

**OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES**

CAPTION: NATIONAL TREASURY EMPLOYEES UNION, ET AL.,
Petitioners V. WILLIAM VON RAAB, COMMISSIONER,
UNITED STATES CUSTOMS SERVICE

CASE NO: 86-1879

PLACE: WASHINGTON, D.C.

DATE: November 2, 1988

PAGES: 1 thru 48

1 IN THE SUPREME COURT OF THE UNITED STATES

2 -----x

3 NATIONAL TREASURY EMPLOYEES :

4 UNION, et al., :

5 Petitioners :

6 v. : No. 86-1879

7 WILLIAM VON RAAB, COMMISSIONER, :

8 UNITED STATES CUSTOMS SERVICE :

9 -----x

10 Washington, D.C.

11 Wednesday, November 2, 1988

12 The above-entitled matter came on for oral
13 argument before the Supreme Court of the United States
14 at 11:04 o'clock a.m.

15 APPEARANCES:

16 LOIS G. WILLIAMS, ESQ., Washington, D.C., on behalf of
17 the Petitioners.

18 CHARLES FRIED, ESQ., Solicitor General, Department of
19 Justice, Washington, D.C.; on behalf of the
20 Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

LOIS G. WILLIAMS, ESQ.

On behalf of the Petitioners

3

CHARLES FRIED, ESQ.

On behalf of the Respondent

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REBUTTAL ARGUMENT OF

LOIS G. WILLIAMS ESQ.

On behalf of the Petitioners

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P R O C E E D I N G S

(11:04 a.m.)

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3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 86-1879, National Treasury Employees Union
5 v. William von Raab.

6 Just a moment until -- you may proceed
7 whenever you're ready, Ms. Williams.

8 ORAL ARGUMENT OF LOIS G. WILLIAMS

9 ON BEHALF OF THE PETITIONERS

10 MS. WILLIAMS: Thank you, Mr. Chief Justice,
11 and may it please the Court:

12 In the Customs program at issue today, large
13 numbers of innocent people are subjected to what they
14 regard as a degrading and embarrassing search of their
15 urine when the government has no reason to believe that
16 they are guilty of any drug use and when the government
17 admits that it does not expect to find significant
18 evidence of such misconduct in these searches. We will
19 argue, therefore, that these suspicionless searches are
20 unreasonable under the Fourth Amendment.

21 I'd like to consider first today the
22 government's justification for this search because under
23 any analysis the Court may employ, the government must
24 have a need to intrude upon the privacy of its citizens,
25 even its employees. And if that need does not exist, if

1 it is not -- if the search is not justified, even a
2 minor intrusion cannot be justified. Therefore, the --
3 the government argues that this is a minor intrusion. I
4 would like to -- to address the intrusion question
5 second.

6 Now, the government recites an interest in
7 this case in a drug-free work force. But on this
8 record, as we will show, that interest is already met
9 and it is not threatened. And in that event, the
10 government has failed to establish any need to undertake
11 new and intrusive searches beyond the many tools it
12 already possesses, let alone searches without any
13 individualized suspicion whatever.

14 May I turn then to what the record actually
15 shows about the origins of this program?

16 QUESTION: (Inaudible) be a warrant --

17 MS. WILLIAMS: Well, Your Honor --

18 QUESTION: -- on that basis.

19 MS. WILLIAMS: We have -- we have -- the
20 government has never really made an argument that it
21 should be freed of the traditional requirements of the
22 Fourth Amendment.

23 QUESTION: Well, are you arguing that in order
24 to justify these tests that there must be a warrant?

25 MS. WILLIAMS: I -- we have -- we did preserve

1 that argument, Your Honor.

2 QUESTION: Well, do you -- is that what
3 you're --

4 MS. WILLIAMS: But we are not -- we do not
5 believe that the Court would require a warrant in this
6 circumstance.

7 QUESTION: So, individualized --

8 MS. WILLIAMS: But --

9 QUESTION: -- suspicion would be enough even
10 though there the government has plenty of other ways to
11 do this?

12 MS. WILLIAMS: Well, let me suggest I -- I
13 really believe that this -- these searches ought to be
14 conducted only on probable cause. The -- I am perfectly
15 willing to -- to see that the warrant requirement is a
16 -- is a bit different. And I -- although I think -- and
17 that's because in a suspicion circumstance, we have a
18 more imminent situation.

