Nova Law Review

Volume 11, *Issue* 2 1987 *Article* 15

Mass Round-Up Urinalysis and Original Intent

Robert L. Stone*

*

Mass Round-Up Urinalysis and Original Intent

Robert L. Stone

Abstract

On Constitution Day, September 17, 1986, forty-eight days before the national elections, the Federal Register published President Ronald Reagan's Executive Order 12564, "Drug-Free Federal Workplace," ordering "all agencies in the Executive Branch" to develop and implement plans to collect and test urine from all government employees in "sensitive positions."

KEYWORDS: urinalysis, mass, round-up

Mass Round-Up Urinalysis and Original Intent

Robert L. Stone*

> When the Fourth . . . Amendment [was] adopted, "the form that evil had theretofore taken" had been necessarily simple. Force and violence were then the only means . . . by which a government . . . could secure possession of [the individual's] papers and other articles incident to his private life — a seizure effected, if need be, by breaking and entry. . . . But "time works changes, brings into existence new conditions and purposes." Subtler and more far-reaching means of invading privacy have become available to the government. . . . The progress of science in furnishing the government with means of espionage is not likely to stop with wire tapping. Ways may some day be developed . . . in the psychic and related sciences . . . of exploring unexpressed beliefs, thoughts and emotions. "That places the liberty of every man in the hands of every petty officer" was said by James Otis of much lesser intrusions than these. To Lord Camden, a far slighter intrusion seemed "subversive of all the comforts of society." Can it be that the Constitution affords no protection against such invasions of individual security?[1]

On Constitution Day, September 17, 1986, forty-eight days before the national elections, the Federal Register published President Ronald Reagan's Executive Order 12564, "Drug-Free Federal Workplace," ordering "all agencies in the Executive Branch" to develop and implement plans to collect and test urine from all government employees in "sensitive positions."[2] The Federal Office of Personnel Management estimates that about half of the federal government's 2.2 million civilian

* B.A., Stanford University, 1969; M.A., Columbia University, 1972; J.D., University of Chicago, 1982; Ph.D. University of Chicago, 1986; Intern in office of the State's Attorney of Cook County, Illinois, 1981; Law Clerk, United States District Court, Northern District of Illinois, 1982-1983; member of the bar of Illinois, admitted 1982.

1. Olmstead v. United States, 277 U.S. 438, 473-74 (1928) (Brandeis, J., dissenting from the holding that wire-tapping is not regulated by the fourth amendment because, unlike cases before 1791, it does not involve force).

2. Order of September 15, 1986, 51 Fed. Reg. 32,889 (1986).

employees are subject to the President's order.[3]

State and federal courts recently have decided at least fifteen cases[4] involving such "mass round-up urinalysis,"[5] and a clear judicial

---

3. Kerr, *Government Drug Tests Losing in Most Court Cases*, Chicago Daily L. Bull., Dec. 11, 1986, at 2, col. 2.

4. American Fed'n of Gov't Employees v. Weinberger, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986) (civilian policemen on a military base); National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986) (Customs Service workers who seek promotion to "covered positions"); Penny v. City of Chattanooga, 648 F. Supp. 815 (E.D. Tenn. 1986) (policemen); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (firemen); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (firemen and policemen); Patchoque-Medford Congress of Teachers v. Board of Educ., 119 A.D.2d 35, 505 N.Y.S.2d 888 (App. Div. 1986), (appeal pending) (teachers); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir. 1986), *cert. den.*, 107 S. Ct. 577 (1986) (jockeys), the only published case permitting random drug testing, the holding of which is limited to the facts: "confidential" and unsupervised testing of small numbers of jockeys in an industry that is traditionally heavily regulated and thus provides elaborate routines and established procedures to protect the subjects; Caruso v. Ward, 133 Misc. 2d 544, 506 N.Y.S.2d 789 (Sup. Ct. 1986) (members of elite City Police Organized Crime Control Bureau); National Fed'n of Fed. Employees v. Weinberger, 640 F. Supp. 642 (D.D.C. 1986), (appeal pending) (civilian employees of the Department of the Army in "critical" jobs); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) (school bus attendant); Turner v. Fraternal Order of Police, 500 A.2d 1005 (D.C. 1985) (policemen); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985) (policemen and firemen); McDonell v. Hunter, 612 F. Supp. 1122 (S.D. Iowa, 1985), *modified*, 809 F.2d 1302 (8th Cir. 1987) (employees of Department of Corrections); Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (prisoners may be tested at random); Committee for G.I. Rights v. Callaway, 518 F.2d 466 (D.C.C. 1975) (soldiers on active duty may be tested in mass round-ups). The court in Burka v. New York City Transit Auth., 110 F.R.D. 595 (S.D.N.Y. 1986), has not yet ruled on the substantive issues. The following cases have not yet been reported: *The Philadelphia Post Office Case*, Chicago Daily L. Bull., Dec. 11, 1986, at 2, col. 2 (E.D. Pa. Dec. 11, 1986); Allen v. County of Passaic, No. L-19262-86 (N.J. Super. Ct. App. Div. June 23, 1986); Bostick v. McClendon, No. C-85-233A (N.D. Ga. July 10, 1986); Guiney v. Roache, No. 86-1346-K (D. Mass. 1987) (the Boston Police case); and Fraternal Order of Police v. City of Newark, No. L-095001-85E (N.J. Super. Ct. App. Div. Mar. 20, 1986) (appeal pending).

