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KRIEG V. SEYBOLD: THE SEVENTH CIRCUIT ADOPTS A BRIGHT LINE IN FAVOR OF RANDOM DRUG TESTING

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INTRODUCTION

In *Krieg v. Seybold*,[1] the United States Court of Appeals for the Seventh Circuit asserted that Robert Krieg—a dump truck, front end loader, and backhoe operator—had a "safety-sensitive" job, and that the City of Marion, Indiana, could therefore test his urine for evidence of drug use. Normally, the Fourth Amendment protection against unreasonable searches and seizures requires a public employer to have a reasonable and individualized suspicion that an employee has used illegal drugs before that employer can require him to submit to drug testing. But the City of Marion claimed, and the Seventh Circuit agreed, that a "safety" exception to this requirement should expand to cover Krieg's job in the Department of Streets and Sanitation. Thus, the City could test Krieg for drugs on a random basis.

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[1] 481 F.3d 512 (7th Cir. 2007).

The Supreme Court established this safety exception in *Skinner v. Railway Labor Executives' Ass'n*[2] and *National Treasury Employees Union v. Von Raab*.[3] In these cases, the Court held that certain jobs created significant safety concerns in circumstances where it would be impractical to require an employer to develop individualized suspicion. Thus, the jobs created "special" governmental needs, and these needs eliminated the presumption that a suspicionless search is unreasonable.

The Seventh Circuit should have explained in detail why Krieg's job as a heavy equipment operator raised sufficient safety concerns to fall within this exception. Next, it should have explained why the circumstances surrounding Krieg's job made it impractical for the City to use a suspicion-based drug testing program to address these concerns.

Instead, the court read *Skinner* and *Von Raab* to create a bright line rule that all employees whose jobs create serious safety concerns are excluded from the normal protections of the Fourth Amendment. Even if the Seventh Circuit correctly interpreted *Skinner* and *Von Raab*, it failed to create a principled reason why heavy equipment operators are safety-sensitive employees within the meaning of those cases. This failure jeopardizes the Fourth Amendment protection against suspicionless searches because labeling jobs such as Krieg's as "safety-sensitive" leaves little room outside the safety exception for any kind of blue-collar labor.

Part I below provides background information about the normal requirements of the Fourth Amendment as they apply to public employers. Part II explains the reasoning of the *Krieg* case, showing that the Seventh Circuit employed a bright line rule with regard to safety-sensitive employees. Part III argues that the Supreme Court has not adopted a bright line rule excepting safety-sensitive employees from normal Fourth Amendment protections, in the way that the *Krieg* court claims it has. Part IV explains why the *Krieg* court was not

[2] 489 U.S. 602 (1989).

[3] 489 U.S. 656 (1989).

compelled to hold that Krieg's position was safety-sensitive and why its choice to do so gives the error in *Krieg* a far-reaching effect.

I. PUBLIC EMPLOYERS DO NOT NEED A WARRANT OR PROBABLE CAUSE

The Fourth Amendment protects persons against unreasonable searches and seizures by government agents,[4] and requires that warrants for searches or seizures be supported by probable cause.[5] The Supreme Court has explained that the Fourth Amendment serves at least the following purposes: First, the protection against unreasonable searches protects citizens against intrusions on their privacy where those intrusions are not justified at the outset by some legitimate governmental interest.[6] Second, the protection against unreasonable seizures of persons protects citizens from unjustified restraints on their

[4] *See Skinner*, 489 U.S. at 613-16 (private employers can be subject to the requirements of the Fourth Amendment when they act with the "encouragement, endorsement, and participation" of a State or federal actor). In a Fourth Amendment analysis, it is typical to proceed by first determining whether the challenged intrusion was carried out by a government actor, then to determine whether it was a "search" within the meaning of the Fourth Amendment, and then to determine whether that search was reasonable under whatever framework applies to the situation at issue. *See, e.g.*, *id*. at 613-19.

[5] The Fourth Amendment provides:

> The 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.

U.S. CONST. amend. IV.

[6] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891))).

freedom of movement.[7] Third, the protection against unreasonable seizures protects citizens' possessory interests in their property from infringement by government agents, unless such infringement is justified.[8]

Next, the requirement of a warrant ensures that some neutral body (normally a magistrate) evaluates the character of the intrusion on one of the above interests and determines whether this intrusion is justified *before* the actual intrusion occurs.[9] The neutral body will also determine the scope of the justified intrusion by describing the persons, places, and things to be affected.[10] Finally, the requirement that a warrant be supported by probable cause sets a uniform measure below which an intrusion will not be justified.[11] By creating a high threshold,[12] it has the effect of weighting the balance of interests between citizen and government *strongly in favor of the citizen*.

The Supreme Court has decided, however, that warrants are not always required. It has created exceptions to the requirement of a warrant for searches that are part of a lawful arrest, for situations in

[7] *See, e.g.*, *Skinner*, 489 U.S. at 616 (stating that the detention of a railway employee awaiting a drug test may be a seizure if it "amounts to a meaningful interference with his freedom of movement").

[8] *See, e.g.*, *id.* at 617 n.4 (stating that the taking of a urine sample might be a seizure if it creates a "meaningful interference with the employee's possessory interest in his bodily fluids").

[9] *Id.* at 621-22.

[10] *See* U.S. CONST. amend. IV (requiring that warrants "particularly describ[e] the place to be searched, and the persons or things to be seized").

[11] *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 370 (2003) ("The long-prevailing standard of probable cause protects 'citizens from rash and unreasonable interferences with privacy and from unfounded charges of crime,' while giving 'fair leeway for enforcing the law in the community's protection.'" (quoting Brinegar v. United States, 338 U.S. 160, 176 (1949))); *Skinner*, 489 U.S. at 619 ("Except in certain well-defined circumstances, a search or seizure . . . is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause.") (citations omitted).

[12] *See Pringle*, 540 U.S. at 371 (defining probable cause as a "reasonable ground for belief of guilt" which is "particularized with respect to the person to be searched") (citations omitted).

which police or other officials must act quickly to prevent physical harm or the destruction of evidence, and for various other circumstances.[13] Each of these exceptions allows government agents to conduct searches or seizures without a warrant, but these acts still must be justified by probable cause.[14]

In a different category are searches conducted by government agents who are not acting in a law enforcement capacity.[15] Searches of this kind include, among others, residential housing inspections,[16] inventory searches of impounded vehicles,[17] and searches that take place in public schools.[18] These searches often do not require a

[13] *See, e.g.*, Chambers v. Maroney, 399 U.S. 42 (1970) (limited exception for searches of automobiles), *abrogated on other grounds by* Brecht v. Abrahamson, 507 U.S. 619 (1993); the line of cases following Chimel v. California, 395 U.S. 752 (1969) (search incident to lawful arrest); Warden, Md. Penitentiary v. Hayden, 387 U.S. 294 (1967) (exigent circumstances).

[14] *See, e.g.*, United States v. Santana, 427 U.S. 38, 42-43 (1976) (describing the rationale of Hayden); *Chambers*, 399 U.S. at 48; *Chimel*, 395 U.S. at 754-55 (the arrest underlying an incident search must be supported by probable cause). There are exceptions to this rule that are beyond the scope of this article. For example, some searches, such as a limited search for weapons, are conducted without a warrant and can be justified by a lesser degree of individualized suspicion than probable cause. *See, e.g.*, Terry v. Ohio, 392 U.S. 1 (1968). In addition, sobriety and border-control checkpoints involve brief seizures for law enforcement purposes that are permissible despite their suspicionless nature. These seizures are limited in nature because they allow an officer to look for only one type of information, for example immigration documents, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), or indications that a driver might be intoxicated, Mich. Dep't of State Police v. Sitz, 496 U.S. 444 (1990). When an officer wishes to engage in more extensive sobriety testing than "preliminary questioning and observation," the Fourth Amendment may require "individualized suspicion." *Sitz*, 496 U.S. at 450-51. In any event, the Supreme Court has made clear that the cases regarding checkpoints and other brief law-enforcement stops are of a different category than the line of cases under *Von Raab*. *Sitz*, 496 U.S. at 449-50 (rejecting motorists' claim that the *Von Raab* standard should apply and that the State police must therefore show a special governmental need that justifies departure from the general rule of individual suspicion).

[15] *Skinner*, 489 U.S. at 619.

[16] *E.g.*, Camara v. Mun. Court of San Francisco, 387 U.S. 523 (1967).

[17] *E.g.*, South Dakota v. Opperman, 428 U.S. 364 (1976).

[18] *E.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985).

warrant, and may require a lesser degree of suspicion than probable cause[19] or even no suspicion at all.[20]

The Supreme Court has not placed drug testing in the workplace in any of the above categories.[21] Instead, it has created yet another category that is unique to the public workplace environment. Therefore, a public employer is able to test its employees for drug use when that employer reasonably suspects that such drug use has occurred.[22] It may not test all employees, but only those whom it suspects on an individual basis.[23] This rule reflects a balance between governmental and personal interests that is unique to adult citizens working on behalf of their government.[24] It is a balance that favors the employee, but the Supreme Court has further held that this balance may shift—creating an even scale—in certain situations. Such a situation arises where the capacity in which the citizen works is particularly safety-sensitive and the nature of the workplace makes the

[19] *Id*. at 337 ("The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.'" (quoting *Camara*, 387 U.S. at 536-37)); *id*. at 341 ("Thus, we have in a number of cases recognized the legality of searches and seizures based on suspicions that, although "reasonable," do not rise to the level of probable cause.") (citations omitted).

