterating agent might be hidden. The enjoined threatened deprivations of constitutional right are said to be of rights of privacy, rights to be free of self-incrimination, and due process.

II

The precise privacy interest asserted is elusive, and the plaintiffs are, at best, inexact as to just what that privacy interest is. Finding an objectively reasonable expectation of privacy in urine, a waste product, contains inherent contradictions. The district court found such a right of privacy, but, in fairness, plaintiffs do not rest there. Rather, it appears from the plaintiffs' brief that it is the manner of taking the samples that is said to invade privacy, because outer garments in which a false sample might be hidden must be removed and a person of the same sex remains outside a stall while the applicant urinates.

Yet, apart from the partial disrobing (apparently not independently challenged) persons using public toilet facilities experience a similar lack of privacy. The right must then be a perceived indignity in the whole process, a perceived affront to personal identity by the presence in the same room of another while engaging in a private body function.

It is suggested that the testing program rests on a generalized lack of trust and not on a developed suspicion of an individual applicant. Necessarily there is a plain implication that an applicant is part of a group that, given the demands of the job, cannot be trusted to be truthful about drug use. The difficulty is that just such distrust, or equally accurate, care, is behind every background check and every security check; indeed the information gained in tests of urine is not different from that disclosed in medical records, for which consent to examine is a routine part of applications for many sensitive government posts. In short, given the practice of testing and background checks required for so many government jobs, whether any expectations of privacy by these job applicants were objectively reasonable is dubious at best. Certainly, to ride with the cops one ought to expect inquiry, and by the surest means, into whether he is a robber.

Finally, reliance upon penumbral rights of privacy adds nothing. The content and dimension of such rights are difficult

to define, at best. At the least, we know that such rights of privacy have been largely confined to matters of family such as "child rearing and education," "family relationships," "procreation," "marriage," "contraception" and "abortion," as well as the "right to decide whether or not to beget or bear a child." Bowers v. Hardwick, 106 S.Ct. 2841, 2843-44 (1986) (citations omitted). I recognize that the Supreme Court has also spoken in terms of an "individual's dignitary interests in personal privacy and bodily integrity." Winston v. Lee, 105 S.Ct. 1611, 1617 (1985). But the Winston court dealt with an intrusion into the body (surgical removal of a bullet). The court balanced the government's need against the extent of intrusion into the body in a coercive environment. Speaking of "dignity interests" out of context is not helpful. Giving the expansive reading claimed for it would implicate testing of intelligence and aptitudes. Many fitness tests would in this broad sense, disclose private matters that are potentially more distructive of "personal dignity"--inquiries, if we succomb to deciding cases by rhetoric, more justifiably called Orwellian than the testing of urine. Surely, the Constitution does not forbid such routine testing for fitness.

III

Reliance upon the fourth amendment suffers from another related problem. There is a substantial question whether

requiring the samples as a condition of hire for the three job categories is a search or seizure at all. It seems odd to think of a government agent as "seizing" urine by requiring the sample as a condition to consideration for a sensitive job applied for with full notice of the requirement. But it is argued, government may not require a waiver of constitutional rights as a condition of employment. Again, such an abstraction sheds little light on this problem; it begs the question of what right. If the government has the right to insist upon proof that its policemen of drug dealers not be drug users, and surely it does, the reasonableness of any invasion of right and the correlative reasonableness of the expectation of privacy is a function of the relevance of the job requirement to the job to be done. Certainly it is permissible, even essential, that persons selected for these jobs not be users of illegal drugs. The decision by the executive branch that this testing is necessary protection of its interest is entitled to some deference and I find no record basis here for a substitution of judicial judgment.

The government, as an employer, is different from a private employer, of course, but not in all respects. See Connick v. Myers, 103 S.Ct. 1684 (1983). An anarchist's political view is protected by the first amendment. But I would not suppose that his constitutional protection extends to the right to be an FBI

agent. The point is that the government's interest as an employer in fit employees may allow it to deny employment when it cannot as a sovereign attack other consequences to the protected view.