The following cases have permitted drug testing where there is a reasonable individualized suspicion: Association of Western Pulp and Paper Workers v. Boise Cascade Corp., 644 F. Supp. 183 (D. Or. 1986) (employees of private corporation); King v. McMickens, 120 A.D.2d 351, 501 N.Y.S.2d 579 (App. Div. 1986) (corrections officer); Mack v. United States, No. 85 C 5764, (S.D.N.Y. 1986) (FBI agent); Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985) (employees observed by undercover investigator smoking marijuana on the job); Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir. 1976), *cert. den.*, 429 U.S. 1029 (1976) (Chicago Transit Authority trainmen and busdrivers involved in serious accidents or intoxicated

consensus has emerged. In the words of Judge R. Allan Edgar, who was appointed by President Reagan in April of 1986, "All courts which have ruled upon the validity of urine tests for public employees . . . have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as 'reasonable suspicion.' "[6] This article is a summary of those cases.

For assessing the purpose of the White House in promulgating Executive Order 12564, it is important to note that it was signed after most of the opinions discussed in this article were written and thus after the judicial consensus against it had emerged. Also, the Order is now being implemented without benefit of public hearings.[7]

The courts agree that the fourth amendment to the United States Constitution prohibits mass round-up urinalysis — although the Constitution permits reasonable tests under controlled circumstances. 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.[8]

Although the fourth amendment on its face restricts only the govern-

---

on the job). *See also* Krolick v. Lowery, 32 A.D.2d 317, 302 N.Y.S.2d 109 (App. Div. 1969) (drunken fireman who fell off of moving fire truck).

5. *Capua*, 643 F. Supp. at 1516.

6. *Lovvorn*, 647 F. Supp. at 881 (citations omitted).

7. As of March of 1987, there have been no rule-making or other hearings scheduled on the new Order, although such hearings are provided for in the Administrative Procedure Act, 5 U.S.C. §§ 553 and 556. Arguably the Order is exempt from the requirement for hearings because it is a "matter relating to agency management or personnel." 5 U.S.C. § 553(a)(2). But the courts have ruled that mass round-up urinalysis is not a mere personnel matter. *Von Raab*, 649 F. Supp. at 380; *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986). And the courts have ruled repeatedly that it is "highly undesirable for an agency to announce a new *per se* rule without *either* a rule-making *or* an evidentiary hearing, thereby denying itself the light on the rule which such proceedings would afford." NLRB v. Majestic Weaving Co., 355 F.2d 854, 862 (2d Cir. 1966) (denying enforcement of a ruling where the determinative issue was raised after a hearing). Did the Administration choose to proceed without hearings because it was obvious that hearings would have revealed the problems recognized in the opinions discussed herein?

8. U.S. CONST. amend. IV.

ment of the United States, it is settled law that the fourteenth amendment incorporates the fourth amendment against the States.[9] Also, it is settled law that taking a sample of blood for testing is a search and seizure regulated by the fourth amendment.[10] And all courts that have ruled on the question agree that urine, for these purposes, is like blood.[11] Thus, although the courts have legitimate "doubts whether requiring a person to provide a sample of his urine for analysis is the kind of 'search' contemplated by the framers of the fourth amendment,"[12] the courts correctly understand that the true meaning of original intent of a law is not limited to what its framers actually had in mind at the time it was passed into law.