[20] *E.g.*, *Opperman*, 428 U.S. at 373-76 (routine inventory searches).

[21] *See* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449-50 (1990) (distinguishing from the line of cases regarding sobriety checkpoints and other brief law-enforcement stops); *see also* L. Camille Hebert, *Early Fourth Amendment Challenges to Drug Testing*, 1 EMP. PRIVACY LAW § 3:4 (June 2007) (explaining that prior to *Skinner* and *Von Raab* some federal circuit courts characterized workplace drug testing as an administrative search similar to those applicable to businesses that participate in closely regulated industries).

[22] *See infra* Part III. In Terry v. Ohio, 392 U.S. 1, 27 (1968), the Supreme Court explains this standard of individualized suspicion in the law enforcement context as a reasonable conclusion, based on inferences drawn from the facts of the situation and from the officer's own experience, that his safety or the safety of others is in danger.

[23] Krieg v. Seybold, 481 F.3d 512, 517 (7th Cir. 2007).

[24] *Compare* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989) *and* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) *with T.L.O.*, 469 U.S. 325.

general requirement of individual suspicion impractical. In such cases, the Fourth Amendment may allow for random drug testing. The Supreme Court created this second measure of permissible employer conduct in the cases of *Skinner* and *Von Raab*.[25]

II. THE SEVENTH CIRCUIT CREATES A BRIGHT LINE RULE

The Seventh Circuit case of *Krieg v. Seybold* [26] was rooted in this second measure of permissible employer conduct. In that case, the Seventh Circuit reviewed an appeal from the United States District Court for the Northern District of Indiana. The district court had granted summary judgment to the City of Marion, Indiana, in an action challenging the City's random drug testing policy.[27]

Robert Krieg had been an employee of the City's Department of Streets and Sanitation since 1985, and was a union member.[28] Under the collective bargaining agreement for the years 2003-2004, employees were subject to drug testing based upon reasonable suspicion, and were also subject to such testing following workplace accidents. The bargaining agreement incorporated a personnel handbook, and that handbook provided for random drug testing of all "safety-sensitive" employees.[29]

Krieg was a "driver/laborer," which meant that he sometimes operated large equipment such as a one-ton dump truck, a dump truck with a plow, a front end loader, and a backhoe, but he did not have a commercial driver's license (CDL)[30] and these vehicles were not commercial motor vehicles. Therefore, Krieg did not fall within the definition of "safety-sensitive" that was set forth in the City's handbook. When the City required Krieg to submit to a drug test in 2002 and he tested positive for marijuana, the City admitted that it

[25] *See infra* Part III.
[26] 481 F.3d 512 (7th Cir. 2007).
[27] *Id*. at 516; Krieg v. Seybold, 427 F. Supp. 2d 842 (N.D. Ind. 2006).
[28] *Krieg*, 481 F.3d at 514.
[29] *Id*. at 514-15.
[30] *Id*.

should not have tested Krieg under its current policies.[31] In 2004, however, the City unilaterally changed its testing policies. It redefined "safety-sensitive" to include "any duty related to the safe operation of City equipment." The City employees refused to consent to this change and objected to it as one about which the City should have negotiated with the union.[32]

Later that year, without any prior notice and without resolving the employees' concerns regarding the new drug testing policy, the City required all employees of the Department of Streets and Sanitation to submit to immediate drug tests.[33] Any employee who refused would be terminated.[34] When Krieg refused to submit to the test and tried to call his attorney, his boss told him to leave the building because he was fired. He also threatened to call the police when Krieg did not leave right away.[35] The City Board of Works later officially fired Krieg, after a meeting about the incident.[36]

Krieg—together with the union—filed a complaint in district court under 42 U.S.C. § 1983.[37] Krieg alleged violations of both the Fourth Amendment and his Due Process right to certain termination procedures. The district court granted summary judgment in favor of the City.[38] The Seventh Circuit affirmed its judgment as to both claims, but this note will focus only on the Seventh Circuit's analysis of the Fourth Amendment.

The Seventh Circuit began its analysis with the general rule that "drug testing must be based upon individualized suspicion."[39] It then looked to *Von Raab* for the proposition that "random drug testing is constitutionally permissible when it 'serves special governmental

[31] *Id*. at 515.
[32] *Id*.
[33] *See id*.
[34] *Id*.
[35] *Id*. at 515-16.
[36] *Id*. at 516.
[37] *See id*.
[38] *Id*.; Krieg v. Seybold, 427 F. Supp. 2d 842 (N.D. Ind. 2006).
[39] *Krieg*, 481 F.3d at 517 (citing Chandler v. Miller, 520 U.S. 305, 313 (1997)).

needs.'"[40] "Special needs" is a shorthand for the Supreme Court's assertion that in certain circumstances a search will serve an important enough governmental interest that it can be conducted despite the absence of a warrant and probable cause.[41] The asserted need must be something more than the "normal need for law enforcement"[42]—therefore government agents such as public employers and school officials often invoke the special needs doctrine to justify searches.[43]

However, a special need is not sufficient on its own to justify a departure from the normal requirements of the Fourth Amendment. Instead, as the *Krieg* court properly explained, "when such a special need exists, courts should '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.'"[44] As will be shown below, the Seventh Circuit did not adhere to this last requirement. Not only did the court fail to determine whether requiring the City of Marion to show "some level of individualized suspicion" would be "impractical," it also failed to point to a single reason why the City could not have complied with that requirement.

In short, the Seventh Circuit treated *Von Raab* as if it created bright line rule that a special need could—by itself—justify drug testing without suspicion.[45] As will be shown in Part III, below, the Supreme Court has never condoned such a rule.

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[40] *Id*. (quoting Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989)).

[41] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989).

[42] *Id*.

[43] *See infra* Part III for more on the requirements of the special needs doctrine and on how the Supreme Court has applied this doctrine to employers versus to school officials.

[44] *Krieg*, 481 F.3d at 517 (quoting *Von Raab*, 489 U.S. at 665).

[45] *See id*. ("However, the Supreme Court has held that random drug testing is constitutionally permissible when it 'serves special governmental needs . . . .'" (quoting *Von Raab*, 489 U.S. at 665)).

A. The Seventh Circuit's Definition of a Special Need

To determine whether a special need existed in Marion, Indiana, the Seventh Circuit asserted that "a special need exists when the government employee subjected to random drug testing holds a 'safety sensitive' position."[46] It then set forth the following test, relying on *Skinner*: "To determine whether an employee occupies a safety sensitive position, courts must inquire whether the employee's duties were 'fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences.'"[47]

The court looked to several cases from other courts that had interpreted this definition of "safety-sensitive." According to the *Krieg* court, lower federal courts had held that duties such as operating forklifts, tractors, cranes, and other types of heavy equipment satisfied the *Skinner* definition.[48] The court also explained that lower courts had rejected claims that public employees such as mail van drivers, shuttle bus drivers, and passenger car drivers held safety-sensitive positions.[49]

The Seventh Circuit held that because Krieg operated "large vehicles and equipment" and these could "present a substantial risk of injury to others if operated by an employee under the influence of drugs or alcohol," Krieg "performed a safety sensitive job."[50] His job raised greater safety concerns than those of van and passenger car drivers because Krieg's equipment was "larger and more difficult to operate."[51] Finally, the court emphasized that Krieg operated his equipment "in the City near other vehicles and pedestrians" rather than

[46] *Id*. (quoting *Skinner*, 489 U.S. at 630).

[47] *Id*. (quoting *Skinner*, 489 U.S. at 628) (bracketed material in original).

[48] *Id*. at 518.

[49] *Id*. (referring to Nat'l Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989); Nat'l Treasury Employees Union v. Lyng, 706 F. Supp. 934 (D.D.C. 1988)).

[50] *Id*. (Krieg "regularly operated a one-ton dump truck, a dump truck with a plow, a front end loader, and a backhoe").

[51] *Id*.

in "rural areas."[52] Thus, the court held, "any reasonable jury would conclude that Krieg's job duties" were safety-sensitive within the meaning of *Skinner*.[53]

B. The Seventh Circuit's Balancing Test Demonstrates That It Adopted a Bright Line Rule

Next, the Seventh Circuit balanced the "intrusion on [Krieg's] Fourth Amendment interests" against the extent to which the City's drug testing program would promote a "legitimate governmental interest."[54] It considered these factors:

> 1) the nature of the privacy interest upon which the search intrudes, 2) the character of the intrusion on the individuals' privacy interest, 3) the nature and immediacy of the governmental concern at issue, and 4) the efficacy of the particular means used to address the problem.[55]

Based on these factors, it held that the City of Marion had "shown a governmental interest sufficient to justify submitting Krieg to random, suspicionless drug testing."[56]

Though engaging in a balancing test once it had identified a special governmental need was consistent with the requirement of *Von Raab* (mentioned above),[57] the court here relied on *Vernonia School District 47J v. Acton* and on the Seventh Circuit case of *Joy v. Penn-Harris-Madison School Corp.* to explain the test.[58] Each of these two

[52] *Id.*

[53] *Id.*

[54] *Id.* (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653 (1995)).