Courts have sustained drug screening for railroad employees, Brotherhood of Maintenance v. Burlington N. R.R., 802 F.2d 1016, 1023 (8th Cir. 1986), sustained urinalysis drug testing for jockeys, Shoemaker v. Handel, 795 F.2d 1136, 1142-43 (3d Cir.), cert. denied, 107 S.Ct. 577 (1986) (when jockeys chose to become involved in this pervasively-regulated business and accepted a state license, they did so with the knowledge that the Commission would exercise its authority to assure public confidence in the integrity of the industry); sustained requirements that participants in AFDC programs submit to home visits by Welfare Workers, Wyman v. James, 400 U.S. 309, 326 (1971); sustained pre-boarding inspection of airline passengers, United States v. Skipwith, 482 F.2d 1272, 1276-77 (5th Cir. 1973). Nor does the fourth amendment prohibit the government from insisting that its contractors consent to searches. Zap v. United States, 328 U.S. 624, 628 (1946), vacated on other grounds, 330 U.S. 800 (1947).

IV

The district court, apparently sua sponte, also concluded that the proposed drug screening would violate the self-incrimination and due process clauses of the fifth amendment. To

the extent the district court's opinion [illegible] privilege against self-incrimination, it was in error. The privilege protects an accused only from being compelled to testify against himself, or to provide "evidence of a testimonial or communication nature." If withdrawing blood does not violate the fifth amendment, Schmerber v. California, 384 U.S. 757, 761 (1966), the sampling of urine would seem to be a fortiori an easier case.

The district court found, and it appears to have been without any suggestion by plaintiffs below, that the tests were so unreliable as to deny applicants due process of law. No court has ever held that the combination of tests used here denies due process. The conclusion is either without record basis or is directed toward the possibility of errors by the laboratories such as an error in identifying a specimen. Such risk is present in most laboratory evidence. Finally, and apart from the fact that the evidence of reliability points to the opposite conclusion, the district court overlooked the procedure in place that allows an applicant who disagrees with test results to have the sample tested by another laboratory.

V

The district court has shut down the hiring of persons found by Congress to be necessary to combat the illegal importation of drugs. I do not lightly discount the considered judgment of a

district judge and my concerns respond to the submissions of the parties made in an emergency application for stay and without the benefit of oral argument. Perhaps more will be developed, but I remain profoundly skeptical.

THE WHITE HOUSE

WASHINGTON

January 6, 1987

MEMORANDUM FOR PETER J. WALLISON

FROM: ROBERT M. KRUGER RMK

SUBJECT: Evans v. Casey

I am attaching an explanation of the settlement of Evans v. Casey, No. 86-1217 (E.D. Pa. 1986), the challenge to the drug testing program instituted by postal facilities in Philadelphia. The narrative was prepared by Tom Barba at the Justice Department in response to my request. Tom advises that it should be treated as attorney-client material.

According to the narrative, the Philadelphia program was instituted without the knowledge or approval of the USPS national or regional headquarters. The program, like other unsanctioned programs in regional postal facilities, required only those persons being seriously considered for employment to submit to urinalysis. As such, one might have expected the program to withstand legal challenges based upon the relatively low Fourth Amendment interest which the Justice Department ascribes to job applicants.

The lawsuit was settled, however, primarily because of a lack of program standards and supervision. Apparently, the programs were vulnerable to attack based upon such factors as the intrusiveness of the testing, the lack of scientific or technical guidelines and the lack of procedures to protect confidentiality and privacy. Tom notes that USPS was unwilling to defend the Philadelphia program or other unsupervised programs. The Justice Department approved the settlement on the expectation that USPS will develop and implement a nationwide program based on the Executive Order.

Attachment

FACTS

In January 1985, without the knowledge or guidance of either the regional or national headquarters, the Philadelphia Post Office and the Philadelphia Bulk Mail Center initiated a practice of requiring all persons being seriously considered for employment to submit to urinalysis for the purpose of detecting use of controlled substances. The requirement applied only to applicants who had reached the point in the hiring process at which they had passed the necessary written examinations, had completed the appropriate interviews, and were being examined for fitness and suitability. When the program was first initiated, the urinalysis was conducted as part of the routine physical examination given to applicants who were about to be hired, but later, evidently to avoid inconvenience and the cost of unnecessary medical examinations, the urinalysis was administered before the physical. A positive result on the urinalysis constituted grounds to reject an applicant, but in most cases the applicant, upon submitting an appeal, was administered a second urinalysis and was hired if the result was negative.

