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Federally Mandated Drug Testing of Transportation Workers

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Introduction

Mandatory public employee drug-testing programs have become a central focus of recent governmental efforts to combat drug abuse in the workplace on both the state and federal levels. Moving on parallel tracks, the Executive Branch and the Congress have each sought to implement programs which target employees in certain "sensitive" federal jobs or within federally regulated industries for routine drug testing. Together with similar programs adopted by state and local governments nationwide, these efforts have led to a proliferation of lawsuits challenging on constitutional grounds the authority of the government to impose mandatory, and primarily random, drug testing without reasonable suspicion of workplace drug abuse. These employee actions have been grounded principally in the guarantee against unreasonable searches and seizures found in the Fourth Amendment to the U.S. Constitution, with due process and equal protection overtones also evident in some cases.

Public employee drug-testing programs may gain added impetus from two U.S. Supreme Court decisions this term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents[1] and of U.S. Customs employees seeking promotion to certain "sensitive" jobs.[2] A key issue which had divided the federal appellate courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment.[3] The High Court's

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[1] *Skinner v. Railway Labor Executives' Ass'n*, 109 S.Ct. 1402 (3-21-89).

[2] *National Treasury Employee's Union v. Von Raab*, 109 S.Ct. 1384 (3-21-89).

[3] See *Policemen's Benevolent Ass'n, Local 318 v. Township of Washington*, 850 F.2d 133 (3d Cir. 1988), *cert. denied* No. 88-706, 57 U.S.L.W. 3647 (S.Ct. 4-4-89)(random urinalysis testing of police officers upheld); *Louvorn v. City of Chattanooga*, 846 F.2d 1539 (6th Cir. 1988)(random drug testing of firefighters prohibited by Fourth Amendment); *Penny v. Kennedy*, 846 F.2d 1563 (6th Cir. 1988)(random drug testing of police officers prohibited); *Rushton v. Nebraska Pub. Power Dist.*, 844 F. 2d 562 (8th Cir. 1988)(allowing random testing of nuclear power plant workers); *Copeland v. Philadelphia Police Department*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied* No. 88-66, 57 U.S.L.W. 3647 (S.Ct. 4-4-89) (upholding reasonable suspicion testing

latest rulings make clear that reasonable suspicion is not always required, at least not where the government's "compelling" interest in public safety outweighs the privacy interests of those being tested. However, these cases did not directly address another, and more controversial, aspect of the issue, that is, the constitutionality of random testing procedures. In this regard, at least two federal appellate courts and a few federal district courts in other circuits have upheld random testing of certain public employees in safety sensitive or critical positions.[4] Other rulings are contrary, however, on the validity of random testing.[5]

The remainder of this report considers recent federal executive and congressional initiatives concerned with mandatory drug-testing of federal

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of police officers); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988), *rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n*, *supra* n. 1 (prohibiting testing of railroad employees after major accidents absent reasonable suspicion); *Everett v. Napper*, 833 F.2d 1507 (llth Cir. 1987)(allowing reasonable suspicion testing of a firefighter); *Jones v. McKenzie*, 833 F.2d 335 (D.C.Cir. 1987), *vacated and remanded sub nom. Jenkins v. Jones* No. 87-1706, 57 U.S.L.W. 3653 (S.Ct. 4-4-89)(allowing random testing of school bus attendants); *National Treasury Employees Union v. Von Raab*, 816 F.2d 170 (5th Cir. 1987), *aff'd in part, rev'd in part* No. 86-1879, 109 S.Ct. 1384 (1989)(allowing drug tests of Customs employees who apply for transfer to certain sensitive jobs); *Mack v. United States*, 814 F.2d 120 (2d Cir. 1987)(allowing reasonable suspicion testing of FBI agent); *McDonell v. Hunter*, 809 F.2d 1302 (8th Cir. 1987)(allowing random drug-testing of certain correctional officers); *Shoemaker v. Handel*, 795 F.2d 1136 (3d Cir.), *cert. denied*, 107 S.Ct. 577 (1986)(allowing random tests of jockeys); *Division 241 Amalgamated Transit Union v. Suscy*, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976)(allowing post-accident testing of bus drivers absent reasonable suspicion).

[4] Third Circuit: *Policemen's Benevolent Ass'n, Local 318*, *supra* n. 3 (police officers); *Shoemaker*, *supra* n. 3 (jockeys); Eighth Circuit: *Rushton*, supra n. 3 (power plant employees); *McDonell v. Hunter*, *supra* n. 3 (correctional officers). See also *Mullholland v. Department of Army*, 660 F. Supp. 1565 (E.D.Va. 1987)(civilian aircraft mechanics and attendants); *American Federation of Government Employees v. Dole*, 670 F. Supp. 445 (D.D.C. 1987)(upheld DOT random testing program of federal employees implemented pursuant to Reagan executive order).

[5] See, e.g., *NFEE v. Carlucci*, 680 F. Supp. 416 (D.D.C. 1988)(compulsory, mandatory urinalysis of Army civilian employees in critical positions invalid in absence of reasonable individualized suspicion of drug influence while on duty); *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988)(Justice Department enjoined from randomly testing employees in sensitive positions pursuant to Reagan executive order in the absence of any evidence of drug problem among department employees).