[55] *Id.* (citing Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052, 1059 (7th Cir. 2000)).

[56] *Id.* at 519.

[57] *See id.* at 517.

[58] *Id.* at 518 (citing *Vernonia*, 515 U.S. at 653; *Joy*, 212 F.3d at 1059).

cases dealt with randomly testing schoolchildren for drug use. As explained in Part III below, randomly drug testing schoolchildren implicates a different body of Supreme Court precedent than does randomly drug testing adults.[59] Setting forth the balancing test under these two school cases, the court simply asserted that it should consider the factors above. It did not mention—even though it had recognized as much when it set forth the special needs test under *Von Raab*, one page earlier—that the purpose of its balancing test should have been to determine whether it was impractical to require "some level of individualized suspicion in the particular context."[60]

The court's treatment of each factor further demonstrates it did not conduct this balancing test with the purpose of determining whether the City was justified in departing from the general rule requiring individual suspicion. The court held that the nature of Krieg's privacy interest was diminished because he had submitted to drug testing on a previous occasion.[61] It then rejected Krieg's claim that the character of the intrusion was "severe" because the City did not follow its own testing policy.[62] This claim centered on whether choosing a random date on which to test an entire Department was truly "random, suspicionless drug testing."[63] The Seventh Circuit concluded that the City had complied with its own policy.[64] Clearly, neither of these arguments or conclusions relate to whether testing Department employees only when the City had reason to suspect they had used drugs would be impractical. Instead, the court's consideration of these two factors related only to the degree of intrusion on Krieg's privacy interests.[65]

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[59] *See infra* Part III.

[60] *Compare Krieg*, 481 F.3d at 517 *with id.* at 518.

[61] *Id.* at 518-19. As mentioned earlier, the prior program was aimed at CDL holders. Krieg does not have a CDL, and the City conceded that it was improper to test him under that program. *Id.* at 515.

[62] *Id.* at 519.

[63] *See id.*

[64] *Id.*

[65] It was not improper for the court to consider only the intrusion on individual privacy when it evaluated these first two factors. *See, e.g.*, Skinner v. Railway Labor

The court next addressed the nature and immediacy of the City's need for the drug testing program. "[T]he City [had] a compelling interest in ensuring that its employees who regularly drive large equipment around the City are not impaired by drugs or alcohol."[66] With regard to the immediacy of the need, the court claimed that it was irrelevant that the City had not shown a "history of drug-related accidents by non-CDL holders" (such as Krieg) because the Supreme Court "has not required" such a showing.[67] Even if it is true that the Supreme Court has not so *required*, the purpose of balancing these factors should have been to determine whether it would be *impractical* to impose a similar requirement.[68] The Seventh Circuit did not address any practical concerns in its treatment of this factor.

With regard to the final factor—the efficacy of the means chosen by the City to address its legitimate governmental concern—the court rejected Krieg's claim that the City must "demonstrate that it could not address the problem by observing Department employees for

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Executives' Ass'n, 489 U.S. 602, 624-28 (1989) (analyzing the intrusion on railroad employees' privacy and contrasting these "limited threats" with "the Government interest in testing without a showing of individualized suspicion"). However, at some point during this balancing test, the court should have considered the practicality of a suspicion-based testing program. The court's failure in this regard is demonstrated below.

[66] *Krieg*, 481 F.3d at 519.

[67] *Id*. The court cites to *Board of Education of Independent School District No. 92 v. Earls*, 536 U.S. 822, 835 (2002) for the claim that the Supreme Court does not require a showing of a "particularized or pervasive drug problem" in order to justify suspicionless drug testing. *Krieg*, 481 F.3d at 519. But *Earls* is also a case about testing schoolchildren for drug use, not about testing adults. Nevertheless, the *Von Raab* Court did allow the Customs Service to employ a program of suspicionless drug testing even though the Service had not shown a pervasive drug problem among its (adult) employees. Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 673-74 (1989). *See* more on this issue *infra* Part III.

[68] While the practicality question under *Von Raab* is whether the City could have formed some level of *individualized* suspicion, suspicion based on a history of drug use among the group targeted for random testing would at least have been closer to such a threshold. Instead, the court here upholds a program of testing persons whom the City has absolutely no reason to suspect of drug use—either individually or as a group.

suspicious behavior."[69] This is the only time in its balancing test that the court mentioned the practicality of requiring some level of suspicion. The court's response, however, was that "neither the Supreme Court nor this Court has ever held that this showing is a requirement of imposing random drug tests."[70] It may be true that neither court has ever required this specific showing. However (as will be shown in Part III below), the Supreme Court has required *some* reason that developing individual suspicion would be impractical.[71] If the Seventh Circuit did ascertain such a reason in this case, it did not share that reason with its readers.

Thus, in this brief opinion, the Seventh Circuit adopted a bright line rule that safety concerns alone are sufficient to justify random, suspicionless drug testing. Further, it showed that the court will eschew any attempt to require a governmental body to demonstrate that the normal requirements of the Fourth Amendment would undermine that body's attempt to address such safety concerns.

III. THE SUPREME COURT USES A FACT-SPECIFIC APPROACH FOR THE PUBLIC WORKPLACE

The Supreme Court has upheld suspicionless workplace drug testing by government agents in two cases: *Skinner*[72] and *Von Raab*.[73] Each of these cases involved a policy that required workplace drug testing triggered by a certain event—a train accident and an application for promotion, respectively—rather than by individualized suspicion. Each case placed substantial emphasis on both the safety concerns raised by the job at issue and the way in which the relevant policy limited the discretion of the government agents.[74] In addition, each case emphasized that the circumstances giving rise to a need for

[69] *Krieg*, 481 F.3d at 519.
[70] *Id*. (citing *Von Raab*, 489 U.S. at 674).
[71] *See infra* Part III.
[72] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).
[73] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
[74] *See infra* Parts III(A) and III(B).

drug testing justified a departure from the normal requirement of reasonable suspicion.[75]

By contrast, the Supreme Court struck down a suspicionless drug testing scheme in *Chandler v. Miller*,[76] where the scheme was meant to deter drug use among political candidates. The proponents of the testing program argued that it addressed safety concerns similar to those that justified the program in *Von Raab*.[77] In addition, the program was statutory, and the statute defined the persons affected, the timing of the tests, and the process of information collection.[78] Therefore, government agents would have had limited discretion in the administration of the program. Nonetheless, the concerns the program addressed did not arise in circumstances unusual enough to justify a departure from the need for individualized suspicion.[79]

When drug testing programs target schoolchildren, however, the Supreme Court has not required school officials to identify an unusual circumstance that would make drug testing based upon individualized suspicion impractical.[80] Instead, it has adopted a bright line rule—justified by and specific to the school setting—that eliminates the presumption in favor of individualized suspicion.[81] Therefore, when evaluating drug testing programs in schools, the Supreme Court will balance the interests of the individual and the government on an even scale, rather than on a scale weighted in favor of the individual.

Thus, the Supreme Court has created differing rules with regard to suspicionless drug testing for various contexts. In the context of schools, the overriding safety concern of preventing childhood drug use will be sufficient on its own to justify suspicionless testing, and

[75] *See infra* Parts III(A) and III(B).

[76] 520 U.S. 305 (1997).

[77] *See infra* Part III(C).

[78] *Chandler*, 520 U.S. at 309-10.

[79] *See infra* Part III(C).

[80] *See infra* Part III(D) for a discussion of the rules applicable to school settings.

[81] This is not to say that all suspicionless drug testing programs in schools will be constitutionally permissible. A court might still consider a testing program's suspicionless nature when deciding whether it is reasonable. *See infra* Part III(D).

the Court will only ask whether the particular program at issue was reasonable. In the workplace, safety concerns have been sufficient to justify suspicionless testing only where they arise in circumstances that make individualized suspicion impractical. Because the testing program in *Krieg* affected adults (as opposed to schoolchildren), the Seventh Circuit should have followed the context-specific approach used by the Supreme Court in *Skinner*, *Von Raab*, and *Chandler*.

A. Safety, Regulation, and an Unusual Need in Skinner

In *Skinner*, a private railroad company was subject to regulations promulgated by the Federal Railroad Administration (F.R.A.),[82] and these regulations required the company to provide the F.R.A. with urine samples from all employees of the railroad who were directly involved in any major train accident.[83] In addition, the F.R.A. regulations allowed railroad companies to test employees in particular positions when certain rule violations occurred, such as "noncompliance with a signal and excessive speeding."[84] A F.R.A. laboratory would test these samples for drugs and for alcohol content.[85] To ensure that all employees were tested in the aftermath of major accidents, the railroad company had to transport them directly to a testing facility.[86]

The *Skinner* Court addressed a constitutional challenge to this testing scheme by first determining whether the Fourth Amendment applied to the railroad company's acts[87] and whether collection of

[82] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 614-15 (1989).