Each of the eleven named plaintiffs was rejected for employment because of a positive result indicating presence of a controlled substance. Each of them alleges that he or she had passed or satisfied all other requirements for employment and would have been hired but for the urinalysis results.

Plaintiffs allege that the urinalysis requirement violates the First, Fourth, Fifth, and Ninth Amendments to the Constitution of the United States. In addition, they allege that the program violates the Rehabilitation Act of 1973, 29 U.S.C. §§791 et seq.; however, only one of the named plaintiffs commenced administrative proceedings under the Act. Their Complaint seeks a permanent injunction prohibiting the urinalysis program, immediate hiring of themselves and all persons similarly situated, and, for the individual plaintiffs, back pay and seniority credit. To date, eight of the eleven plaintiffs have successfully appealed and have been hired or offered employment.

DISCUSSION

Before the commencement of this civil action, both the national headquarters of the United States Postal Service and the headquarters for the Eastern Region, which comprises an area of eight States, were unaware that urinalysis programs had been instituted by the postal facilities in Philadelphia and throughout the remainder of the Eastern Region. Each facility had initiated and operated a program without the knowledge or guidance of any supervisory authority, so that there were no uniform standards or procedures, except that in all cases the urinalysis requirement was limited to applicants.

Because of the haphazard fashion in which the individual programs had been developed, the public controversy attendant to the effort by the Administration to establish a comprehensive urinalysis system, and the fear that the lack of effective supervision could lead to an adverse decision, the Postal Service concluded that it would be preferable to settle rather than to litigate this action. The Postal Service felt particularly that any urinalysis program should be subject to uniform procedures and guidelines established at the national headquarters level.

The settlement proposed by plaintiffs and the Postal Service is generous but reasonable. Each of the named plaintiffs will receive a lump sum payment of $5000, and the Postal Service will pay attorneys' fees of $12,000, for a total monetary settlement of $67,000. Plaintiffs had previously advised us that the average lost pay was over $9,000 per plaintiff and that their estimated costs and fees, as of August 1986, exceeded $14,500.

In addition, the Postal Service will terminate the urinalysis requirement in the Philadelphia Division on December 5, 1986, and will not reinstitute any such program in the future except pursuant to procedures and standards established by the national headquarters. The three named plaintiffs who have not already been hired will be offered employment immediately provided they meet the standard suitability and fitness requirements.

Finally, the Postal Service will agree to the certification of a class consisting of all persons who applied after January 1, 1985, and on or before November 21, 1986, for employment within the Philadelphia Division of the U.S. Postal Service and who were rejected or denied employment solely on the basis of a positive result on a urinalysis to detect the presence of a controlled substance, or metabolite of a controlled substance. The Postal Service estimates that about two hundred persons, many of whom have already been hired, fall within the class description. The class members will be given priority placement on the hiring register, and will be offered employment as positions become available, provided they meet the standard requirements of suitability and fitness. References in the individual files to the urinalysis requirement and to the results will be expunged.

The Postal Service's dissatisfaction with the existing state of affairs, its unwillingness to defend the unsupervised amalgamation of programs, and the prospect of an adverse judgment that could hamper any future plans to institute a properly supervised program and which could taint the Administration's efforts in this area make the class relief appropriate and reasonable. Furthermore, a positive aspect of the settlement proposal is that the class relief is limited to the Philadelphia area rather than to the entire Eastern Region. Certification of a region wide class could have led to a class consisting of several thousand. Although it is not part of the explicit settlement agreement, the Postal Service is terminating all

programs throughout the Eastern Region. Assuming that no further litigation is commenced elsewhere in the region, this settlement will dispose of the controversy with relatively little disruption to the Postal Service's normal hiring process.