19 In this situation, however, we have people who
20 have done nothing. There is no triggering event of any
21 sort which would suggest that a warrant requirement
22 could be abandoned. I mean, usually it's justified in
23 abandoning the warrant requirement when there are some
24 sort of exigencies. And when you are looking at people
25 who have given you no cause at all, it is rather more

1 like the situation where at least some sort of area-wide
2 warrant or work force-wide warrant might be obtained.

3 I frankly believe that that is less --

4 QUESTION: Would a work force --

5 MS. WILLIAMS: -- far less important than the
6 -- than the requirement of cause.

7 QUESTION: Would a work force-wide warrant
8 really be of any benefit to -- to your clients here?

9 MS. WILLIAMS: Your Honor, it -- it -- I am
10 perfectly satisfied that the -- the warrant would give
11 very little more than we already have, which is why we
12 don't place great stock in it. But the analysis to be
13 sound -- true to the analysis, normally the government
14 would have to justify abandoning the traditional
15 requirements. It hasn't really made that argument in
16 this case.

17 But the regularity of the procedure is not
18 really the problem in this case. The problem is in
19 taking people who have done nothing for which they can
20 be criticized. Indeed, the selection of this group is
21 almost perverse because they have recently been examined
22 and their work record evaluated. They are current
23 employees, many with long histories, who have been
24 selected for promotion. It -- they would appear to be
25 on common sense the least likely to create any problem

1 for the Customs Service.

2 QUESTION: Mr. Williams, how -- how do you
3 reconcile the notion of the need for particularized
4 suspicion with the requirements that -- you know, when
5 we think of these privacy cases, I suppose every federal
6 judge thinks of the annual financial disclosures that
7 every federal judge has to file every year showing all
8 -- all income received by the judge and by his spouse
9 and children. Now, is there -- is your position that
10 that is invalid or -- or is there --

11 MS. WILLIAMS: No.

12 QUESTION: -- some reason why that invasion of
13 privacy, which is much greater because that goes to the
14 entire public, whereas these -- these tests just go to
15 -- are not published, of course. They don't become
16 public.

17 MS. WILLIAMS: Well, it is true, indeed, Your
18 Honor, that there are many invasions of privacy that we
19 suffer. But I take it even a federal judge, who is
20 subjected to the most rigorous scrutiny and who
21 discloses -- who permits disclosure of financial records
22 and even medical records and the like, might well object
23 if it -- if it were announced that his home should be
24 subject to search or that his desk perhaps should be
25 subject to search. This is a search. That's the

1 difference.

2 QUESTION: If you're asking me to decide this
3 on -- if you're asking me to decide this on the basis of
4 whether it's a greater invasion of privacy that -- that
5 I should give a urine sample when I'm up for a promotion
6 or a transfer versus whether I should publish my entire
7 financial background every year, you're going to lose.

8 (Laughter.)

9 MS. WILLIAMS: That's right. That's why I
10 would not make that argument.

11 (Laughter.)

12 QUESTION: Well, then --

13 (Laughter.)

14 MS. WILLIAMS: It is -- there are --

15 QUESTION: I thought -- I thought you just had.

16 MS. WILLIAMS: No, there are --

17 (Laughter.)

18 MS. WILLIAMS: There are very -- there are
19 many very substantial intrusions that are not searches
20 within the Fourth Amendment. We do suffer those, and I
21 think in the -- the problem in the employment context is
22 perhaps we feel that we have opened ourselves to
23 practically every question, and we have practically no
24 privacy left when we're applying for a promotion in a
25 job, let us say. But that's not so because all of us

1 would draw lines at being personally searched even
2 though we -- we do permit vast disclosures of our
3 private information. That personal search is what
4 distinguishes this from the many other privacy invasions
5 involved.

6 And let me say that when those other areas of
7 privacy are yielded up, there is even less justification
8 for the search of this sort because we have disclosed,
9 in fact, so much. Do -- does society really require
10 this further indignity that is wrought upon us? I think
11 the justification decreases in that situation rather
12 than saying, well, we've -- we've -- we've let our
13 privacy go. We have no expectation left.

14 QUESTION: Do you think that a periodic
15 physical inspection, including urine and blood tests for
16 employees, for example, engineers of trains or pilots of
17 airplanes, is not a reasonable requirement on an ongoing
18 basis?

19 MS. WILLIAMS: Yes. I think it may be a
20 reasonable requirement in -- in the right sort of
21 safety-connected jobs.

22 QUESTION: Well, isn't the government's
23 argument here that these are in a sense safety-connected
24 jobs at stake in the Customs Service. People who are
25 out there in the field trying to stop the flow of drugs

1 into this country, for example -- should they not -- is
2 there no heightened concern for those employees that
3 they also be drug-free, not users or abusers of drugs
4 themselves?