[83] *Id*. at 609. The regulations also required blood samples. The Court analyzed these separately throughout its opinion, so this article will focus only on the urine sampling.

[84] *Id*. at 611.

[85] *Id*. at 610 (regarding samples taken post-accident). Samples taken after a rule violation would be processed at an independent facility. *Id*. at 611.

[86] *Id*. at 609.

[87] *Id*. at 614-15. In these circumstances, the railroad company was a government agent with regard to the post-accident testing. And, with regard to the post-rule violation testing, the government was sufficiently involved in the railroad

urine for testing was a search,[88] answering both in the affirmative. Next, it evaluated whether the search could be reasonable in the absence of the default threshold: a warrant and probable cause.[89] It determined that, in the circumstances presented, such searches could be reasonable because (a) the purpose of the testing went "beyond normal law enforcement," creating a "special need;"[90] and (b) the purposes of the warrant requirement were satisfied by the regulations themselves.[91]

The purpose of the drug testing at issue was "to prevent accidents and casualties in railroad operations," thus protecting the safety of "the traveling public and of the employees."[92] As evidence of this purpose, the Court looked in part to the categories of employees covered by the regulations.[93] These employees included persons "handling orders concerning train movements, operating crews, and those engaged in the maintenance and repair of signal systems."[94] Both parties conceded that these positions required "safety-sensitive tasks."[95]

The Court did not assume that the "special need" created by this safety purpose and by the safety-sensitive nature of the employees' tasks would automatically allow government agents to search employees without a warrant. Instead, it examined the purposes of the warrant requirement to decide whether that requirement should apply in the particular circumstances before it. It defined these purposes as:

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company's acts where it "removed all legal barriers to the testing," had a "strong preference" that the company conduct such testing, and "share[d] the fruits of such intrusions." *Id*. at 615.

[88] *Id*. at 617. The Court in *Vernonia* began in the same way, i.e., by determining that the Fourth Amendment protections reached public school officials and that compelled urinalysis constituted a search. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652 (1995).

[89] *Skinner*, 489 U.S. at 619.

[90] *Id*. at 620 (citations omitted).

[91] *Id*. at 621-24.

[92] *Id*. at 620-21.

[93] *Id*. at 620.

[94] *Id*.

[95] *Id*.

to assure citizens that searches are not "random or arbitrary acts of government agents;" to ensure that searches are narrow in both objective and scope; and to allow a neutral, objective magistrate to determine whether a search is justified in each particular case.[96]The F.R.A. regulations satisfied these purposes [97] because they specifically defined the narrow objectives and scope of the drug testing program, and because they were well-known to the employees affected.[98] In addition, the regulations left "minimal discretion" to the persons who would administer the search.[99]

Even though the *Skinner* Court had thus determined that the railroad company's drug testing program served a special need and that the regulations mandating the program obviated the need for a warrant, it still had to decide whether the special need would justify a search without suspicion.[100] It characterized the circumstances in which a search can be reasonable in the absence of any individualized suspicion as limited to those where (a) the intrusion on the individual's privacy interests is minimal, (b) the government's interests are important, and (c) requiring suspicion would undermine the government's objective.[101]

The Court found that the intrusion on the railway workers' privacy was minimal because the collection environment was similar to a routine medical examination, and because the regulations limited the private facts revealed to those related to alcohol or drug use.[102] The

[96] *Id*. at 621-22.

[97] *Id*. at 624.

[98] *Id*. at 622. The Court also looked to the way that requiring a warrant would frustrate the objectives of the government in conducting the search. Here, the objective was to help determine whether drugs were a factor in a major train accident. Waiting for a warrant could allow evidence of these substances to metabolize out of the bodily fluids of the involved employees. *Id*. at 623.

[99] *Id*. at 622.

[100] *Id*. at 624.

[101] *Id*.

[102] *Id*. at 626-27. The testing procedures would also include information about any other medications that the employees were taking. The Court assumed in its

Court emphasized that the workers knew that their industry involved many regulations to ensure safety and that these regulations frequently dealt with employee health and fitness.[103] Further, it emphasized that many companies in the railway industry required routine physical examinations, such as eye exams, for some groups of employees.[104] Thus, the workers had a diminished expectation of privacy.[105]

The government's interest in safety was important because of the danger presented by even a "momentary lapse of attention" by a person in the covered employees' position.[106] Therefore, the Court would not impose a requirement of reasonable suspicion if it would "seriously impede" the government's objective. The Court gave three reasons that a requirement of reasonable suspicion would impede the government's objective in these circumstances. First, an "impaired employee" would not show signs of impairment that an ordinary person could detect.[107] Second, an investigator at the "chaotic" scene of a train accident would have difficulty determining who was responsible for the accident.[108] Third, likewise, the time required to determine which of the individuals responsible for a rule violation might have been under the influence of drugs or alcohol would create a risk that the evidence available through urinalysis would metabolize and be lost.[109] Thus, because of the particular difficulties of the circumstances giving rise to the need for drug testing, it would be "unrealistic" to require the railroad company to develop individualized suspicion of drug use prior to administering the tests.[110]

analysis that this information would be used only to prevent false positives and would be kept confidential. *Id*. at 626 n.7.

[103] *Id*. at 627-28.

[104] *Id*. at 627 & n.8.

[105] *Id*. at 627.

[106] *Id*. at 628.

[107] *Id*. at 628-29.

[108] *Id*. at 631.

[109] *Id*.

[110] *Id*.

Only after it had thus considered whether the asserted special need of railroad safety would justify a departure from the requirement of individualized suspicion did the *Skinner* Court go on to determine whether the particular scheme of suspicionless tests required by the regulations was reasonable. For this inquiry, it looked to the efficacy of the means chosen by the F.R.A.[111] Because the F.R.A. had "expressly considered various alternatives" and "reasonably found them wanting,"[112] the Court held that it would not independently determine whether less intrusive means for obtaining evidence of drug or alcohol use were available.[113] Therefore, the drug testing required by the F.R.A. regulations was reasonable.[114]

B. Safety, Uniform Policy, and an Unusual Need in Von Raab

The Court in *Von Raab* undertook a similar analysis when it addressed a challenge by the National Treasury Employees Union to the Customs Service's policy of requiring a drug test from all applicants for promotion to positions that required carrying firearms or involved enforcing laws regarding illegal drugs.[115]

It began by determining whether a warrant was required. It stated that, because the purpose of the program was to "deter drug use among those eligible for promotion to sensitive positions," the program served a special governmental need.[116] Once it found this special need, it was "necessary" to "balance the individual's privacy expectations against the Government's interest to determine whether it [was]

[111] *Id*. at 631-32.

[112] *Id*. at 629 n.9.

[113] The court below asserted that the tests themselves were unreliable, but the *Skinner* Court held that the drug test need not provide conclusive proof of drug use in order to be reasonable. *Id*. at 631-32.

[114] *Id*. at 633-34.

[115] Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). Also at issue was the testing of employees who would handle classified materials. *Id*. at 661. The Court did not resolve the issue as to this group. *Id*. at 677-78.

[116] *Id*. at 666.

impractical to require a warrant or some level of individualized suspicion in the particular context."[117]

Thus, the *Von Raab* Court did not discuss the purposes of the warrant requirement in such depth as did the *Skinner* Court, but instead assumed that "some level of individualized suspicion" could be sufficient to meet the mandate of the Fourth Amendment.[118]The *Von Raab* Court concluded that requiring a warrant would be impractical because it would divert resources without creating any additional protection for the applicants. The interests protected by the warrant requirement were already satisfied because the testing policy was well-known to the applicants and left no room for discretion as to who would be tested.[119]

The *Von Raab* Court also did not use *Skinner*'s language regarding the circumstances in which testing without suspicion could be permissible. However, it set forth a similar principle: suspicionless tests are constitutional in "certain limited circumstances" where there is a "compelling" governmental need that will "justify the intrusion on privacy."[120] In the *Von Raab* formulation, such compelling needs exist when the government must "discover . . . latent or hidden conditions" or "prevent their development."[121] This portion of the *Von Raab* standard addresses concerns similar to those in the *Skinner* test above[122] because, clearly, requiring individualized suspicion of

[117] *Id*. at 665-66.

[118] *See id*.

[119] *Id*. at 666-67.

[120] *Id*. at 668. The full standard is: "[I]n 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." *Id*.

[121] *Id*.

[122] *Supra* Part III(A). Suspicionless searches can be reasonable if (a) the intrusion on the individual's privacy interests is minimal, (b) the government's interests are important, and (c) requiring suspicion would undermine the government's objective. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

wrongdoing would frustrate the objective of discovering hidden crimes or preventing criminal patterns that had not yet developed.

The *Von Raab* Court thus upheld the Custom Service's suspicionless drug testing policy[123] where (1) the applicants expected inquiry into their fitness with regard to judgment and dexterity;[124] (2) the safety and national security risks of promoting drug users to positions involving firearms and controlled substance enforcement were "extraordinary;"[125] (3) the nature of the job did not permit day-to-day supervision that would allow authorities to detect impairment;[126] and (4) the government had a "compelling interest" in preventing even off-duty drug use by its applicants.[127]

The *Von Raab* Court recited each of these circumstances as part of a larger inquiry into whether the interests of the government would outweigh those of the individual applicants.[128] Therefore, the *Von Raab* decision might not require that lower courts consider *each* of the factors implicated by these circumstances: the expectations of the applicants, the magnitude of the safety concerns at issue, the degree of legitimate government interest, and the practicality of suspicion-based testing in the specific work environment at issue.[129] However, at least this much is clear: the *Von Raab* Court did not hold that safety concerns on their own would suffice to justify suspicionless testing, and it did not hold anything with regard to random drug testing.