Federally Mandated Drug Testing of Transportation Workers

SUMMARY

Public employee drug-testing programs, a focal point of recent efforts to curb illegal drug use in the workplace, may gain added impetus from two U.S. Supreme Court decisions this term which upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents and of U.S. Customs employees seeking promotion to certain "sensitive" jobs. A key issue which had divided the federal appellate courts was whether public employee drug testing is ever permissible in the absence of "reasonable" or "individualized" suspicion of drug abuse or impairment. The High Court's latest rulings make clear that reasonable suspicion is not always required, at least not where the government's "compelling" interest in public safety outweighs the privacy interests of those being tested. However, these cases did not directly address another, and more controversial, aspect of the issue, that is, the constitutionality of random testing procedures.

Moving on parallel tracks, the Executive Branch and the Congress have each sought to implement programs which target employees in certain "sensitive" federal jobs or federally regulated industries for routine drug testing. On November 21, 1988, DOT published in the Federal Register interim final drug-testing rules that will affect about 4 million public and private sector transportation employees in the aviation, motor-carrier, railroad, maritime, mass-transit, and pipeline industries who hold safety- or security-sensitive positions. Five types of drug testing will be required under the final DOT rules: random testing, pre-employment testing for job applicants, periodic testing during routine physicals, "reasonable-cause" testing, and post-accident testing. Workers with confirmed positive test results are to be removed from their positions and may only return upon successful completion of a rehabilitation program, which employers are not required to sponsor.

S. 561 would provide statutory authority for a comprehensive program of alcohol and controlled substances testing of transportation workers in the air, rail, and commercial motor vehicle industries that coincides in some respects, but is broader in others, than the DOT final rules. First, the bill parallels the current DOT program as to the circumstances in which testing is authorized. Unlike the DOT regulation, however, which is strictly limited to controlled substances specifically identified by the rule, the bill gives the relevant federal administrator more discretion to test for any scheduled controlled substance that is deemed to "pose[ ] a risk to transportation." Significantly, the bill would also direct the random and other testing of transportation workers for "alcohol" use, "without lawful authorization." The DOT rules do not authorize alcohol testing.

employees and workers within federally regulated industries, mainly transportation. Specifically, final interim regulations of the Department of Transportation, as implemented by various DOT Division rules published on November 21, 1988, will be compared with bills before the current Congress, S. 561 and H.R. 1208, mandating drug-testing of transportation workers. This is followed by a brief discussion of judicial decisions pertinent to federally required drug-testing of transportation workers.

Recent Federal Legislative and Executive Actions

Since March 1986, when the President's Commission on Organized Crime issued a report which recommended employee drug-testing programs as one means of stemming the flood of illicit drugs, both Congress and the President have responded with concrete proposals of their own. As in the preceding Congress, several employee drug-testing bills are before the 101st Congress and, for its part, the Administration is moving forward with implementation of E.O. 12564 which calls for each executive branch agency to undertake mandatory drug testing of personnel in sensitive federal jobs. Similarly, the Department of Transportation (DOT) last year issued comprehensive regulations requiring industry-wide testing of workers in the trucking, bus, rail, air, and maritime transportation industries

Executive Order 12564, issued Septembe- 15, 1986, makes federal executive branch employees in "sensitive" positions subject to mandatory drug testing.[6] Specifically, the order defines "sensitive" positions as: 1) employees in designated critical/sensitive positions; 2) employees who have access to classified information; 3) Presidential appointees; 4) law enforcement officers; and 5) other positions that the agency head determines "involve law enforcement, national security, the protection of life and property, public health or safety, or other functions requiring a high degree of trust or confidence." Testing of any covered employee may be based on "reasonable suspicion," may result from a post-accident investigation, or may be part of an employee counseling or drug rehabilitation follow-up. Beyond these designated circumstances, however, the agency head is granted substantial discretion to determine:

> [t]he extent to which such employees are tested and the criteria for such testing. . ., based upon the nature of the agency's mission and its employees' duties, the efficient use of agency resources, and the danger to the public health and safety or national security that could result from the failure of an employee adequately to discharge his or her position.[7]

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6 51 Fed. Reg. 32889 (Sept. 17, 1986).

7 §3 of E.O. 12564, Id., at 32830.

The Office of Personnel Management, in consultation with the Justice Department, has since issued guidelines entitled "Establishing a Drug-Free Federal Workplace" to implement the executive order. The guidelines basically leave it to the discretion of the agency head to determine just which groups of employees in sensitive positions will be tested and whether random testing will be applied. These guidelines, however, were declared invalid by the federal district court in *Treasury Employees v. Reagan*[8] for the failure of OMB to follow the public notice and comment requirements of the Administrative Procedure Act in promulgating them. In a separate action, *Harmon v. Meese*,[9] the federal district court for the District of Columbia enjoined the Justice Department from randomly testing its "sensitive" employees pursuant to the executive order due to lack of evidence of any drug problems within the department.