5 MS. WILLIAMS: There is a heightened concern,
6 and I think these are the kind of employees for which we
7 might ask is -- is probable cause required or might we
8 do some kinds of searches on reasonable suspicion.

9 QUESTION: (Inaudible).

10 MS. WILLIAMS: But let me -- but let me say
11 that in a situation like this where we have a 200-year
12 old agency and no incident in this record -- none -- no
13 study is ever done. There is not a single incident of
14 -- of a safety problem, a bribery or integrity problem
15 owing to employee drug use in that entire history.

16 QUESTION: Well, do you think it's
17 unreasonable for the government to rely on statistics
18 generally for all employees to the extent of drug use to
19 -- to develop its concern within this particular agency?

20 MS. WILLIAMS: Yes, I do, Your Honor, for
21 several reasons. One, there -- I have -- I have
22 searched. It is very difficult to find reliable
23 statistics about work places in general, number one.

24 Number two, we have a work force here about
25 whom we know a great deal. And I think --

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QUESTION: Ms. Williams --

MS. WILLIAMS: -- it is --

QUESTION: -- do we know how many applying for promotion were actually tested?

MS. WILLIAMS: We have -- the record -- the record in the case shows that at the time the case was decided in the Court of Appeals, there were approximately 1,000 persons tested.

QUESTION: Had been tested.

MS. WILLIAMS: Had been tested, not --

QUESTION: Do we know how many of them tested positive?

MS. WILLIAMS: No -- no employee tested positive.

QUESTION: None.

MS. WILLIAMS: Right.

Since then on the public record last spring, the Commissioner in testimony to Congress stated that some 3,600 tests had been done and five persons tested positive. We do not know whether any of those were current employees or not. And we -- we have before us the current employees. So, we -- we know at most it was -- it was five persons out of 3,600.

I have no information about what has been done since.

1 But I would say with the size of the Customs
2 Service, even if you assumed that every single one of
3 those was a current employee and we tested everybody
4 next week, that would -- that would yield 20 or 21
5 positives out of a -- a work force of 14,000 to 15,000.

6 QUESTION: Of course, we don't know how many
7 might have not applied for promotion or might have left
8 the Service because they simply could not get rid of a
9 drug habit which they knew would turn up in these tests.

10 MS. WILLIAMS: Yes.

11 QUESTION: There's no way --

12 MS. WILLIAMS: We do not know that. But we
13 have, as I say --

14 QUESTION: And that's really the crucial
15 figure, isn't it?

16 MS. WILLIAMS: Yes. But -- but let's look at
17 that question of deterrence. When -- it 's very
18 difficult to evaluate that when we've had no problem
19 that we know of ever. So, when we talk about deterrence
20 as a feature of the government's argument, I think it's
21 very easy to say -- and it's impossible to evaluate.
22 One can't really speak meaningfully of deterring a
23 non-problem. First of all, the tests would have to be
24 highly effective I think to serve as an effective
25 deterrent. And as we've argued in our brief, this

1 particular test is unusually ineffective since it's
2 given one time and on -- on several days' notice.

3 But in any event, there's nothing in the
4 record that would help us evaluate the deterrent effect
5 and note the -- the argument that the government makes
6 allows it to claim success either way. If we catch any
7 people, this test is working; and if don't catch any
8 people, the test is working. That -- that defies common
9 sense.

10 Compare it with the magnetometer searches
11 which have been the subject of litigation. That search,
12 far less intrusive than this one I trust by anyone's
13 measure has -- we -- there is -- there was clearly
14 something going on that needed to be deterred. There
15 was a problem. It was a -- it was a terrible problem.
16 And we knew it, and we could see it, and we could
17 measure it. And when magnetometers were instituted all
18 around the country, we no longer had to think when we
19 got on an airplane am I going to end up in Cuba at this
20 time.

21 QUESTION: But must the government wait until
22 the dimension is that of a terrible problem?

23 MS. WILLIAMS: No.

24 QUESTION: Can't it anticipate?

25 MS. WILLIAMS: It could anticipate it, but it

1 has to be a reasonable anticipation. This agency has --
2 it's very clear that -- that it has many tools to see
3 whether it has the kind of problem it purports to look
4 for. It has a very aggressive internal affairs division
5 whose sole reason for being is to investigate the
6 conduct of its employees and it does that with a
7 vengeance. And it never has turned up any of the kinds
8 of problems that the Commissioner refers to related to
9 employee drug abuse.