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[13]

---

9. Wolf v. Colorado, 338 U.S. 25 (1949).
10. Schmerber v. California, 384 U.S. 757 (1966).
11. *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986); *Von Raab*, 649 F. Supp. at 380; *Lovvorn*, 647 F. Supp. at 879; *Capua*, 643 F. Supp. at 1513; *Patchoque-Medford Congress of Teachers*, 119 A.D.2d at 37, 505 N.Y.S.2d at 890; *Caruso*, 133 Misc. 2d at 547, 506 N.Y.S.2d at 792; *Storms*, 600 F. Supp. at 1217; *McDonell*, 612 F. Supp. at 1127; *Allen*, 601 F. Supp. at 488; and *Division 241 Amalgamated Transit Union (AFL-CIO)*, 538 F.2d at 1267.
12. *Allen*, 601 F. Supp. at 488.
13. Weems v. United States, 217 U.S. 349, 373 (1909), quoted at length by Justice Brandeis in his dissent in Olmstead v. United States, 277 U.S. 438, 472-73 (1928), which holds that wiretapping is not regulated by the fourth amendment because, unlike the search at issue, it does not involve force or entry.

The Framers were thinking of writs of assistance, which gave officers of customs blanket authority to make general searches for goods imported into the colonies in violation of the laws of England. (This writ derives its name from its requirement that all civil officers and subjects of the Crown assist in its execution the officer of the customs to whom it was issued.) Instead of describing the place to be searched and the things to be seized, the writ of assistance gave the officer of customs, to whom it was issued by the court, the absolute power to enter and search any building, ship, or other place where he reasonably suspected smuggled goods to be and to seize and remove them. Historians agree that the resentment of the colonists, especially in Massachusetts, to these writs was one of the causes of the American Revolution. John Adams, second President of the United States, says that James Otis's arguments before the Superior Court in Boston against writs of assistance "breathed into this nation the breath of life."[14] Since legal authorization to conduct mass round-up urinalysis closely resembles such a general warrant, inclusion of it under the fourth amendment's ban is a legitimate, strict interpretation of the original intent of the fourth amendment.

The fourth amendment proscribes only those searches and seizures that are unreasonable. The decision as to whether a given search or seizure is reasonable requires a balancing of the need to search against the intrusiveness of a particular kind of search.[15] Before one may invoke the protection of the fourth amendment, one must have a reasonable or legitimate expectation of privacy, according to the Supreme Court; and one's expectation is reasonable if (1) one has a subjective expectation of privacy and (2) this expectation is one which society is prepared to recognize as reasonable.[16] Given the complexity of this bal-

---

14. Letter to Hezekiah Niles, Jan. 14, 1818, quoted in Ervin, *The Exclusionary Rule: An Essential Ingredient of the Fourth Amendment*, 1983 SUP. CT. REV. 283, 286. For a quotation from this letter and a general discussion of the extraordinary importance of resentment against unreasonable searches and seizures for the founding generation, *see id. See also* 2 LEGAL PAPERS OF JOHN ADAMS 107 (Wroth & Zobel ed. 1965).

15. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985); Bell v. Wolfish, 441 U.S. 520, 559 (1979).

16. Smith v. Maryland, 442 U.S. 735, 739-40 (1979); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring). The *Smith-Katz* doctrine is cited as authoritative in *Caruso*, 133 Misc. 2d at 547, 553, 506 N.Y.S.2d at 792, 798; *Turner*, 500 A.2d at 1010-11; *Lovvorn*, 647 F. Supp. at 880; *Capua*, 643 F. Supp. at 1514; and *McDonell*, 612 F. Supp. at 1127.

ancing process and the importance of the particular facts and procedures in each case, it is remarkable that a judicial consensus has emerged so quickly against a much-publicized initiative of the Administration. The remainder of this article will summarize this consensus using the following outline:

I. Considerations that Weigh in the Balance in Favor of Mass Round-Up Urinalysis: Arguments Pro and Con

A. *Urgency*

Proponents argue that the extraordinary urgency of the problem of drug abuse, and the frightening inability of the police to control the problem, justify extraordinary means. But in fact, in each case where data are available, where employees have been tested by surprise or under observation, there is no evidence of widespread drug abuse. In *Penny v. City of Chattanooga*,[17] only two of 360 policemen tested positive in 1985; in *Capua v. City of Plainfield*,[18] sixteen of 103 policemen and firemen tested positive; and in *City of Palm Bay v. Bauman*,[19] five firemen and no policemen tested positive.