Just prior to adjournment, the 100th Congress approved the omnibus drug bill, P.L. 100-690, which included provisions to require federal contractors and grantees to certify that they will maintain drug-free workplaces by fulfilling specific requirements.[10] The law covers all organizations receiving contract awards of $25,000 or more, all contracts awarded to individuals, and all recipients of federal grants, regardless of grant amount. Specifically, contractors and grantees must certify to the contracting or grantmaking agency that they will provide a drug-free workplace by publishing a statement prohibiting unlawful manufacture, distribution, possession, or use of a controlled substance in the workplace, and specifying actions that will be taken against offending employees. Also mandated are drug-free awareness programs to inform employees of the dangers of workplace drug abuse and any available drug counseling, rehabilitation, and employee assistance programs. Employees are to be required, as a condition of employment, to report any criminal conviction for drug-related activity in the workplace and the employer, in turn, must notify the contracting or granting agency and impose appropriate sanctions against convicted employees. Federal contracts or grants could be terminated or suspended in cases where the employer fails to make a "good faith" effort to maintain a drug-free workplace. The Act, however, does not mandate, or even mention, testing employees for illicit drug use.[11]

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[8] 685 F.Supp. 1346 (E.D.La. 1988).

[9] 690 F. Supp. 65 (D.D.C. 1988).

[10] See the "Drug-free Workplace Act of 1988," 102 Stat. 4304 (Nov. 18, 1988).

[11] More detailed information on how federal contractors and grantees must comply with the provisions of the Drug-free Workplace Act may be found in implementing rules issued by the Office of Management and Budget at 54 Fed. Reg. 4946 (1-31-89).

U.S. defense contractors must establish and maintain a drug-free workplace program under a Department of Defense (DOD) rule that became effective October 31, 1988.[12] The DOD rule is designed to eliminate drugs from the workplace by compelling the agency's contractors to establish programs including the testing of employees in "sensitive" positions to ensure that they neither possess or use illegal substances. This is to be achieved by including a clause in all covered contracts binding the contractor to a program meeting stated criteria and objectives. The drug testing program covers all the contractor's "sensitive" positions, based upon a consideration of the work performed and duties of the employee, the efficient use of contractor resources, and potential risks to public health and safety or national security from improperly performed contract tasks. Testing is authorized in "reasonable suspicion" cases, when the employee is involved in an accident or an unsafe practice, or in connection with drug counseling, rehabilitation, or a voluntary testing program. Random testing is not addressed in the DOD rule. No covered employee who is found to be using drugs may be allowed to remain on duty or to continue performing contract work until the employer has determined that the worker is fit for duty.

On November 21, 1988, DOT published in the Federal Register interim final drug-testing rules that will affect about 4 million public and private sector transportation employees in the aviation, motor-carrier, railroad, maritime, mass-transit, and pipeline industries who hold safety- or security-sensitive positions.[13] Of those workers, only railroad employees are currently subject to limited alcohol and drug-testing. Five types of drug testing will be required under the final DOT rules: random testing, pre-employment testing for job applicants, periodic testing during routine physicals, "reasonable-cause" testing, and post-accident testing. Drugs for which testing is authorized include marijuana, cocaine, opiates, amphetamines, and phencyclidine.[14] Alcohol screening is not included. Workers with confirmed positive test results are to be removed from their positions and may only return upon successful completion of a rehabilitation program. Employer sponsored rehabilitation is not required, however, but will be left to collective bargaining. Large companies and agencies will be required to implement the new rules by December 1989 while smaller employers will have longer periods--up to two years--within which to comply.

Under the DOT rules, random drug testing must be conducted on half of the eligible employee pool so that every twelve months, half of the covered workforce is tested. Where a consortium arrangement exists, the 50 percent testing rate can be applied to the entire employee population covered by the

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[12] 53 Fed. Reg. 37763.

[13] 53 Fed. Reg. 47002 (1-21-1988).

[14] Id. at 47005.

consortium. Employers are required by the DOT rules to develop and maintain clear and well-documented procedures for the collection, handling, transfer, and testing of employee urine samples.[15] In addition, certain "minimum precautions" must be taken by the employer to guard against physical tampering either with the urine specimens or information on urine bottles and required "control and custody" forms.[16] For example, bluing agents are to be used in toilet bowls at the collection site and all other water sources in the area monitored to prevent adulteration of collected samples. Employees are also to be directed to remove unnecessary outer garments that might conceal items or substances that could be used to adulterate a urine sample.[17] Elaborate "chain of custody" procedures are also set forth in the rules.

The DOT rules also mandate personnel qualification, training, and "quality assurance" standards to be met by testing laboratories.[18] Only those laboratories approved and certified by the U.S. Department of Health and Human Services may provide testing services under the rules.[19] Certified test results must be reported to the employer within an average of five working days and must be available thereafter to the employee upon request. Specimens that yield a positive result on the initial immunoassay screen are subject to confirmatory testing by use of gas chromatography/mass spectrometry methods.[20] Any specimen that tests negative on initial screening or negative on confirmatory analysis must be reported as negative.[21] All specimens confirmed positive must be secured in long-term frozen storage for a minimum of one year, and documentation on all aspects of the testing process must be maintained and made available by the laboratory for at least two years. An employer's contract with a laboratory must provide for unannounced inspections by the employer and the DOT agency having jurisdiction over the employer.[22]

Other aspects of the DOT rules address concerns of personal privacy.[23] Thus, any employee subject to drug testing must generally be allowed to

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15 Id. at 47006.