10 Moreover, the Commissioner himself said drug
11 abuse would create these problems in the work force.
12 And he points to things like theft, health insurance,
13 accidents, lowered productivity, morale problems though
14 every one of those is a visible manifestation. You can
15 look at the work force and you can see whether you have
16 those sorts of problems. And you can perhaps use those
17 as the basis for individualized suspicion.

18 I suggest the analysis this Court employed in
19 Delaware v. Prouse is very appropriate here when it --
20 when it inquired into the effectiveness of the -- of the
21 search in service of the stated goal. And what the
22 Court said is it does -- it is not necessarily a matter
23 of common sense that we will catch more people if we
24 just set out to do it without any suspicion. Isn't it
25 far more sensible, in fact, to look for the

1 manifestations, to -- to -- to see what kinds of
2 problems you have bearing in mind that none has
3 emerged? It's inconceivable that there should have been
4 some kind of significant problem before that -- that has
5 never surfaced. But look for those kinds of infractions
6 -- in Delaware v. Prouse, it was traffic infractions;
7 here any kind of work place infractions -- and use those
8 as the basis for individualized suspicion.

9 In that event, I suggest -- and the record I
10 -- I think there is not a suggestion in this record to
11 the contrary -- that that would be a far more effective
12 way to search out whether, in fact, there is anyone in
13 this work force to be concerned about.

14 There is -- the deterrence rationale seems to
15 me to go to the heart of what the Fourth Amendment is
16 all about. And if deterrence alone is enough to justify
17 dragnet searching of innocent people, I do not see any
18 principled way that lines can begin to be drawn after
19 that.

20 Now, perhaps if we are talking about dramatic
21 public safety concerns, that is a place where we would
22 want to draw a line. But the further we get from that
23 into areas of integrity and responsibility --

24 QUESTION: Why do you think the government
25 sort of -- maybe it didn't start with this, but it -- it

1 picked out the Customs Service. Why that?

2 MS. WILLIAMS: Well, that's an interesting
3 question --

4 QUESTION: Rather than some other --

5 MS. WILLIAMS: -- Your Honor. We can only
6 speculate. Obviously there is a reason why they need to
7 be concerned about drug abuse among their employees, and
8 we have never suggested to the contrary. But the -- but
9 the Fourth Amendment question is one of --

10 QUESTION: Do you think it has something to
11 do, though, with enforcement of the law against the
12 importation of drugs?

13 MS. WILLIAMS: Yes, of course, it does.

14 QUESTION: How is that?

15 MS. WILLIAMS: And that -- that question --
16 even if the -- the rationale is these employees need to
17 be above suspicion, I do not disagree with that point.
18 They are in a position where they are -- they have a
19 very sensitive responsibility that has to do with
20 drugs. But --

21 QUESTION: Do you think -- are you -- are you
22 telling me that in all of history, there -- they've
23 never discovered a faithless Customs employee that is
24 conniving with some importer?

25 MS. WILLIAMS: They have discovered such.

1 They have very effective investigations that do turn
2 those up --

3 QUESTION: Well --

4 MS. WILLIAMS: -- but never connected with
5 drug abuse on the part of the employee.

6 QUESTION: Well --

7 MS. WILLIAMS: Never yet. And that -- that is
8 the critical link that's missing here. People are
9 subjected to bribery all the time and integrity
10 violations are of great concern.

11 QUESTION: Well, I would think -- I would
12 think -- I would think people who use drugs are
13 especially subject to -- to -- to influence.

14 MS. WILLIAMS: Well, they may -- they may be --

15 QUESTION: They have to -- they have to --
16 Customs employees don't -- I don't suppose they're rich.

17 MS. WILLIAMS: They're not, Your Honor.

18 QUESTION: They have to -- that's going to be
19 hard to feed their habit. So, there's one way they can
20 do it I suppose is conniving.

21 MS. WILLIAMS: That's true, but I mean, I
22 think that stands to reason.

23 QUESTION: Well, it's not beyond imagination,
24 is it?

25 MS. WILLIAMS: It is not beyond imagination.

1 That's right. But it is -- it is -- it is a little
2 further removed from -- from --

3 QUESTION: Well, all you need is one or two
4 moles in the Customs Service to really cause a lot of
5 problems.

6 MS. WILLIAMS: But what might subject a person
7 to a bribe are vast numbers of things, Your Honor. And
8 I take it we would say -- we would -- we would say the
9 fact that someone might be subjected to a bribe because
10 he is in financial difficulty is our justification for
11 now searching desks, searching homes, tapping phones. I
12 -- I think that the difficulty is that -- that a
13 possible drug use does not subject one to a bribe any
14 more than any number of other things that we might think
15 of and that those things we have always understood must
16 be demonstrated to be suspicious in order to justify
17 those kinds of searches.