B. *Efficiency*

Proponents argue that mass round-up urinalysis is the most efficient way to deter drug abuse. But the courts remind us that the law is not economics:

> Taking and testing body fluid specimens, as well as conducting searches and seizures of other kinds, would help the employer discover drug use and other useful information about employees. There is no doubt about it — searches and seizures can yield a wealth of information useful to the searcher. (That is why King George III's men so frequently searched the colonists.)[20]

C. *Limited Scope*

Proponents argue that the test in whichever case is at bar is not "mass" testing but instead is limited to those employees in truly sensitive positions. In *National Treasury Employees Union v. Von Raab*,[21] testing was limited to customs agents who search for illegal drugs and

---

17. 648 F. Supp. 815 (E.D. Tenn. 1986).
18. 643 F. Supp. 1507 (D.N.J. 1986).
19. 475 So. 2d 1322 (Fla. 5th Dist. Ct. App. 1985).
20. *McDonell*, 612 F. Supp. at 1130; *quoted in AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986); and in *Caruso*, 133 Misc. 2d at 550, 506 N.Y.S.2d at 795.
21. 649 F. Supp. at 380.

who were applying for promotion. In *Caruso v. Ward*,[22] testing was limited to the elite Police Organized Crime Bureau that deals with drug dealers. And in *American Federation of Government Employees, AFL-CIO (AFGE) v. Weinberger*,[23] the testing was limited to those in the forty most critical positions out of 2,000 civilian employees at Fort Stewart, Georgia. But even in these cases, the courts have recognized that mass round-up urinalysis of such employees is unreasonable — absent reasonable evidence of mass abuse — in spite of the fact that these employees, "as opposed to the general citizenry, have a . . . diminished expectation of privacy."[24] If these groups may not be tested with mass round-up urinalysis, then very few groups may be so tested. *AFGE v. Weinberger* suggests in a dictum that employees involved directly in an activity that is "intimately or even regularly related to national security concerns" may be tested with mass round-up urinalysis.[25]

II. Considerations that Weigh in the Balance against Mass Round-Up Urinalysis

A. *The Tests are Not Reliable*

The test that is used in most instances is the Enzyme Multiplied Immunoassay Technique (EMIT), produced by the Syva Company. Syva claims that, when used properly, EMIT has a failure rate of one to five percent.[26] The practical value of the test seems to depend upon the composition of the group to which it is applied. But, even in groups in which one would not expect to find a high incidence of drug use many "false positives" are elicited by such tests. If we assume that Syva's claim of five percent inaccuracy is correct, and if the facts in *Penny v. Chattanooga* are typical and the guilty rate is much more

22. 133 Misc. 2d 544, 506 N.Y.S.2d 789 (Sup. Ct. 1986).
23. 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986).
24. *Lovvorn*, 647 F. Supp. at 880 (citing *Allen*, 601 F. Supp. at 489-91; *Turner*, 500 A.2d at 1007-08; and Mack v. United States, No. 85 Civ. 5764 (S.D.N.Y. Apr. 21, 1986)). *See also AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986).
25. *AFGE*, 1 Individual Employees Rights (BNA) at 1139.
26. *Von Raab*, 649 F. Supp. at 380. (EMIT gives a false positive for marijuana if the subject has ingested a prescription antiinflammatory drug such as Anaprox. EMIT gives a false positive for amphetamines if the subject has ingested cold preparations such as Nyquil or Contac. And it gives a false positive for heroin if the subject has taken cough medicine containing codeine.)

than about one percent, then use of EMIT will falsely accuse five people for every one true accusation. Clearly, prudence and fairness would suggest that the tests should only be applied when there is at least some reasonable suspicion that the subject is guilty.[27]

The courts generally have recognized the significance of the tests' unreliability. "All drug testing procedures result in false positives."[28] One court has gone so far as to hold that EMIT field tests are so unreliable that their use with any kind of personnel sanction is a per se violation of due process.[29]

True, the results of EMIT may be checked against the results of the more accurate and much more expensive[30] method of gas chromatography/mass spectroscopy (GCMS). But each false positive has a profound impact on the life of the unlucky subject. In *Penny*, the plaintiffs were suspended and their identities reported to the local newspaper after testing positive with EMIT tests. Apparently GCMS is too expensive and slow for practical use in a mass round-up. In *Jones v. McKenzie*,[31] the plaintiff, after testing positive with the EMIT, claimed that she had never taken drugs and volunteered immediately for verification tests. Two verification tests were negative, but the plaintiff was dismissed from her job nonetheless. It seems that the employer thought that the plaintiff had detoxified in the interim, and that whichever test is positive is more accurate.

---

27. *See* Anderson, *Too Many Bugs in Screening Measures*, Wall St. J., Apr. 14, 1986, at 22, col. 3. Dr. Anderson is an academic physician at St. Elizabeth's Hospital, Boston, and teaches at Harvard and Tufts Universities. His article dismissing scientific doubters of yellow rain appeared in the Wall Street Journal last December.