[123] *Von Raab*, 489 U.S. at 677.
[124] *Id*. at 672.
[125] *Id*. at 674.
[126] *Id*.
[127] *Id*.
[128] *See id*. at 677.
[129] *See id*. at 667-677.

C. The Chandler *Court Rejects a Testing Program Where Circumstances Were Not Unusual Enough*

In the case of *Chandler v. Miller*,[130] the Supreme Court struck down a Georgia statute that required that candidates for certain state offices pass a drug test within thirty days prior to nomination or election.[131] The Eleventh Circuit had upheld the statute by relying upon the logic in *Skinner* and *Von Raab*: the statute served a special governmental need.[132] The court looked to the state's interest in ensuring that its officials could be trusted with the "ultimate responsibility for law enforcement" and the supervision of "drug interdiction efforts."[133] These were similar to the interests relied upon in *Von Raab*: ensuring that drug interdiction personnel "are physically fit, and have unimpeachable integrity and judgment."[134] The Eleventh Circuit held that the state's interests outweighed those of the candidates.[135]

The Supreme Court began its analysis with the general rule, consistent with *Skinner* and *Von Raab*, that government officials normally must have individualized suspicion with regard to the subject of a search before the search can be reasonable within the meaning of the Fourth Amendment.[136] The Court went on to explain that "particularized exceptions" to this rule are "sometimes" permissible when based upon a special governmental need.[137] "When such 'special needs' . . . are alleged," the Court explained, "courts must undertake a

[130] 520 U.S. 305 (1997).

[131] *Id*. at 308-10.

[132] *Id*. at 311-12.

[133] *Id*.

[134] *Von Raab*, 489 U.S. at 670.

[135] *Chandler*, 520 U.S. at 312.

[136] *See id*. at 308, 313.

[137] *Id*. at 313; *see id*. at 308 (citing to *Von Raab*, 489 U.S. at 668, and referring to border checkpoints, sobriety checkpoints, and administrative inspections of "closely regulated" businesses as examples of "certain limited circumstances" in which a search may be reasonable in the absence of individual suspicion).

context-specific inquiry, examining closely the competing private and public interests advanced by the parties."[138]

This explanation of the legal framework behind the *Skinner* and *Von Raab* safety exception makes explicit that the inquiry is "context-specific" rather than a bright line. Though the context in *Chandler* differed from that in *Skinner*, *Von Raab*, and *Krieg* (because the persons to be tested were candidates for office rather than large groups of public employees), the underlying analysis was uniform. In none of these situations was the special governmental need in itself sufficient to justify suspicionless testing. Courts must use a fact-specific approach to determine whether some unusual circumstance will justify a departure from the general rule. The *Chandler* Court used the *Skinner* formulation to explain what circumstances provide such a justification, namely, "where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[139]

The Georgia statute did not address an important governmental interest. Because concerns about candidates' trustworthiness were "hypothetical"—there was not an existing drug problem among this group—the asserted special need was not "substantial" enough to justify intruding upon recognized privacy interests in the absence of individualized suspicion.[140] The Court emphasized that while it is not true that in all cases there must be a demonstrated drug problem before a government agency can adopt a suspicionless drug testing program, the existence of a drug problem can help to justify such a program.[141]

In addition, Georgia had not shown that requiring normal, suspicion-based searches would jeopardize the government's ability to

[138] *Id*. at 314 (citing *Von Raab*, 489 U.S. at 665-66, 668).

[139] *Id*. (quoting Skinner v. Railway. Labor Executives' Ass'n, 489 U.S. 602, 624 (1989)).

[140] *Id*. at 318-19 ("Notably lacking in respondents' presentation is any indication of a concrete danger demanding departure from the Fourth Amendment's main rule.").

[141] *Id*. at 319.

meet its goal of deterring drug use among public officials.[142] This was true because the candidates worked in the public eye—in sharp contrast to *Von Raab*, where the targeted group worked in a situation in which "day-to-day scrutiny" was impossible.[143] When comparing *Chandler* to *Von Raab*, the Court further emphasized that *Von Raab* did not "open[] broad vistas for suspicionless searches."[144]

In sum, the *Chandler* Court confirmed that *Skinner* and *Von Raab* did not create a broad rule that special safety needs will always justify suspicionless searches. In other words, the Supreme Court has not created a bright line rule allowing suspicionless drug testing programs whenever such programs serve a special governmental need.

Moreover, the Court established several facts relevant to the "context-specific" inquiry that each court must undertake before upholding a suspicionless testing program premised on a special need. First, situations allegedly creating safety concerns will not justify suspicionless searches where the concerns are merely hypothetical. Second, the existence of a drug problem is relevant to whether there is an important governmental interest at stake. And finally, the absence of a suspicion-based approach sufficient to address the relevant safety concerns is key to the inquiry of whether a suspicionless program can be justified.

D. In Schools, No Unusual Circumstance is Necessary

In contrast to the above cases regarding testing adults for drug use, the Supreme Court has created two bright line rules regarding drug testing in schools. First, schools present special governmental needs. Second, the particular role of school officials as guardians over schoolchildren justifies suspicionless drug testing programs that target students in voluntary extracurricular activities. Therefore, the cases of *Vernonia*[145] and *Board of Education of Independent School District*

[142] *Id*. at 320.
[143] *Id*. at 321.
[144] *Id*.
[145] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

No. 92 v. Earls,[146] dealing with suspicionless drug testing in schools, are inappropriate sources of authority for a court to rely upon when determining whether suspicionless drug testing in a workplace is constitutionally permissible.

In *Vernonia*, the Court recognized the first of these bright line rules—that schools present special governmental needs. In *Vernonia*, student athletes challenged a policy that required them to undergo random drug testing.[147] The school administration thought athletes were "the leaders of the drug culture" and had therefore adopted the policy in response to a "sharp increase" in drug use in the school district.[148]

The Court started with the general rule that, when law enforcement officials try to obtain "evidence of criminal wrongdoing," a search will not be reasonable without a warrant supported by probable cause.[149] It then set forth the principle that "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable" a search can be reasonable even though it is not supported by probable cause.[150] Next, the Court cited *New Jersey v. T.L.O.* for the proposition that special needs "exist in the public school context" because (a) the "warrant requirement would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed;" and (b) the requirement of probable cause "would undercut the substantial need of teachers and administrators for freedom to maintain order in the schools."[151] The Court did not make reference to any need for a context-specific inquiry to determine whether the Vernonia schools

[146] 536 U.S. 822 (2002).

[147] *Vernonia*, 515 U.S. at 648-49.

[148] *Id*.

[149] *Id*. at 652-53.

[150] *Id*. at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[151] *Id*. (citing *T.L.O.*, 469 U.S. 325, 340-41 (1985)) (internal quotation marks omitted).

presented special governmental needs.[152] Rather, it treated this language from *T.L.O.* as a bright line rule.

This bright line rule did not establish that random drug testing was permissible in schools, because *T.L.O.* dealt with a search based on individualized suspicion.[153] Thus, the next inquiry of the *Vernonia* Court was whether this special need would allow school officials to conduct suspicionless searches. To answer this question, the Court considered the nature of the privacy interest, the character of the intrusion, the nature and immediacy of the governmental concern, and the efficacy of the means used to address the concern.[154]

In holding that a suspicionless search was justified, the Court emphasized that, because the testing program affected schoolchildren, the "most significant element" in its decision was that the school had "responsibilities . . . as guardian and tutor of children entrusted to its care."[155] Further, the Court "caution[ed] against the assumption that suspicionless drug testing [would] readily pass constitutional muster in other contexts."[156] In this cautionary paragraph, it contrasted the context of a school, where one must ask whether the officials acted as reasonable *guardians*, with the context of employment, where one must ask whether the officials acted as reasonable *employers*.[157]

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[152] *See id*. at 653-54.

[153] *Id*. at 653; *T.L.O.*, 469 U.S. at 344-46.

[154] *Vernonia*, 515 U.S. at 654-64. Although the *Vernonia* Court cited to *Skinner* for the proposition that some suspicionless searches are acceptable, it did not explicitly employ the test for whether a search can be reasonable in the absence of suspicion that *Skinner* set forth (*supra* Part III(A)). *See id*. at 653-54. However, in the course of its balancing test (which used factors articulated in similar language to those used by the *Krieg* court), it explicitly addressed whether testing based on suspicion would be practicable in public schools. *See id*. at 663-64. Though it used the language of "efficacy," it also addressed the inquiry of whether requiring suspicion would frustrate the objective of the administrators. *Id*. In this discussion, it pointed to parent resistance to suspicion-based testing, to possible unfair effects on troubled children, and to the burden that would be posed on schoolteachers where they are not trained in the duty of recognizing signs of drug use. *Id*.