18 QUESTION: Well, you -- you say the Service
19 must be above suspicion. And yet, you insist on
20 suspicion as the premise for the test.

21 MS. WILLIAMS: I --

22 QUESTION: It seems to me, therefore, you say
23 the government has an unattainable goal.

24 MS. WILLIAMS: I say that I understand the
25 goal that they want their employees to be -- to have

1 integrity and to be seen as such. What I am saying is
2 that the Commissioner said when he promulgated -- he
3 just decided to do this. He just announced it. There
4 was never any study --

5 QUESTION: Can you tell us a little bit about
6 the three categories? It's -- it's not quite clear to
7 me the percentage of Customs employees that are covered
8 in the three categories. There are those who carry
9 arms, those who are involved in the interdiction of
10 drugs, and those who have access to classified
11 material. Is that -- can you tell me what percentage of
12 the Customs force that is?

13 MS. WILLIAMS: I can tell you, Your Honor, it
14 is not in the record. It is not, but it is a matter
15 probably that could be compiled from public records. We
16 know that one-third of the Customs Service's customs
17 inspectors -- they are covered. That would be 5,000.
18 We know that virtually every manager is covered. It is
19 my information that -- that probably at least
20 three-quarters of the Customs Service occupy covered
21 positions now. That -- that is a matter of putting
22 together a number of records.

23 It is clear to us that the justification --
24 the -- the catchall justification really -- and
25 virtually all of the employees in the Customs Service

1 are categorized as critical-sensitive, which means that
2 -- that the justification could apply to virtually all
3 of them. It has not yet been so applied. But that --
4 the catchall category is access to confidential
5 information by which is meant sensitive and -- and
6 delicate, but not necessarily of a top secret
7 classification which I think is important not to confuse
8 those two.

9 QUESTION: You say that the Commissioner
10 decided upon this program on his own?

11 MS. WILLIAMS: Yes, he did, Your Honor. He --
12 he -- not -- not --

13 QUESTION: He didn't have to get the approval
14 of any agency or otherwise?

15 MS. WILLIAMS: No, not so far as this record
16 shows and it did precede the executive order that the
17 President issued. The -- the -- this program preceded
18 it.

19 He -- the Commissioner -- not only did he not
20 know of any problem in his work force, he didn't look --
21 he did not study to see whether there was any. He
22 sought no one's advice as far as we know, and made no
23 judgment that is anywhere on this record that said that
24 it is necessary to do these searches without probable
25 cause, without individualized suspicion. He simply

1 announced that he was going to do it. He announced that
2 he might do it, and then a little later he announced
3 that, in fact, he was going to do it.

4 And he acknowledged, when he made that
5 announcement, that the Customs employees were known for
6 their integrity in the law enforcement community. And
7 he announced that drug use in the agency was not the
8 reason for this program. He did not expect to find a
9 significant problem and, indeed, he has not found a
10 significant problem.

11 So, why would he do it? His announced reasons
12 were two: to set an important example in the country's
13 struggle against drugs, and to show the entire work
14 force the drug screening is a good thing in that
15 struggle.

16 But it seems to us quite clear that the goals
17 recited in the government's brief, safe and efficient
18 operation, promoting the integrity of the Service,
19 preserving the agency's reputation, are fine goals.
20 They simply were never in jeopardy here. And -- and
21 ironically, the Commissioner may have placed them more
22 in jeopardy when he suggested that now, although there's
23 no problem, we're going to start testing.

24 Now, because these goals were not threatened
25 and because they were not addressed by this program at

1 all except in some very attenuated way -- we want to
2 prevent these things from ever arising -- we do not see
3 how they can justify the searches -- searches that are
4 intrusive of -- of innocent persons. And I'd like to
5 spend a moment, if I can, talking about the nature of
6 the intrusion here because I think it is very easy --

7 QUESTION: Before you do that, may I ask just
8 one question?

9 MS. WILLIAMS: Surely.

10 QUESTION: I understand this case just
11 involves people who are being transferred and promoted.

12 MS. WILLIAMS: Yes.

13 QUESTION: And your argument rests very
14 heavily on the past history of these people.

15 MS. WILLIAMS: Yes.

16 QUESTION: I take it your argument really
17 would not apply to initial applicants for employment.

18 MS. WILLIAMS: I think -- we do not argue for
19 initial applicants. I believe the balance is somewhat
20 different in that circumstance, and whereas I do believe
21 that -- that individuals applying for jobs have
22 significant privacy rights, the government has less
23 means to evaluate them perhaps than it does -- certainly
24 than it does current employees.