28. *Von Raab*, 649 F. Supp. at 380. The procedural dangers inherent in relying on the results of such tests are well documented in both legal and medical literature. *See, e.g.*, Jones v. McKenzie, 628 F. Supp. at 1505-06 and authorities cited therein; *see also* Divoll & Greenblatt, *The Admissibility of Positive EMIT Results as Scientific Evidence: Counting Facts, not Heads*, 5 J. CLINICAL PSYCHOPHARMACOLOGY 114-16 (1985). *Capua*, 643 F. Supp. at 1521. *See also Jones*, 628 F. Supp. at 1505-06; and *Storms*, 600 F. Supp. at 1221-22.

29. *Von Raab*, 649 F. Supp. at 380.

30. "Mandatory drug testing of urine would cost $8 billion to $10 billion a year if it is to be done accurately, the editor of the Journal of the American Medical Association warned . . . . Dr. George Lundberg . . . based his estimates on actual costs expended by the military services for programs to test urine to detect illicit drug use. The military spends $90 to $100 for each specimen tested, not counting the expense of lost time." Van, *Vote Urged on Drug Tests*, Chicago Tribune, Dec. 5, 1986, at 21, col. 1.

31. 628 F. Supp. 1500 (D.D.C. 1986).

B. *Testing Must be Public and by Surprise to be Effective*

If samples are taken in private without supervision, the test is a farce. In *Penny*, some employees carried clean urine samples to the test in balloons in their trousers. It is widely reported that some employees buy and sell drug-free urine and even insert it into their bladders using catheters.[32] Therefore, many tests have been conducted by surprise, and employees have been compelled to urinate in front of a bonded testing agent.[33] The minimum precaution is to observe the subject from the shoulders up while he is urinating and then to observe the temperature of the sample — and then to observe him directly if there is a suspicion of tampering. Observation must be closer for women than for men. But because of the catheter problem, even this type of procedure must be done by surprise to catch the careful abuser. The gross indignity of such proceedings has influenced the courts to rule against mass round-up urinalysis even where observation is "close but not direct."[34]

The courts also have pointed out that the problematic character of such proceedings is shown by the fact that all states have laws against urinating in public. "[S]ociety has generally condemned and prohibited the act in public."[35]

C. *Urinalysis Provides too Much Information*

It is characteristic of modern technology that it provides not less but more information than is good for people.

> [C]ompulsory urinalysis forces plaintiffs to divulge private, personal medical information unrelated to the government's professed interest in discovering illegal drug use. Advances in medical technology make it possible to uncover disorders, including epilepsy and diabetes [as well as pregnancy and hence either miscarriage or abortion], by analyzing chemical compounds in urine.[36]

Many courts have expressed concern that urinalysis may reveal use of very small amounts of marijuana "up to two to three weeks" before the

---

32. *Altered Urine Samples Make Drug Testing Chancy*, Chicago Tribune, Dec. 4, 1986, at 46, col. 1.
33. *Capua*, 643 F. Supp. at 1511.
34. *Von Raab*, 649 F. Supp. at 380; *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986).
35. *Capua*, 643 F. Supp. at 1514; *Von Raab*, 649 F. Supp. at 380.
36. *Capua*, 643 F. Supp. at 1515.

test and hence provide information unrelated to job performance.[37]

D. *Mass Round-up Urinalysis Shifts the Burden of Proof in an Impermissible Manner*

Voluntary testing is no testing at all. To be a true test, the testing procedure must include punishment for those who decline to submit to testing. When an authorized tester selects an employee for testing, that employee is then presumed guilty, even if there is no suspicion whatsoever against him. Unless the employee proves that he is innocent, he will be punished. And to prove his innocence, the employee must submit to a humiliating and intimidating test.

> The invidious effect of such mass, round-up urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. The City of Plainfield essentially presumed the guilt of each person tested. The burden was shifted onto each fire fighter to submit to a highly intrusive urine test in order to vindicate his or her innocence. Such an unfounded presumption of guilt is contrary to the protection against arbitrary and intrusive government interference set forth in the Constitution . . . .[38]

Unfounded presumptions of guilt are contrary to a millennium of Anglo-American legal tradition.

III. Legal Conclusions

A. *No Warrant is Required*

The courts have long recognized that governmental agents may conduct warrantless searches whenever it would be unreasonable to require a warrant, provided the scope of the warrantless search is reasonably related to the circumstances which justified the search. The courts in the drug-use testing cases often cite *Terry v. Ohio*,[39] in which a policeman frisked a suspect encountered on a street and confiscated a pis-

---

37. *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986) (citing NFFE v. Weinberger, 640 F. Supp. 642, 647 (D.D.C. 1986)). *See also Von Raab*, 649 F. Supp. at 380; *McDonell*, 612 F. Supp. at 1130.