16 Id. at 47008.

17 Id. at 47007.

18 Id. at 47008-7011.

19 Id. at 47013.

20 Id. at 47010.

21 Id. at 47013.

22 Id. at 47016.

23 Id. at 47007.

provide a urine specimen within the confines of a restroom stall or other secure, partitioned "enclosure" free from third party observation. However, if there is reason to believe that an employee has altered or substituted a specimen, the employee can be required to provide a second urine sample under the direct observation of an authorized person of the same gender. A decision to collect a second specimen under direct observation must be reviewed and approved by a designated employer representative or higher level supervisor of the "collection site person."[24] Employees may be required to sign a consent or release form authorizing collection and analysis of the specimen, and disclosure of test results to the employer, but need not waive liability for any negligence in the collection, handling, or analysis procedures. Finally, employers may not provide any personal identification information other than an employee identification number to the testing laboratory and must ensure that only the employee and medical review officer responsible for reporting test results to the employer receive copies of the chain of custody form containing personal medical information.[25]

Six divisions within DOT--including the Federal Aviation Administration (FAA), the Federal Railroad Administration (FRA), the Coast Guard, the Federal Highway Administration (FHWA), and the Urban Mass Transportation Administration--have published individual, implementing regulations as part of the overall rule. The FAA final rule requires domestic and supplemental air carriers, commercial operators of large aircraft, air taxi and commuter operators, certain commercial operators and contractors to such operators, and air traffic control facilities not operated by the FAA or the U.S. military to have an anti-drug program for employees who perform sensitive safety- or security-related functions.[26] The rule specifically covers employees performing the following duties or functions: flight crewmembers, flight attendants, flight or ground instruction, flight testing, aircraft dispatcher or ground dispatcher, aircraft maintenance, security or screening, and air traffic control.[27] Pre-employment testing is required of all applicants for a covered position and periodic testing is to be a part of any required medical examinations. Post-accident testing must occur with 32 hours unless the employer determines that "the employee's performance could not have contributed to the accident." Testing based on reasonable cause may be administered where two of the employee's supervisors have "a reasonable and

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24 Id. at 47008.

25 Id. at 47010.

26 Id at 47057.

27 Id. at 47058.

articulable belief that the employee is using a prohibited drug on the basis of specific, contemporaneous physical, behavioral, or performance indicators of probable drug use."[28] "Unannounced" random testing under the FAA final rule will be phased in so that only 25% of an employer's covered employee population are subject to testing the first year of the program, rather than the annualized rate of 50% required thereafter.[29] Each employer must establish an Employee Assistance Plan, including education and training on drug use for employees and supervisors, but the final rule does not require employer-sponsored rehabilitation.[30]

The final FRA rules supplement pre-existing regulations concerning the control of alcohol and drug use in railroad operations applicable to employees performing functions subject to the Hours of Service Act.[31] Those regulations currently prohibit any covered employee from performing duties while using, possessing, or under the influence of alcohol or a controlled substance; mandate post-accident toxological testing after certain significant train accidents and employee fatalities; provide for pre-employment drug screens; and authorize reasonable cause testing based on incidents involving human failure or enumerated safety rule violations.[32] The new rule adds to this regulatory structure the requirement that each railroad submit for approval a random testing program providing each covered employee a "substantially equal" statistical chance of selection within a specified time frame.[33] Prior to implementation, each covered employee must be afforded notice of the program, the consequences of a positive test results, and of the employee's right to self-refer for counseling and treatment without adverse consequences.[34] The final rule requires that an employee who refuses to be tested or who is determined to have used a controlled substance without appropriate medical authorization be removed from covered employment by his

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[28] Id. at 47058.

[29] Id.

[30] Id. at 47059.

[31] 45 U.S.C. 61 et seq. The Act, generally, prescribes limits on the hours of duty that may be performed by any railroad employees "actually engaged in or connected with the movement of any train" or "engaged in installing, repairing or maintaining signal systems." The FRA final rule incorporates this same universe of employees for coverage by the newly mandated random drug-testing program.

[32] 49 CFR Part 219.

[33] 53 Fed. Reg. 47128.

[34] Id. at 47129.

present, or any subsequent, employer.[35] The employee may not be returned to covered service until having submitted a negative urine sample and successfully completed an appropriate rehabilitation program.[36] Nothing in the rule, however, requires that an employee determined to have violated the drug use prohibition be provided rehabilitative services or be retained by the railroad. Like the FAA rule, a gradual phase-in to a 50 percent testing rate is allowed during the first twelve months of the program.[37]

The FHWA final rules governing motor carriers and operators of commercial motor vehicles apply generally to drivers of vehicles with a gross weight rating over 26,000 pounds, vehicles transporting hazardous materials which must be placarded, and bus vehicles designed to transport more than 15 passengers.[38] A principal issue noted by the Administration in the formulation of this rule concerned the feasibility of random testing as applied to smaller motor carriers and independent owner-operators working as contractors rather than employees of corporate carriers. In lieu of roadside testing conducted by State enforcement officers, or other alternative mechanisms advanced by the comments, the final rule seems to opt for private testing through formation of "consortia" or other voluntary associations of small owner/operators.