25 QUESTION: So --

1 MS. WILLIAMS: So, whether or not that could
2 be justified, it is a -- a different balance, a little
3 different balance. And I think --

4 QUESTION: Do you think the government would
5 have a stronger case as to applicants than it --

6 MS. WILLIAMS: I think it would have somewhat
7 stronger case, yes.

8 QUESTION: Well, don't they -- don't they give
9 physical exams to -- to people who want to be a Customs
10 inspector?

11 MS. WILLIAMS: To some -- oh, inspectors do
12 have to have what is called a medical certification.
13 Many of the people covered do not have medical exams.

14 QUESTION: Well, how about the inspectors?

15 MS. WILLIAMS: What they do is they have a --
16 a form, a one-page form, they take to their doctor with
17 things circled that -- that say these are the
18 requirements for the job. And the doctor, one's own
19 doctor, signs that -- that requisite --

20 QUESTION: Well, is there any evidence then to
21 find out if some person is an alcoholic or a drug user?

22 MS. WILLIAMS: No, not -- it is -- there is no
23 test done for that.

24 QUESTION: No blood test?

25 MS. WILLIAMS: No, no, not -- not -- no, not

1 for that. And if urinalysis is required -- it is in
2 some -- it is not -- a drug screen is not done.

3 The -- the nature of the intrusion in this
4 case is we think twofold. It -- it has to do with both
5 the process of collecting the sample, which we have
6 outlined in our brief, and with the -- the laboratory
7 analysis itself.

8 And recalling that these are good employees,
9 they -- they must report to what we have come to call a
10 collection site to give a urine sample in a highly
11 controlled atmosphere closely monitored by a collection
12 site person who has no training or experience in
13 particular whose sole purpose is to prevent cheating and
14 to preserve the chain of custody. Usually the employee
15 is not directly watched while urinating, but he may be
16 under certain circumstances. But he must be closely
17 listened to and in all other ways closely observed for
18 signs of unusual or suspicious behavior which is noted
19 in a permanent book.

20 The sample is then sent to a laboratory for
21 analysis to detect the presence of drugs. And I have to
22 mention that every single one of these specified drugs
23 but one has licit uses as well as illicit. Every single
24 one but one. And all of those legitimate therapeutic
25 uses will have -- will be discovered by this test and

1 will have to be justified to a representative of the
2 employer. So, those employees who take medication for
3 certain kinds of pain, certain kinds of depression,
4 narcolepsy, inflammatory bowel disease, chronic cough,
5 maybe even some cancer treatments, will have to justify
6 their use of these drugs.

7 Now, the Fourth Amendment protects various
8 interests, among them privacy, bodily integrity and
9 dignity. And I think each of those is seriously
10 transgressed by this test. It is a personal search of
11 the contents of one's bladder. It is taken under
12 demeaning conditions. It involves a very sheltered and
13 private function of our person, something many people go
14 to great lengths to avoid attracting any attention to
15 whatever.

16 QUESTION: Do you think any urinalysis --
17 collection of urine is demeaning?

18 MS. WILLIAMS: No, indeed, Your Honor. It's
19 the -- it's the highly controlled and observed
20 circumstances that is -- that are particularly demeaning
21 in this case.

22 QUESTION: You surely have had a physical
23 examination.

24 MS. WILLIAMS: Yes, indeed, Your Honor.

25 QUESTION: Did you find it demeaning in that

1 respect?

2 MS. WILLIAMS: No, but nobody came into the
3 toilet with me to watch to see whether this, indeed, was
4 my urine. That is what's demeaning about this
5 particular test. The -- the intrusion on various
6 aspects of one's privacy that is wrought by this test
7 far exceeds I think because of those -- those demeaning
8 features.

9 QUESTION: Well, I probably am embarrassed
10 because of my relationship with the medical profession,
11 but I -- I wonder a little bit about this super
12 sensitivity about blood tests and urine collection.

13 MS. WILLIAMS: Well, I think my clients, Your
14 Honor, who are standing before this collection site do
15 not confuse what they are about to do with a visit to
16 the doctor. It is not the same. The atmosphere is an
17 adversarial, punitive atmosphere. It is not a trusting,
18 confidential one that we have come to expect in a visit
19 to the doctor which is the most these employees would
20 ever have to do for their employer in a fairly limited
21 way.