[155] *Id*. at 665.

[156] *Id*.

[157] *Id*.

The next case addressing suspicionless drug testing in schools was *Earls*.[158] In that case, students in extracurricular activities again challenged a random drug testing policy. The *Earls* Court started with the bright line rule recognized in *Vernonia*: that "'special needs' inhere in the public school context" such that probable cause may not be necessary to justify a search.[159] However, unlike the Court in *Vernonia*, the *Earls* Court did not conduct a separate inquiry into whether suspicionless searches could be reasonable. Instead, based on the *Vernonia* proposition that in public schools "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children,"[160] the Court asserted that "a finding of individualized suspicion may not be necessary when a school conducts drug testing."[161]

The Court clarified the meaning of this assertion later in its opinion, when it rejected the students' claim that drug testing presumptively requires individualized suspicion by saying, "[i]n this context, the Fourth Amendment does not require a finding of individualized suspicion."[162] To support this response, the Court referred the reader back to the section of its opinion regarding the special needs inherent in schools.[163]

Thus, in sharp contrast to the cases of *Skinner*, *Von Raab*, and *Chandler*, the *Earls* Court did not undertake a context-specific balancing test to determine whether a departure from the normal requirement of individualized suspicion could be justified by some unusual circumstance. Instead, the *Earls* Court created a bright line rule that individualized suspicion is not presumptively necessary in the context of school drug tests, even though it is presumptively necessary for other drug tests.[164] Thus, the school context will—in effect—

[158] Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822 (2002).
[159] *Id*. at 829 (quoting *Vernonia*, 515 U.S. at 653).
[160] *Id*. at 830 (quoting *Vernonia*, 515 U.S. at 656).
[161] *Id.*
[162] *Id*. at 837.
[163] *Id.*
[164] *See supra* Parts III(A)-III(C).

replace a balancing test that is weighted in favor of individual privacy with one that is measured on an even scale.[165]

E. Summary of Supreme Court Treatment of Suspicionless Drug Tests

Skinner and *Von Raab* make clear that the fact that government agents have a safety purpose for their drug testing program will not obviate the need to determine whether those agents were justified in departing from the requirement of individualized suspicion. Instead, the Supreme Court will look to the circumstances surrounding the safety concern for some reason that it would be impractical to require individual suspicion.[166]

Further, the *Chandler* case has shown that not all safety concerns are important enough to present a special governmental need. Instead, the concerns that the testing program addresses must be real and substantial. Finally, the *Chandler* Court explained that when it looks for an unusual circumstance that will justify a suspicionless test, it will consider whether there was a drug problem among the targeted group of persons.[167]

By contrast, in the school context, the Supreme Court has eliminated any presumption that individualized suspicion is required before a drug testing program involving school children can be reasonable. Instead, it allows courts to balance the interests of the individual students against those of the school officials and to assess the efficacy of those officials' chosen method of drug deterrence without any initial inquiry into whether the school's needs could be served by a suspicion-based program.[168]

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[165] This bright line rule does not mean that all drug testing in schools will be *reasonable* within the meaning of the Fourth Amendment. *Earls*, 536 U.S. at 830. However, it does allow courts to look directly to whether a reasonable guardian would have acted as the school district did without first asking whether some unusual circumstance justified the school district in disregarding general rule requiring individualized suspicion.

[166] *Supra* Parts III(A) and III(B).

[167] *Supra* Part III(C).

[168] *Supra* Part III(D).

IV. THE SEVENTH CIRCUIT'S BRIGHT LINE RULE CREATES SIGNIFICANT POLICY CONCERNS

As shown above in Part II, the *Krieg* court treated the fact that the City of Marion had a safety purpose for its drug testing program as sufficient to eliminate any presumption that individualized suspicion was required. Thus, it analyzed Krieg's case in a manner more appropriate to a school context than to a workplace. This was inappropriate because, as shown above, the cases addressing drug testing in schools have been premised almost entirely on the role of school administrators as the guardians of the minor children for whom they are responsible.[169]

Had it used the *Skinner* framework for evaluating workplace drug testing by government agents, the *Krieg* court would have first determined whether (a) the intrusion on Krieg's privacy interest was minimal, (b) the City's interests were important, and (c) requiring suspicion would have undermined the City's objective.[170] Only after determining that this threshold was met would it have been possible for the court to hold that the City's suspicionless drug testing program was reasonable. Instead, the *Krieg* court balanced the interests of Krieg and the City on even scale, ignoring the presumption that when the City chose a random drug testing program it chose an unreasonable method of pursuing its interests.[171]

By omitting the analytical step of determining whether the special need asserted by the government created some unusual circumstance that would make the normal application of the Fourth Amendment (requiring individualized suspicion at an absolute minimum) impractical, the Seventh Circuit "un-tipped" a balance that normally weighs in favor of individual privacy rights. This creates significant policy concerns. First, it stretches a narrow exception to

[169] *See supra* Part III(D).

[170] *Supra* Part III(A); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

[171] *See supra* Part II for the reasoning used by the *Krieg* court.

constitutionally-required protections to include a large number of blue-collar workers, without explaining why it was appropriate to do so. Second, even if it were appropriate, the decision is not desirable in that it undermines the goals of the Fourth Amendment. It does so by diminishing the incentive for public employers to obtain public input and to consider less intrusive means before implementing drug testing programs that will affect large numbers of people.

A. The Seventh Circuit Expanded the Exception to the Supreme Court's Rule

As will be shown, the Seventh Circuit broadly interpreted the safety concerns that will satisfy *Skinner*. This is not necessarily incorrect. However, when paired with the bright line effect that the Seventh Circuit has given to the *Skinner* test, the result is an exception permitting suspicionless drug testing that threatens to swallow the rule.

In short, the Seventh Circuit has applied the concept of safety-sensitive positions in a way that will include much of the blue-collar public workforce. The Seventh Circuit has also interpreted *Skinner*, *Von Raab*, *Vernonia*, and *Earls* to mean that, where a worker holds a safety-sensitive position, a public employer can test that worker for drug use without any need for individualized suspicion.[172] Thus, the general rule that an employer must have individualized suspicion to test an employee for drug use will apply to far fewer people than it would have if the court had applied the *Skinner* rule differently in the *Krieg* decision.

Because of the widespread effect of its interpretation of *Skinner*, and because this interpretation was not compelled by precedent, the *Krieg* court should have explained why it was appropriate to adopt a broad view of the types of safety concerns that will satisfy the *Skinner* test.

[172] *Supra* Part II.

1. The Seventh Circuit's Interpretation of *Skinner* Was Not Compelled by Precedent

Consistent with *Skinner*, the *Krieg* court defined safety-sensitive positions as those "fraught with such risks of injury to others that even a momentary lapse of attention [could] have disastrous consequences."[173] Using primarily district court cases from other circuits, the court concluded that Krieg's position was similar enough to the other safety-sensitive positions for which random drug testing had been allowed that a "reasonable jury would conclude" that Krieg was a safety-sensitive employee.[174]

The Seventh Circuit cited first to appellate level cases from other circuits about random drug testing in the aviation, rail, highway, and water transportation industries, listing some of the employees covered in these industries' testing regimes.[175] However, it did not mention any similarities between the positions covered in those cases and Krieg's position as the operator of several types of heavy equipment, such as a one-ton dump truck, a dump truck with a plow, a front end loader, and a backhoe.[176] The court then looked to two federal district court cases and to a Michigan Supreme Court case, each of which involved heavy equipment operators of some kind.[177] Based on these cases, the Seventh Circuit claimed that "[a] number of courts" agree that heavy

[173] Krieg v. Seybold, 481 F.3d 512, 517 (7th Cir. 2007) (quoting *Skinner*, 489 U.S. at 628) (bracketed material in original).

[174] *Id*. at 518.

[175] Bluestein v. Dep't of Transp., 908 F.2d 451 (9th Cir. 1990); Am. Fed'n Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989). These cases are immediately distinguishable from the situation in *Krieg* because, like *Skinner*, they involved testing regimes created by regulations or official orders that limited the scope and circumstances of each drug test. *Bluestein*, 908 F.2d at 453; *Am. Fed'n Gov't Employees*, 885 F.2d at 886-88.

[176] *See Krieg*, 481 F.3d at 518.

[177] *Id*. (citing Am. Fed'n Gov't Employees v. Cheney, Nos. C-88-3823-DLJ, C-89-4112-DLJ, C-89-4443-DLJ, 1992 WL 403388 (N.D. Cal. Aug. 14, 1992); Plane v. United States, 796 F. Supp. 1070 (W.D. Mich. 1992); Middlebrooks v. Wayne County, 521 N.W.2d 774 (Mich. 1994)).

equipment operators can create a threat to safety that is sufficient under *Skinner*.[178]

The court next looked to federal district court cases in which public employees' positions were not safety-sensitive.[179]Two of those cases held that workers such as mail van and shuttle bus drivers did not satisfy the *Skinner* test. Krieg's job was safety-sensitive because Krieg operated equipment that was "larger and more difficult to operate" than the equipment in those cases.[180] The fact that he did not operate this equipment in a rural area away from other vehicles and pedestrians added to the safety-sensitive nature of Krieg's job.[181]

The first case the *Krieg* court relied upon was *American Federation of Government Employees v. Cheney*, an unpublished case from the United States District Court for the Northern District of California.[182] In *Cheney*, civilian employees of the Navy challenged the Navy's Drug-Free Workplace Plan, which was created in compliance with President Reagan's Executive Order requiring all federal agencies to create programs to eliminate drugs from their workplace.[183] The Navy's program included random testing for certain categories of employees.[184] All employees were subject to testing in the aftermath of an accident and to testing based on individualized suspicion.[185]

The *Cheney* court asserted that, in addition to balancing private interests against governmental interests in order to determine whether random drug testing was permissible, a court must also find that "there

[178] *Id*.