> the FHWA envisions that many of the small motor carriers and owner-operators will form consortiums and other cooperatives to meet the requirements of this rule. The FHWA encourages this and intends to promote such consortiums. The arrangements agreed to by these drivers will be tailored to their specific operations and characteristics. The FHWA welcomes any type of arrangement as long as it complies with the requirements of this rule.[39]

The final rule also makes clear that a carrier would be required to verify that any independent owner-operator with whom it enters a lease agreement is participating in a bona fide drug testing program through a consortium or otherwise and is not currently unqualified because of a positive test result. If the motor carrier uses the same driver on a number of different trip

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35 Id.

36 Id.

37 Id. at 47128.

38 Id. at 47151-52.

39 Id. at 47143.

contracts, it would have to verify the status of the driver once every six months.[40]

The air, rail, and commercial motor vehicle sectors of the domestic transportation industry are also the target of legislation pending in the current Congress that would establish standards and requirements for testing transportation workers for drug use. Two of those measures, S. 561 and H.R. 1208, are considered in the final portion of this report with a view to highlighting any major differences with the final DOT rules.

Mandatory Drug Testing of Transportation Workers Under S. 561 and H.R. 1208

S. 561 would provide statutory authority for a comprehensive program of alcohol and controlled substances testing of transportation workers in the air, rail, and commercial motor vehicle industries that coincides in some respects, but is broader in others, than the DOT final rules. First, the bill parallels the current DOT program by granting to federal administrators the authority to implement testing of "safety-sensitive" personnel in five situations: preemployment, periodic recurring, random, post-accident, and upon "reasonable suspicion." Unlike the DOT regulation, however, which is strictly limited to controlled substances specifically identified by the rule, the bill gives the relevant federal administrator more discretion to test for any scheduled controlled substance[41] that is deemed to "pose[ ] a risk to transportation." Significantly, the bill would also direct the random and other testing of transportation workers for "alcohol" use, "without lawful authorization." The DOT rules do not authorize alcohol testing.

Note that scope of the proposed stricture on unauthorized alcohol use may be ambiguous and in need of additional legislative clarification. On the one hand, the bill's reference to "lawful authorization" might be construed to mean other transportation regulations governing alcohol use by covered employees. For example, under FAA rules, pilots, flight attendants, flight engineers, and flight navigators may not act as a crewmember of a civil aircraft within eight hours after drinking an alcoholic beverage.[42] So interpreted the bill may mean only that alcohol use by covered employees within the eight-hour period designated by the regulation is prohibited by the bill. As to other covered employees, subject perhaps to no similar regulatory "authorization", the implication of the bill's ban on alcohol use may be less certain. Under the DOT final rules, by analogy, the only permitted authorization for use of a otherwise prohibited controlled substance is a

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40 Id.

41 See 21 U.S.C. 802(6).

42 43 Fed. Reg. 47024.

physician's prescription for legitimate medical purposes. Viewed accordingly, the bill could be read to bar all but the medicinal use of alcohol as prescribed by a physician, that is, to bar all recreational use of alcohol by covered employees. Whatever the proper interpretation, some clarification of the bill in this regard may be advisable.

The bill would amend Title VI of the Federal Aviation Act of 1958[43] to direct the FAA Administrator to establish a testing program within the FAA and requiring foreign and domestic air carriers to conduct testing of their safety-sensitive employees. Besides designated employee classifications that largely track the coverage of the FAA final rule, the bill would leave for determination by the Administrator which employees are "responsible for safety-sensitive functions." Any employee who is confirmed positive for drug or alcohol use is subject to disqualification, dismissal, or suspension or revocation of certification, "as the Administrator considers appropriate." Further, the employee is apparently to be removed permanently from prior air transportation duties for refusal or failure to complete a rehabilitation program, for repeated drug use upon completion of a program, or for performing his former duties "while impaired or under the influence of alcohol or a controlled substance." In contrast to the DOT rules, which include no similar requirement, air carriers are required by the bill to establish rehabilitation programs which "at a minimum" are to provide for "identification and opportunity for treatment" of covered employees. Cooperative programs with other domestic or foreign carriers are permitted. Finally, standards incorporating DHHS scientific and technical guidelines are set forth to govern laboratory certification and inspections, test reliability and accuracy, chain of custody, privacy and confidentiality, and related issues that are elaborated in some greater detail by the DOT final rules.

The rail provisions of S. 561 would amend the Federal Railway Safety Act of 1970[44] to authorize review by the Secretary of Transportation of all "existing rules, regulations, standards, and orders governing alcohol and drug use in railroad operations" for adequacy to ensure safety. More specifically, however, that review shall "require" a random testing program for safety-sensitive functions and consider existing rules regarding classes of employees covered. This may respond certain FRA comments indicating that while the final rule conformed to the past practice of testing only Hours of Service Act employees, "from the point of view of ideal or optimum safety objectives," drug or alcohol testing should

> extend to those actually involved in moving freight and passengers, those responsible for inspection and maintenance of rail track and structures, employees who work on rolling stock or inspect it for compliance with

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[43] 49 U.S.C. App. 1421 et seq.

[44] 45 U.S.C. 431.

> Federal standards, those who prepare shipping papers for hazardous materials, on board service personnel on passenger trains, and a variety of other employees who are few in number but whose responsibilities can affect safety.[45]

Also to be considered by that review are sanctions of suspension and dismissal for alcohol use or impairment while on duty or nonmedical use of a controlled substance on or off duty. Unlike the air carrier provisions of the bill, but similar to the FRA final rule, there is no apparent requirement that railroad employers implement rehabilitation programs. The Secretary, however, could presumably exercise his rulemaking authority under the bill to mandate rehabilitation. The railroad provisions again incorporate the DHHS scientific and technical standards for drug testing and laboratory procedures basically corresponding to the approach of the DOT final rules.