22 I'd like to save a moment, if I can, for
23 rebuttal.

24 QUESTION: Thank you, Ms. Williams.

25 General Fried, we'll hear now from you.

1 ORAL ARGUMENT OF CHARLES FRIED

2 ON BEHALF OF THE RESPONDENT

3 MR. FRIED: Thank you, Mr Chief Justice, and
4 may it please the Court:

5 The Fourth Amendment says that the right of
6 the people to be secure against unreasonable searches
7 and seizures shall not be violated.

8 Our principal contention here is that what the
9 Customs Service has done is entirely reasonable. Let me
10 focus in a little bit more on the -- on the program we
11 have, and I think it's very well described in
12 Petitioners' amici, the AF of L-CIO.

13 On page 4 of their brief, the AF of L-CIO
14 writes, this program "applies only to a self-selected
15 subgroup of employees: those who voluntarily apply for
16 a promotion to a new job for which some inquiry into the
17 employees' fitness for duty must be conducted." And
18 then a footnote goes on to say: "Indeed, of these
19 applicants, only those who are tentatively selected for
20 promotion are required to undergo the test, and before
21 being so required these individuals are permitted to
22 withdraw." I would only add that if they do withdraw,
23 this has no employment consequences and they are free to
24 reapply at any time.

25 It seems to us that this program so described

1 is a very long way from what the Fourth Amendment was
2 originally intended to cover. Nevertheless --
3 nevertheless -- over the years and through many
4 decisions of this Court, it's quite clear that
5 government programs that implicate privacy and dignitary
6 interests of the individual come within the
7 gravitational force of the Fourth Amendment. And we
8 don't dispute that.

9 What's also clear, however, is that the
10 further you come from the central case of an abrupt,
11 coercive intrusion upon the individual in a criminal
12 context, the less appropriate it is to think in terms of
13 probable cause and the warrant and the more we're thrown
14 back on the overarching test of reasonableness which the
15 amendment itself specifically sets forward.

16 Now, that reasonableness is the product of a
17 balance, a balance of the seriousness of the
18 government's interest, on one hand, and the intrusion on
19 the individual, its nature, its context, its timing.

20 QUESTION: Mr. Solicitor General, may I ask
21 this question? Is one element in the balance the
22 probability that some useful information will be
23 discovered? When we talk in -- in the normal warrant
24 case probable cause to find something or -- is that an
25 element in the balance?

1 MR. FRIED: It is an element in the balance,
2 and I think that's an important point to talk about
3 because it's hard to argue -- and nobody seriously
4 argues -- that the government does not have a very
5 serious interest in assuring that those who are on the
6 front line of drug interception are not themselves
7 involved in drugs. And that does not mean just on the
8 job, but the weekend before or the week before or the
9 month before. That's quite clear.

10 What is urged against this program and what is
11 said to argue against its reasonableness is that this is
12 not as effective as it might be in weeding out drug
13 users. But that seems to us a rather curious objection.
14 We are told that it's possible to defeat the test. All
15 you have to do is abstain from drugs for a period of
16 from five days to -- we heard Mr. Mann say in the
17 previous case -- up to 60 days.

18 Now it seems to us that the very
19 indefiniteness of that time horizon is going to have an
20 effect. It will deter persons from applying for the job
21 because they can't be sure if they have been involved in
22 a drug, that they're going to be drug-free.

23 QUESTION: Mr. Solicitor General, may I
24 interrupt because I don't think we should talk about
25 applicants. We're talking about a group of people who

1 have a track record. And as your brief points out, they
2 have a 50 to 67 percent capacity under drugs and they
3 have absenteeism and all the rest of it. And they don't
4 have it -- they have a track record of not disclosing
5 that kind of behavior.

6 So, isn't it fair to presume that there is
7 very -- that the incidence of drug use among the people
8 that are going to be tested is very, very small?

9 MR. FRIED: The incidence is certainly small,
10 and we do not contest that. It is not, however,
11 nonexistent.

12 QUESTION: Well, but your tests show it to be
13 nonexistent.

14 MR. FRIED: Not nonexistent. There are very
15 small number of cases. We have, in fact --

16 QUESTION: Not among -- among transferees?

17 MR. FRIED: Yes, sir. The most recent
18 information, which I'll be happy to lodge with the
19 Court --

20 QUESTION: Let me just first interrupt and ask
21 you. As to what was in the record at the time the case
22 was tried, it was nonexistent, wasn't it?