38. *Von Raab*, 649 F. Supp. at 386 (quoting *Capua*, 643 F. Supp. at 1517) *See also Lovvorn*, 647 F. Supp. at 875.

39. 392 U.S. 1 (1968).

tol, as the guiding case.[40]

B. *Reasonable Suspicion is the Standard*

The courts have agreed not only that mass round-up urinalysis is illegal, but they have agreed on the proper standard for when urinalysis is legal: whenever the employer has a reasonable suspicion that an employee is intoxicated. Therefore, the fourth amendment will not hinder the government significantly in its efforts to detect harmful drug abuse. To date no plaintiff has argued that there is a constitutional right of penumbral privacy to use the drugs of one's choice.

"All courts which have ruled upon the validity of urine tests for public employees, including police officers and firemen, have required as a prerequisite some articulable basis for suspecting that the employee was using illegal drugs, usually framed as 'reasonable suspicion.' "[41] For example, *King v. McMickens*[42] holds that it is lawful to dismiss those employees who refuse urinalysis after a "reasonable suspicion" of drug abuse. Likewise, *Division 241 Amalgamated Transit Union v. Suscy*[43] affirms dismissal of a suit by bus drivers and trainmen against the Chicago Transit Authority, challenging the legality of the CTA's practice of forcing employees to submit to urinalysis after they are involved in any serious accident or whenever they are suspected by two supervisors of being under the influence of liquor or narcotics.

C. *Probable Cause is Rejected as the Standard*

"Reasonable suspicion" means "individualized suspicion" and is

---

40. Opinions that cite *Terry* as a guide to the reasonableness of urinalysis include *Lovvorn*, 647 F. Supp. at 882; *Caruso*, 133 Misc. 2d at 547, 506 N.Y.S.2d at 792; *Capua*, 643 F. Supp. at 1516; *Turner*, 500 A.2d at 1007; *McDonell*, 612 F. Supp. at 1127-28; and *Allen*, 601 F. Supp. at 489.

41. *Lovvorn*, 647 F. Supp. at 881 (citing *Capua*, 643 F. Supp. at 1517; *City of Palm Bay*, 475 So. 2d at 1325; *Turner*, 500 A.2d at 1008-09; *McDonell*, 612 F. Supp. at 1129; *Allen*, 601 F. Supp. at 489; *Patchoque-Medford Congress of Teachers*, 119 A.D.2d at 38, 505 N.Y.S.2d at 891; *Jones*, 628 F. Supp. at 1508; and *Caruso*, 133 Misc. 2d 547, 506 N.Y.S.2d at 792-93). *See also AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986); *Von Raab*, 649 F. Supp. at 380; *Association of Western Pulp and Paper Workers*, 644 F. Supp. at 186; *King*, 120 A.D.2d at 353, 501 N.Y.S.2d at 681; *Division 241 Amalgamated Transit Union*, 538 F.2d at 1266-67; and *Krolick*, 32 A.D.2d at 323, 302 N.Y.S.2d at 115.

42. 120 A.D.2d 351, 501 N.Y.S.2d 679 (1986).

43. 538 F.2d 1264, 1267 (7th Cir. 1976), *cert. den.*, 429 U.S. 1029 (1976).

something between "mere suspicion" and "probable cause." The "probable cause" standard would significantly hinder the government's efforts to test for drug abuse, and this standard is decisively rejected in the case law. In *Patchogue-Medford Congress v. Board of Education*[44] the court declared that, "[w]e reject the argument that the type of test proposed in this case is warranted only upon a showing of full-scale probable cause."[45]

D. *Mere Suspicion is Rejected as the Standard*

Because the opinions reject the probable-cause standard, they are careful also to reject the mere-suspicion standard. "Reasonable suspicion is also referred to as founded suspicion, which this court has described . . . as . . . something less than probable cause, but something more than a mere suspicion. It is a reasonable suspicion that requires further investigation."[46]

For example, in *McDonell v. Hunter*[47] the subject was employed as a correctional officer at the Men's Reformatory at Anamosa, Iowa. He refused to submit to urinalysis after his employer "received confidential information indicating that he had been seen the previous weekend with individuals who were 'being looked at' by law enforcement officials regarding drug-related activities."[48] The employee was fined ten days' pay when he refused to submit to urinalysis, and the court ordered the employer to repay the lost salary. The court held that the employer did not yet have a reasonable suspicion and the employer's attorneys agreed:

> Defendants argue that "mere suspicion" rather than "reasonable suspicion" should be the standard . . . . This position is arguable, but I do not find it persuasive . . . The Fourth Amendment allows [employers] to demand of an employee a urine . . . specimen . . . only on the basis of a reasonable suspicion, based on specific objec-

---

44. 119 A.D.2d 35, 505 N.Y.S.2d (App. Div. 1986).