Rail carrier-sponsored rehabilitation programs are a requirement of H.R. 1208, the "Railroad Drug Abuse Prevention Act of 1989," which mandates drug and alcohol testing for safety-sensitive railroad employees but, unlike S. 561, does not apply to the air and commercial motor vehicle industries. Under the House measure, any employee who voluntarily enters the program, prior to notification that he will be tested or the occurrence of any of a series of specified incidents that may trigger post-accident or "reasonable suspicion" testing, is to be removed from his safety-sensitive position, but with pay if he accepts alternative duties. On the other hand, any employee who has a confirmed positive test result must be suspended without pay and referred for rehabilitation. If an employee fails to complete the programs, or thereafter again tests positive, he "shall" be discharged from employment. Rehabilitated employees may be subject to daily testing for a period of three years following completion of the program. The railroad employer may be subject to civil and criminal penalties if it discharges or otherwise disciplines any employee who successfully completes rehabilitation.[46]

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[45] 53 Fed. Reg. 47107. Nonetheless the FRA final rule opted for a narrower approach because "Congressional attention to these functions through the Hours of Service Act has also established a strong precedent for focusing the alcohol/drug control program on persons performing these functions. Further, FRA has sought to focus its enforcement efforts on areas of most immediate need."

[46] On May 10, 1989, the House Subcommittee on Transportation and Hazardous Materials approved H.R. 1208 by voice vote after adopting an amendment to clarify that there would be no lapse between the FRA final rule that is to take effect on November 1, 1989 and the testing requirements of the bill. The amendment also specified that rail employees who tested positive for drugs or alcohol under pre-existing FRA rules would be subject to discharge if they failed a test required by the bill. Another aspect of the amendment provided that rehabilitation programs must include an education and prevention component, and that employees who complete a rehabilitation

S. 561 would also amend the Commercial Motor Vehicle Safety Act of 1986[47] to mandate DOT regulations within twelve months governing preemployment, periodic, recurring, random, and post-accident, and "reasonable suspicion" testing for controlled substance or alcohol use by commercial motor vehicle operators. Rehabilitation program requirements are to included in the authorized regulations with the DOT Secretary to "determine the circumstances under which such operators shall be required to participate in such program." Again, this would seem to require expansion of current DOT rules which omit provision for mandatory rehabilitation. The same DHHS scientific and technical standards are to apply to the testing program as in the air carrier and railroad aspects of the bill.

Finally, the Senate bill would require that a "pilot program" be developed and implemented by the Secretary within fifteen months to "consider alternative methodologies" for randomly testing independent commercial motor vehicle operators for drug and alcohol use. The program would continue for one year after which DOT would report to Congress on its results and recommendations for random testing of commercial operators. This appears to respond to FHWA comments concerning its views concerning "how such a testing program would work for smaller motor carriers and owners-operators who are not motor carriers."[48] As noted, in its final rule, the FHWA seemed to opt for some variant of the consortium approach over the alternative of

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program must also perform 40 hours of community service in order to be reinstated. BNA, *Daily Labor Reporter*, A-4 (5-12-89).

[47] P.L. 99-570, 100 Stat. 5223.

[48] 53 Fed. Reg. 47141. Among the alternatives considered by the comments were the following:

> 1. Form consortiums made up of owner-operators and small carriers that would develop a centrally administered random testing program.
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> 2. Form consortiums, and hire a contractor to develop and implement a random testing program.
>
> 3. Contract separately with an outside company that would setup these services.
>
> 4. Have existing industry-related groups (e.g., trade associations) set up drug programs in which small entities could participate.
>
> 5. Arrange to be included as a part of a larger company's drug testing program.

state-operated roadside testing stations advanced by some interest groups.[49]

Judicial Decisions Relevant to Federally Required Drug-Testing of Transportation Workers

During its current term, the U.S. Supreme Court sustained federally mandated drug-testing programs in two cases which, while not involving random testing, may portend the direction of future judicial decision-making on this controversial issue. *Skinner v. Railway Labor Executives Ass'n* concerned DOT mandated post-accident testing of railway workers like that required by current regulation and as proposed by S. 561. *National Treasury Employees Union v. Von Raab* involved the testing of customs service employees as a prerequisite to promotion to certain "sensitive" positions. As noted, the Supreme Court held that mandatory testing in these situations, even without individualized suspicion of drug use, was not an "unreasonable search or seizure" under the Fourth Amendment, because of the overarching public safety considerations involved.[50]

In *Skinner* a panel of the Ninth Circuit voided on Fourth Amendment grounds Federal Railroad Administration regulations requiring breath, blood, and urine tests of railroad workers who are involved in train accidents.[51] A federal district court had accepted the government's argument that public safety interests served by the rules outweighed any possible intrusion on privacy rights asserted by the contesting labor unions. However, because the post-accident drug and alcohol testing procedure applied to all covered employees without regard to "reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment," a divided appeals court panel struck down the regulation. In so doing, it refused to find that rail employees enjoy a "diminished expectation of privacy" due to the "heavily regulated"

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[49] Id.