[179] *Id*. (citing Burka v. N.Y. City Transit Auth., 751 F. Supp. 441, 443-44 (S.D.N.Y. 1990); Nat'l Treasury Employees Union v. Watkins, 722 F. Supp. 766, 770 (D.D.C. 1989); Nat'l Treasury Employees Union v. Lyng, 706 F. Supp. 934, 947 (D.D.C. 1988)).

[180] *Id*. (referring to *Watkins* and *Lyng*).

[181] *Id*.

[182] Am. Fed'n Gov't Employees v. Cheney, Nos. C-88-3823-DLJ, C-89-4112-DLJ, C-89-4443-DLJ, 1992 WL 403388 (N.D. Cal. Aug. 14, 1992).

[183] *Id*. at *1.

[184] *Id*.

[185] *Id*.

is a clear, direct nexus between the nature of the employee's duties and the compelling governmental interest articulated by the government."[186] Throughout its opinion, the court emphasized that jobs that were "no more dangerous" than "traditional blue-collar tasks" would not raise safety concerns of the "significant level" required to justify a suspicionless search.[187]

On a motion for summary judgment, the court held that the government had *not* shown that the duties of forklift operators, tractor operators, road sweeper operators, and engineering equipment operators had a sufficient nexus to its interest in safety.[188] Instead, among those challenged, the only category of employees from the "Transportation Mobile Equipment Operators Family" of employees that *did* have the requisite nexus to safety was crane operators.[189] Unlike the other types of heavy equipment operators, crane operators lifted large loads above the ground, creating an opportunity for true disaster.[190] By contrast, the other operators did not create exceptional safety concerns because they drove their vehicles at "slower speeds than automobiles" and normally did not drive on public roads.[191]Thus, the court granted the plaintiffs' motion for summary judgment as to all of the mobile equipment operators except for the crane operators.[192]

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[186] *Id*. at *2.

[187] *Id*. at **11-12. Most pipefitters, riggers, and shipwrights performed tasks that were no more dangerous than ordinary blue-collar work. *Id*. The court emphasized elsewhere in its opinion that "[w]ork with machinery does not automatically carry with it the risk of unpredictable catastrophic accidents." *Id*. at *12. In all, the court analyzed thirteen different "families" of positions within the Navy's civilian workforce; these families were grouped by duties and were titled "plumbing family," "metal work family," "electrician work group," and the like. The court held that eight of these families were not safety-sensitive or were defined in a manner that included too many non-safety-sensitive workers. Three families were safety-sensitive. The court parsed the remaining two families, holding that some positions within those families were safety-sensitive and others were not.

[188] *Id*. at *13.

[189] *Id*. at **13-14.

[190] *Id*. at *13.

[191] *Id*.

[192] *Id*. at *14.

The next case *Krieg* relied upon was *Plane v. United States*, from the United States District Court for the Western District of Michigan.[193] In that case, civilian employees of the Defense Logistics Agency sought summary judgment in their challenge of that agency's Drug-Free Workplace Plan, which required certain groups of employees to undergo random drug testing.[194] These employees included forklift operators, tractor operators, engineering operators, and crane operators.[195] In holding that the duties of these employees presented a sufficient nexus to the government's safety concern, the court emphasized that the jobs at issue involved using heavy equipment to lift and move thousands of pounds to heights ranging from fourteen to fifty feet, and that some of the positions involved operating cutting torches near "fuel cells and other hazardous devices."[196] The court then held that the dangers to safety that these jobs presented were sufficient to justify random drug testing.[197] The court did not explain why the magnitude of these harms was "disastrous" within the meaning of *Skinner*; it only explained that the harms that could result were "immediate."[198]

Finally, the *Krieg* court drew support from *Middlebrooks v. Wayne County*, in the Supreme Court of Michigan,[199] for its claim that heavy equipment operators can create safety risks that are sufficient under

[193] Plane v. United States, 796 F. Supp. 1070 (W.D. Mich. 1992).

[194] *Id*. at 1070-71.

[195] *Id*. at 1075.

[196] *Id*. at 1075-76. Forklift operators might lift up to 10,000 pounds, tractor operators tow trailers through narrow passages and other difficult to navigate spaces and thus must make sure that all couplings are secure and that speed, clearance, and weight limitations are observed, crane operators lift up to 50 tons, engineering operators operate the cutting torches, and some of these jobs also involve operating a bulldozer. *Id*.

[197] *Id*. at 1077. Operators could drop their loads onto a fellow employee, hazardous materials could be released by a cutting torch accident, trailers towed by a tractor could tip over while navigating a narrow passage, equipment operators may back over someone while not looking, etc. *Id*.

[198] *See id*. (concluding that the harms were "immediate" and deciding, without reasoning, that they were "quite significant").

[199] 521 N.W.2d 774 (Mich. 1994).

Skinner to justify testing without individualized suspicion. The holding in *Middlebrooks* provides the strongest support for the conclusion that Krieg's job was safety-sensitive, because the plaintiff in *Middlebrooks* operated several of the same kinds of machines that Krieg operated. There, the plaintiff was an applicant for a position with the Wayne County Road Commission that would require him to operate "a riding lawn mower on highway medians and embankments," to drive "dump trucks carrying equipment" between road commission work sites and repair facilities, and to operate a front end loader.[200]

The court emphasized that the safety risks involved in the job for which Mr. Middlebrooks applied were more significant than those inherent in the operation of motor vehicles by the general public, because he would be operating this heavy equipment on the medians and embankments of roads designed for cars, vans, and trucks traveling at high rates of speed.[201] The court balanced these safety concerns against the diminished expectation of privacy that occurred when Mr. Middlebrooks applied for a job that he knew required drug testing—and when he, in fact, consented to the test.[202] It then concluded that it was appropriate to dismiss the plaintiff's claim that Wayne County violated his Fourth Amendment rights when it tested his urine for illegal drugs.[203]

In *Middlebrooks*, the court recognized that federal courts have not uniformly agreed that heavy equipment operation creates a safety risk of sufficient magnitude to justify drug testing without individualized suspicion, under the *Skinner* standard.[204] The *Middlebrooks* court lengthens its list of courts that have held in favor of testing heavy equipment operators by including cases regarding drivers of passenger

[200] *Id*. at 775.
[201] *Id*. at 779-80.
[202] *Id*. at 778-80.
[203] *Id*. at 779.
[204] *Id*. at 778-79.

vehicles, but the authority that it cites directly is limited to two cases—one of which is the *Plane* case discussed above.[205]

Therefore, the cases on which the Seventh Circuit relied to conclude that Krieg's position was safety-sensitive within the meaning of *Skinner* reveal only the following: First, one district court has held that most heavy equipment operators fall outside the "safety-sensitive" designation, but that crane operators fall within that title because they lift heavy loads high in the air.[206] Second, another district court held that several heavy equipment operators created safety risks that were "immediate" because they lifted heavy loads high in the air, moved heavy loads through difficult-to-manage passages, or operated cutting torches near explosive devices.[207] Third, a state court held that operating certain kinds of heavy equipment—the same kinds that Krieg operated—on highway medians or on highways created a safety risk within the meaning of *Skinner*.[208] And finally, lower federal courts overall have been divided about whether heavy equipment operation is a safety-sensitive task within the meaning of *Skinner*.[209]

All together, these cases do not justify the Seventh Circuit in resting on a simple assertion that courts have "upheld drug testing of heavy equipment operators" and have limited the groups that can be drug tested by excluding persons who drive mail vans and shuttle busses.[210] Thus, the Seventh Circuit's decision to include Krieg within the class of safety-sensitive employees was neither required by precedent nor supported by uniform persuasive authority. The Seventh Circuit announced its agreement with a rule that heavy equipment operators are safety-sensitive employees within the meaning of *Skinner* without ever addressing the fact that persuasive authorities were divided about whether they should be.

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[205] *Id*. at 779 nn.25, 26.

[206] *See* Am. Fed'n Gov't Employees v. Cheney, Nos. C-88-3823-DLJ, C-89-4112-DLJ, C-89-4443-DLJ, 1992 WL 403388 (N.D. Cal. Aug. 14, 1992).

[207] *See* Plane v. United States, 796 F. Supp. 1070 (W.D. Mich. 1992).

[208] *See Middlebrooks*, 521 N.W.2d 774.

[209] *See id.*

[210] Krieg v. Seybold, 481 F.3d 512, 518 (7th Cir. 2007).