45. *Id.* at 38, 505 N.Y.S.2d at 891. "Probable cause is not required where the search is not aimed at the discovery of evidence for use in a criminal trial. Reasonable suspicion is sufficient." *King*, 120 A.D.2d at 353, 501 N.Y.S.2d at 681 (citation omitted).

46. *City of Palm Bay*, 475 So. 2d at 1326 (citations omitted). *Cf. Jones*, 628 F. Supp. at 1509 (dictum).

47. 612 F. Supp. 1122 (S.D. Iowa, 1985).

48. *Id.* at 1126.

> tive 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.[49]

On the other hand, in *King*, the employer had

> contacted a confidential informant who advised him that petitioners [also correctional officers] had frequented a certain drug trafficking location and that they used illegal drugs at such location. Further investigation revealed that the location was known to the police department as premises used for drug trafficking. Thereafter, the investigator received information from the informant that petitioners had recently been observed using drugs at the location.[50]

The petitioners refused to submit to urinalysis, so the employer dismissed them from the Corrections Department after a hearing. The court held that this action was reasonable.

E. *Involuntary Waivers of Constitutional Rights are Not Valid*

In the typical case, the employer attempts to coerce its employees to sign a form that states that the employees consent to random urinalysis in the future, by making such a waiver a condition of continued employment.[51] The courts agree that coerced waivers of constitutional rights are not valid.[52] "In a long line of cases, the Supreme Court has consistently adhered to the principle that the state may not condition access to public benefits or privileges on the waiver of a constitutional right. . . ."[53]

F. *Mass Round-Up Urinalysis Does Not Violate the Fifth Amendment*

The privilege against self-incrimination "applies only to testimonial communications."[54] On the other hand, *NTEU v. Von Raab*[55]

---

49. *Id.* at 1129-30.
50. 120 A.D.2d at 352, 501 N.Y.S.2d at 680.
51. *See McDonell*, 612 F. Supp. at 1134, for an example of such a form.
52. *Id.* at 1131.
53. *Caruso*, 133 Misc. 2d at 548, 506 N.Y.S.2d at 793. *See also City of Palm Bay*, 475 So. 2d at 1325.
54. *City of Palm Bay*, 475 So. 2d at 1324.
55. 649 F. Supp. 380 (E.D. La. 1986).

holds that a public employer violates the fifth amendment when it requires employees to fill out a form stating which drugs they have used recently, because that kind of information is a testimonial communication.[56]

G. *Mass Round-Up Urinalysis is Not a Mere Personnel Action*

The court in *National Federation of Federal Employees v. Weinberger*,[57] dismissed the employees' lawsuit on the ground that drug testing is a "federal personnel policy," a mere "labor-management dispute;" therefore challenges to such a policy must proceed under the Civil Service Reform Act (CSRA). According to the CSRA, the aggrieved employee waits to be tested, then refuses, then allows himself to be dismissed, then appeals his dismissal to the Merit Systems Protecting Board (MSPB), then appeals from the MSPB to the federal circuit court of appeal for *ex post facto* judicial review. This approach to the problem has been squarely rejected as "absurd" or "irrational" by all other courts that have considered this question.[58] First, warrantless searches simply are not mere "personnel actions," so a claim for injunctive relief is not covered under the CSRA. Second, it is absurd to require employees to submit to an unconstitutional program and then to seek damages for it. Such a mechanism manufactures damages. Third, the majority of subjects who submit to urinalysis and test negative would have no cause of action under the CSRA because no personnel action would be taken against them.

IV. When Is Mass or Random Urinalysis Permitted?

A. *In the Military*

"Servicemen are subject to far more discipline and regimentation and thus retain a more diminished expectancy of privacy than civilians."[59] The courts recognize that there is "precedent authorizing drug

---

56. *Id.* at 382.
57. 640 F. Supp. 642 (D.D.C. 1986) (appeal pending).
58. *Von Raab*, 649 F. Supp. at 380; *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986).
59. *Caruso*, 133 Misc. 2d at 553, 506 N.Y.S.2d at 798 (citing Parker v. Levy, 417 U.S. 733 (1974)); *see also* Committee for G.I. Rights v. Callaway, 518 F.2d 466, 474, 476 (D.C. Cir. 1975).

screening of all personnel in the armed forces."[60]

B. *In Prisons*

Storms v. Coughlin[61] holds that daily random urinalysis of prison inmates is reasonable, provided only that the selection is truly random and is not used to harass unruly prisoners.