[50] *Supra*, n. 1.

[51] Briefly, alcohol and drug testing is mandated for all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $500,000 damage to railroad property); impact accidents (involving a reportable injury or damage to railroad property of $50,000); and fatal accidents (involving fatality of an on-duty railroad employee). 49 *C.F.R.* §219.213. The FRA regulations require that blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon a possible afterwards. Blood samples are to be taken at independent medical facilities by qualified professionals or technicians. 49 *C.F.R.* §219.203. Refusal to provide a sample results in a nine-month period of disqualification. 49 *C.F.R.* §219.213.

nature of the railroad industry or that the program fit any of the traditional judicial exceptions to Fourth Amendment principles.

In reversing, the Supreme Court first held that the entire testing regulation, even portions applicable to certain employee rule infractions that were merely permissive rather than mandatory upon the railroads, carried sufficient government "encouragement, endorsement, and participation" to implicate the Fourth Amendment considerations. On the merits, Justice Kennedy wrote for the majority that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," FRA testing for drugs and alcohol was a "search" that had to satisfy constitutional standards of reasonableness. The "special needs" of railroad safety, however, made traditional Fourth Amendment requirements of a warrant and probable cause applicable to normal law enforcement "impracticable" in this context. Nor was "individualized suspicion" deemed by the majority to be a "constitutional floor" where the intrusion on privacy interests are "minimal" and an "important governmental interest" is at stake. According to Justice Kennedy, covered rail employees had "expectations of privacy" as to their own "physical condition" that were "diminished" by "their participation in an industry that is regulated pervasively to ensure safety." In these circumstances, the majority held, it was "reasonable" to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.

Justice Kennedy also rejected another line of attack against the challenged tests which proceeds from the generally accepted scientific and judicial view that standard test protocols are capable indicators only of prior drug use but are not a measure of current job impairment or drug influence. Because of this fact, a number of lower federal courts had voided the EMIT screen and confirmatory GC\MS for not being reasonably related to legitimate governmental interests in assuring employee fitness or competence.[52] In *Skinner*, however, the majority found the information provided by the tests to be a valid investigative tool which "may allow the [FRA] to reach an informed judgment as to how a particular accident occurred." In addition, opposition on these grounds "failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it," and according to the majority, the government "may take all necessary and reasonable regulatory steps to prevent and deter" forbidden drug use by the covered employees.

In the *Von Raab* case, decided the same day as *Skinner*, a Fifth Circuit panel had upheld drug testing of U.S. Customs Service personnel who sought transfer to certain "sensitive" positions, namely, those involving drug interdiction, carrying firearms, or access to classified information, without a

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[52] *E.g., Jones v. McKenzie*, 833 F.2d 335, 340 (D.C.Cir. 1987); *Railway Labor Executive Ass'n v. Burnley*, 839 F.2d 1507 (9th Cir. 1988); *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988).

requirement of reasonable individualized suspicion. The testing procedure was administered once, when the employee sought transfer to the sensitive position, and the Customs Service gave the qualified applicant five days notice of the test. Thus, the drug test in *Von Raab* was conditioned on the employee's own action in seeking a transfer and no adverse consequence flowed from a later withdrawn transfer application.

In a 5 to 4 ruling, Justice Kennedy again speaking for the majority affirmed the Customs Service policy with respect to the interdiction of illegal drugs and employees required to carry firearms. According to the Court, the government has a "compelling interest" in not promoting drug users to jobs where they could "endanger the integrity of our Nation's borders or the life of the citizenry." That interest outweighs the privacy interests of employees who seek promotions to those jobs, but who enjoy "a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions." Neither the absence of "any perceived drug problem among Customs employees," nor the possibility that "drug users can avoid detection" by temporary abstinence, would defeat the program since deterrence of "highly hazardous conduct" as much as detection was a "substantial" justification and the risk of circumvention was "overstated." However, the Court found the record insufficient to determine whether searches of employees who would handle classified information was reasonable. It was not apparent that individuals in certain positions would actually have access to sensitive information, leading Justice Kennedy to question whether the category was too broad to meet Fourth Amendment requirements.

As noted in the introduction, before these High Court rulings, several courts had speculated whether employee drug testing could ever pass Fourth Amendment muster in the absence of a reasonable suspicion that a particular employee or group of employees were active drug users or impaired on the job. This concern seems largely put to rest by *Skinner* and *Von Raab* which make clear that individual suspicion is not invariably required, at least where overarching public safety or national security interests are at stake. Just how broadly this judicial approach of balancing the public and private interest extends, however, or whether it would tolerate the random testing of employees in these same circumstances, may not yet be settled. But considerable judicial support may be drawn from these cases for testing safety-sensitive transportation employees in many of the circumstances contemplated by S. 551.

Notably, perhaps, the Court subsequent to *Skinner* and *Von Raab* let stand lower court decisions allowing random and "reasonable suspicion" drug testing for police officers and mandatory, preemployment drug testing for applicants for nuclear power plant jobs. The Justices' determination to deny review of the decisions--two by the U.S. Court of Appeals for the Third Circuit and one by the Washington Supreme Court--came only a week after the post-accident testing and Customs Service cases.