2. The Seventh Circuit's Broad Interpretation of *Skinner* Will Have Widespread Effect

Because the Seventh Circuit employed a broader application of the *Skinner* concept of safety-sensitive employees than did some federal courts, it should have explained why it was adopting the broader view. Beyond the need for reasoned judicial opinions, this failure on the part of the court is particularly severe because the effect of this application was to create a bright line rule[211] excepting a large number of public employees from a constitutionally-required protection.

While not every blue-collar worker operates heavy machinery, the Seventh Circuit makes clear in *Krieg* that blue-collar workers other than heavy equipment operators have safety-sensitive positions as well. The court lists, as representatives of some of the other groups of safety-sensitive employees, workers in the aviation, rail, highway, and water transportation industries.[212] Blue-collar workers account for approximately 245,000 of the federal government's 1.75 million employees.[213] That is about 14% of the federal workforce. Add to these all of the blue-collar workers employed by State and local governments, and the result is a sizable portion of the public workforce.

While there are many instances in which members of the public will be subject to suspicionless searches of some kind—such as airport screenings and business inspections—each of these exceptions has

[211] *See supra* Part II.

[212] *Krieg*, 481 F.3d at 518.

[213] Am. Fed'n of Gov't Employees, AFGE At A Glance, http://www.afge.org/Index.cfm?Page=AFGEFacts (last visited Dec. 6, 2007); Stephen Barr, *Eagerly Anticipated Raises for Blue-Collar Workers Are a Tangle*, WASH. POST, Mar. 10, 2004, at B02, *available at* http://www.washingtonpost.com/ac2/wp-dyn/A44771-2004Mar9?language=printer.

been the result of significant discussion on the part of the courts.[214] Each has its own narrowly drawn limits and each expansion of such exception is in effect "tampering with the scales of justice" in an area of law in which a "citizen's interest in freedom" is supposed to be given additional weight.[215]

The Seventh Circuit incorrectly interpreted the limits of the exception for workplace drug testing by removing any weight on the side of a requirement of individualized suspicion.[216] Theoretically problematic on its own, this mistake became disastrous when the court additionally held, without adequate explanation, that large numbers of ordinary blue-collar workers are subject to that exception. This failure is particularly troublesome because one of the three cases on which the Seventh Circuit relied makes clear that the safety exception should not be construed in a manner that will encompass ordinary blue-collar workers.[217]

B. A Lost Incentive for Non-Governmental Input and for Less Intrusive Means

Even if it was appropriate for the Seventh Circuit to expand the safety exception in this way, it is not at all clear that this expansion is desirable. This is because the policies underlying the Fourth Amendment favor the encouragement of methods whereby government agents seek input from the public or from the targets of searches before conducting those searches.

For example, one purpose of the Fourth Amendment is to protect citizens against intrusions on their privacy where those intrusions are

[214] *See supra* Part I for an introduction to these exceptions. *See also* Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 449-50 (1990) (safety-based checkpoint stops rely on different precedent than do safety-based workplace drug tests).

[215] *See Sitz*, 496 U.S. at 473 (Stevens, J., dissenting).

[216] *See supra* Part II.

[217] Am. Fed'n Gov't Employees v. Cheney, Nos. C-88-3823-DLJ, C-89-4112-DLJ, C-89-4443-DLJ, 1992 WL 403388, **11-12 (N.D. Cal. Aug. 14, 1992).

not justified at the outset by some legitimate governmental interest.[218] This purpose is better served when unreasonable searches are *prevented* than when such searches are merely punished or stopped.[219] Input from the public or from the intended subjects of a search could help government bodies become aware of potential problems with their intended drug testing programs. For example, there might be reasons why a particular group should be excluded from testing[220] or why a particular collection protocol is worrisome. Discovering these problems before the testing program is implemented could both decrease the need for litigation and promote the Fourth Amendment policy of preventing unnecessary intrusion.

Public input also serves the purpose that underlies the warrant requirement: ensuring that a neutral body determines the scope of the justified intrusion by describing the persons, places, and things to be affected.[221] If the government and the individuals to be affected discuss these terms before a testing program is implemented, then they can potentially reach an agreement about what kind of testing program is reasonable. This might include not only the time, place, and persons involved, but could also include a discussion of less intrusive alternatives to random testing. This agreement may not be "neutral," but it will represent *both* interested parties rather than only one. Clearly, the Fourth Amendment does not require such input. However, input of this kind promotes the interests that underlie the law.

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[218] *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." (quoting Union Pac. R. Co. v. Botsford, 141 U.S. 250, 251 (1891))).

[219] *See* Mapp v. Ohio, 367 U.S. 643, 648 (1961) (discussing the need for a "deterrent safeguard" to protect the Fourth Amendment), *abrogated in part by* United States v. Leon, 468 U.S. 897 (1984).

[220] *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 677-78 (1989) (upholding a testing program with regard to one group of Customs Service employees but remanding for further information as to the need for testing *all* employees in a separate group).

[221] Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 621-22 (1989).

The City of Marion apparently believed that there was some benefit to receiving input from the workers of the Department of Streets and Sanitation about the City's drug testing policy. The City had bargained with the union representing those employees and signed a collective bargaining agreement that allowed the City to test workers for drugs after accidents and upon reasonable suspicion.[222] Further, the parties had negotiated a personnel handbook that allowed the City to test "safety-sensitive" employees—those who held a commercial driver's license or operated commercial motor vehicles—on a random basis.[223]

Nonetheless, the City unilaterally adopted a new handbook that re-defined "safety-sensitive" employees to include all employees with duties "related to the safe operation of City equipment."[224] The union and the employees represented by it refused to agree to these terms, but the City implemented them anyway.[225] Krieg fell within this new category of safety-sensitive employees.[226] Therefore, in essence, Krieg's termination and subsequent lawsuit was the result of the City's decision to back out of the deal that it had made with its employees about what kinds of searches were permissible.

Does the Fourth Amendment provide redress for such bad behavior? Of course not. But when the City chose to bargain with the employees, it obtained their consent[227] before conducting an intrusive

[222] Krieg v. Seybold, 481 F.3d 512, 514-15 (7th Cir. 2007).

[223] *Id*. at 515.

[224] *Id*.

[225] *Id*.

[226] *Id*. at 515-16.

[227] Here, the author uses this term "consent" in its more colloquial sense. Krieg argued that because Indiana unions do not have the benefit of certain public employee collective bargaining laws available in other states, the union in this case could not have waived his Fourth Amendment right to be free from unreasonable searches even if it had agreed to random drug testing of non-CDL holders. Nonetheless, Krieg agreed that some unions do have the power to waive employees' rights. *See* Reply Brief of Plaintiffs-Appellants, Robert Krieg and American Federation of State, County, and Municipal Employees, Local 3063, 2006 WL 3098735, at **14-17, Krieg v. Seybold, 481 F.3d 512 (7th Cir. 2007).

search. When it unilaterally adopted a different policy with regard to such searches, the result was that employees felt—correctly or incorrectly—that the intrusion was unjustified.[228]

By condoning the City's behavior in the *Krieg* case, the Seventh Circuit has diminished the incentive for the City to bargain in the future. If the City can implement a random drug testing program without showing that it is the only workable way to address its safety concerns, then it will have little incentive to engage in the lengthy and costly process of bargaining with its employees about whether and to what extent such a program is necessary. Where before the City sought the union's input into which employees should be subject to random testing, it has now been told that it need not bother.

CONCLUSION

The Seventh Circuit's decision to consider Krieg a safety-sensitive employee was not wrong. However, because the Seventh Circuit incorrectly asserted that safety-sensitive employees can be subject to suspicionless drug testing as long as the interests promoted by the testing program outweigh the employees' privacy interests, the overall result of the court's decision in *Krieg* was problematic. First, it misconstrues Supreme Court precedent in a way that confuses the context of a public workplace with that of a public school. This confusion created a bright line rule in an area where the Supreme Court has required a fact-sensitive inquiry. Second, the result of this confusion was that the court failed to inquire whether departure from the Fourth Amendment requirement of individualized suspicion was

[228] This effect can be seen in Krieg's reaction to the unannounced drug test that precipitated this lawsuit. Krieg first refused to submit to the test, and then immediately tried to call his union attorney. *Krieg*, 481 F.3d at 515-16. One can infer that Krieg did not believe that the City was permitted to test him in the manner it was asserting that it could. As a result, the City had to resort to threats to call police before Krieg would leave the premises. *Id.* If the City had resolved its differences with its employees through bargaining, then Krieg would have known that whatever options his boss presented to him were the same options that he would hear from his union representative. If nothing else, this would have the value of reassuring Krieg that he was not being unfairly singled-out or otherwise mistreated.

justified by the safety concerns that the City of Marion raised. Third, this failure undermines incentives for bargaining with public employees with regard to the conditions that will trigger drug testing. Such bargaining is desirable because it promotes the goals of the Fourth Amendment itself.

Because when the court labeled Krieg a safety-sensitive employee it did not include a principled reason to distinguish him from other heavy equipment operators or from large numbers of other kinds of blue-collar workers, these problematic results will be far-reaching in effect, if the Seventh Circuit does not remedy its mistakes.