C. *In the Private Sector*

It is true that private-sector employees may be 'forced to consent' to random urine testing without individualized suspicion as a condition of employment. The fourth amendment operates to restrain the freedom of only state actors.[62]

D. *During Pre-Employment or Routine Physical Examinations*

One of the most important reasons why the judicial consensus against mass round-up urinalysis will not defeat legitimate attempts to detect and punish drug abuse is that public employers may simply add a test for illegal drugs to the annual physical examination performed in a hospital or clinic by medical professionals (where the test will be more accurate and confidential because medical professionals understand that their tests are problematic). One of the complaints of the plaintiffs in these cases is that the urine tests "stigmatize" them and require that they prove their own innocence. The taking of a routine physical examination is something that we all do (or should do), so it cannot have those effects. In the words of Judge Edgar:

> [There is] no constitutional difficulty with the regularly conducted physicals or the requested physicals, or a pre-employment physical, even if they involve a urinalysis for drugs, provided that they are not used as a subterfuge to conduct an unreasonable search and seizure.[63]

---

60. *Jones*, 628 F. Supp. at 1508. *See also Turner*, 500 A.2d at 1008; and *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986).
61. 600 F. Supp. 1214 (S.D.N.Y. 1984).
62. *AFGE*, 1 Individual Employees Rights (BNA) 1137 (S.D. Ga. Dec. 2, 1986). *See, e.g., Association of Western Pulp and Paper Workers*, 644 F. Supp. at 186.
63. *Lovvorn*, 647 F. Supp. at 881 n.7 (citing *Turner*, 500 A.2d at 1011; *McDonell*, 612 F. Supp. at 130 n.6; *Caruso*, 133 Misc. 2d at 552, 506 N.Y.S.2d at 797).

On the other hand, *Jones v. McKenzie*[64] granted an employee-plaintiff's motion for summary judgment on the grounds that mass round-up urinalysis is unreasonable even when the urinalysis is part of a general physical examination. The Court noted that the general physical examination in that case was ordered "as quickly as possible . . . prior to the opening of school in September"[65] specifically to test for drugs, and the tests were conducted by the employer in the field instead of in a clinic or hospital.

V. Conclusion

In *Capua v. City of Plainfied*[66] well-meaning but zealous municipal officials staged a ludicrous, paramilitary raid upon their own employees. The officials struck at dawn, locked the employees in, rounded them up, and forced them to urinate in public. "The harassment, coercion and tactics utilized here, even if motivated by the best of intentions, should cause us all to recognize the realities of government excesses and the need for constant vigilance against intrusions into constitutional rights by its agents."[67]

The spectacle of such official misbehavior, and also the broader failure of the Administration's attempt to proceed by decree with mass round-up urinalysis after Congress declined to pass into law the Administration's "Drug-Free America Act of 1986,"[68] are instructive for a number of reasons.

First, the Administration's defeat by the judicial branch reminds us in a dramatic way of the subordinate role of the executive branch in Anglo-American legal systems. Judge William Blackstone teaches that the rule of law *per se* requires this subordination.[69]

Second, the Administration has been hoisted on its own petard. This Administration more than any in recent time has appointed judges that understand that "[t]he fairest and most rational method to inter-

---

64. 628 F. Supp. 1500 (D.D.C. 1986).
65. *Id.* at 1502.
66. 643 F. Supp. 1507 (D.N.J. 1986).
67. *Id.* at 1511.
68. THE WHITE HOUSE, OFFICE OF THE PRESS SECRETARY, THE PRESIDENT'S DRUG ABUSE INITIATIVES § 4 (Sept. 15, 1986) (*Summary of Legislation*, which includes a proposed law authorizing random testing of students in schools that receive subsidies from the federal government, as well as testing of governmental employees).
69 Stone, *We Inherit an Old Gothic Castle*, 8 HASTINGS CONST. L.Q. 923, 925, 933 (1981) (reviewing W. BLACKSTONE, COMMENTARIES ON THE LAWS).

pret the will of the legislator, is by exploring his intentions at the time when the law was made."[70] Ironically, one of the most quoted opinions in this summary of the judicial consensus against mass round-up urinalysis is by Judge R. Allan Edgar, who was appointed by President Reagan in the same year that Executive Order 12564 was signed.[71]

Third, we are reminded once again in this dramatic way that "the true liberty of the subject consists not so much in the gracious behavior, as in the limited power, of the sovereign."[72]

70. *Id.* at 924.
71. *Lovvorn*, 647 F. Supp. at 875.
72. Stone, *supra* note 69, at 943.