Policemen's Benevolent Association v. Township of Washington involved a program which subjected local police officers to random urinalysis testing and mandatory drug tests administered during required annual physical examinations. In rejecting the challenge of a local police union, the Third Circuit relied upon its own earlier decision in *Shoemaker v. Handel*[53] which had upheld random testing of jockeys. The appeals court concluded that various state statutes and "detailed regulations" of the township governing police conduct and discipline had reduced the officers' justifiable privacy expectations which were outweighed by the strong public interest in averting police drug use. The Policemen's Benevolent Association, backed by the American Civil Liberties Union, had sought review of the appeals court ruling, contending that it "has effectively vitiated Fourth Amendment protection for public employees." In the other police case, *Copeland v. Philadelphia Police Department*, the Justices rejected the petition of a former Philadelphia police officer who was fired following a positive drug test. The appeals court ruled that the city had not violated the Fourth Amendment rights of the officer by ordering him to submit to a urinalysis based on "reasonable suspicion" as the result of information gained from an informer.

In the nuclear power plant case, *Alverado v. Washington Public Power Supply System and Bechtel Construction, Inc.*, the Washington Supreme Court ruled that the WPPSS did not violate the Fourth Amendment by requiring applicants for repair jobs to pass a pre-employment drug test to obtain access to secure areas at the plant. Bechtel Power had a contract with the system to perform the repair work and several members of Plumbers Local 598 who had applied for jobs with Bechtel challenged the drug testing requirement. The Washington Court unanimously held that job applicants could be required to undergo the drug screening under an administrative search exception to the Fourth Amendment. The court reasoned that the applicants have a substantially diminished expectation of privacy because of the "pervasive" federal regulation of nuclear power plants and that the employers interest in nuclear safety outweighed the limited intrusion on privacy interests.

In other significant action, the Court vacated and remanded for reconsideration in light of *Skinner* a 1987 ruling of D.C. Circuit in *Jones v. McKenzie*.[54] *Jones* was the first federal appellate court decision to void a public employee drug testing program for its inability to measure job impairment or drug influence. While upholding mandatory urinalysis testing of public school transportation employees as part of routine annual physical exams, it invalidated the EMIT test actually used because it failed to "measure . . . whether an employee has used or been under the influence of drugs" while on school premises. As noted, the Court appeared to take a contrary approach by rejecting the same argument by opponents of post-accident testing in *Skinner*.

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[53] 795 F.2d 1136 (3d Cir.), *cert. denied*, U.S. (1986).

[54] *Supra* n. 3.

Brief mention should be made of the status of current judicial challenges to the drug-testing of federal workers under E.O. 12564 and of transportation workers pursuant to DOT regulations. To date, federal district courts have barred random drug testing of federal employees at the Justice,[55] Agriculture,[56] and Interior[57] Departments due to lack of a demonstrated drug problem sufficient to warrant invasion of employee privacy. On May 19, 1989, a federal district judge in *Hartness v. Bush*[58] issued preliminary injunctions against random drug testing of employees on the White House staff and at the General Services Administration who are in "sensitive" or safety-related position who do not carry firearms. The White House plan authorizes testing of all such employees in the Executive Office of the President, including the U.S. Trade Representative, the Office of Administration, and the Office of Management and Budget. To the contrary, random testing of DOT employees in sensitive position was permitted to go forward in *AFGE v. Dole*[59] while allowing the possibility of a later more specific challenge based on its actual implementation. Drug testing plans for air traffic controllers and for uniformed members of the Secret Services have also been upheld.[60]

Finally, various challenges have been filed against testing of transportation workers under the DOT final rules. Late last year, in *Owner-Operators Independent Drivers Association v. Burnley*,[61] a federal judge in San Francisco issued a preliminary injunction from the bench that excuses employers from implementing procedures for random and mandatory post-accident drug testing of commercial motor vehicle operators under the

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55 *Harmon v. Meese*, 690 F. Supp. 65 (D.D.C. 1988).

56 *NTEU v. Lyng*, 706 F. Supp. 934 (D.D.C. 1988).

57 *Bangert v. Hodel*, 705 F. Supp. 643 (D.D.C. 1989).

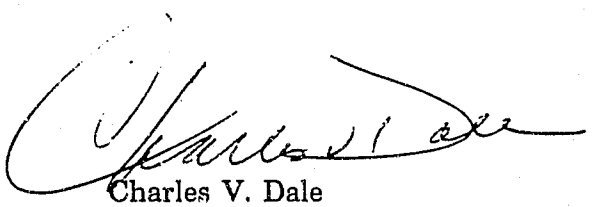
58 Nos. 89-0040-LFO, 89-0950-LFO, and 89-1152-LFO (slip opinion)(D.D.C. 5-19-89).

59 670 F. Supp. 445 (D.D.C. 1987).

60 See *National Air Traffic Controllers Ass'n v. Burnley*, 700 F. Supp. 1043 (N.D. Cal. 1988).

61 57 U.S.L.W. 2452 (N.D. Cal 12-30-88).

regulations. In *Amalgamated Transit Union v. Burnley*[62] several unions joined in a suit against implementation of random testing as it affects interstate bus drivers alleging lack of statutory authority and constitutional infirmities.



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62 No. C89-0081 FMS (N.D. Cal 1-11-89).