23 MR. FRIED: At the time the case was tried, I
24 believe that there were no positives which were shown up
25 in the transferee population. Since that --

1 QUESTION: But did you -- but at that time was
2 there any record of people who withdrew or who -- who
3 otherwise would have applied for a transfer?

4 MR. FRIED: Well, I don't think -- I don't
5 think records were kept --

6 QUESTION: Yes, of that.

7 MR. FRIED: -- of people who withdraw. And in
8 fact it's rather important that they not be kept --

9 QUESTION: Yes.

10 MR. FRIED: -- because the withdrawal process
11 is one which is quite free.

12 QUESTION: Well, that might -- if there were a
13 lot of withdrawals, I suppose that might be one
14 explanation you didn't find anybody.

15 MR. FRIED: That's right, or people who simply
16 don't apply. Since the time the case was tried, there
17 have been a small number of persons who were uncovered.
18 And I would say that even with --

19 QUESTION: Would that -- would those be the
20 figures that Ms. Williams gave us?

21 MR. FRIED: I think so. What -- what we have
22 is that -- that two internal applicants tested
23 positively for marijuana, and I believe Ms. Williams
24 mentioned that there were five instances in her brief.
25 It's a very, very small number. I don't think we need

1 to quarrel about what the exact number is. It's a very
2 small number, but it is not zero. And --

3 QUESTION: How long had the program been in
4 effect at the time the case was tried?

5 MR. FRIED: I think about somewhat between a
6 year and two years, Mr. Chief Justice.

7 Our contention --

8 QUESTION: But, again, let me just -- let me
9 just -- so you have time to address it. If in the
10 probable cause situation we think there ought to be
11 maybe a 35, 40, 50 percent chance that the warrant will
12 produce incriminating evidence and you have a test of
13 two people out of a couple of thousand or whatever it
14 is, is that a sufficient probability you think to be
15 reasonable?

16 MR. FRIED: I think that you're comparing,
17 with respect, apples and oranges because the point of
18 probable cause is to focus and -- to focus and to
19 confine discretion. In this case there is no need to
20 confine discretion because the program specifies the
21 threshold and persons voluntarily approach that
22 threshold.

23 QUESTION: But are you saying then that the
24 probability of finding something is not relevant to the
25 analysis?

1 MR. FRIED: The probability is not relevant to
2 the -- I have -- I have --

3 QUESTION: That isn't what you said earlier.
4 That's why --

5 MR. FRIED: No. My point is that if it has
6 any chance at all -- and I think it does have a chance
7 -- of deterring applicants and catching the occasional
8 person, that is sufficient given the extreme sensitivity
9 of these positions and given the need to assure the
10 public that persons who are engaged in drug interception
11 have been willing to go through what I would describe as
12 a kind of right of passage to indicate that they know
13 and that the Service knows that their job is entirely
14 incompatible with any involvement with drugs
15 whatsoever. And this is a way of doing that. It is a
16 way of --

17 QUESTION: Are they compelled to file
18 financial disclosure statements such as Justice Scalia
19 suggested?

20 MR. FRIED: Well, of course, some of these
21 people --

22 QUESTION: I mean, do you regularly look at
23 their bank accounts and find out what their financial
24 status is?

25 MR. FRIED: No, we do not, but there is --

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QUESTION: (Inaudible).

MR. FRIED: -- inquiry made into those things. Anybody who suffers a background check -- there are --

QUESTION: No. I'm talking about after they're on the job and when they apply for a transfer or promotion. I would think an elementary thing you'd want to know if they're susceptible to bribery is what their financial condition is.

MR. FRIED: It is I think a normal part of the background check involved in a transfer to a sensitive position, if you're not in one already, is to ask do you know -- and you will ask this rather widely of friends, acquaintances, families -- do you know if the person lives beyond their means. That's a standard FBI type of question which is asked of many, many people seeking government --

QUESTION: But do you conduct any searches to find that information? This is a search. I guess everybody agrees to that.

MR. FRIED: Well, we think that it's not necessary to make an argument about whether it's a search. We're prepared to concede it's a search. We think it's pretty much on the border of a search and no search. It's a very marginal kind of search.

QUESTION: Let me put it differently. Do you

1 think you have the right to make a search to find out
2 about the financial information of all your -- your
3 agents?

4 MR. FRIED: Not any kind of search, not of
5 their desks, not of their homes, no, I don't think we
6 have that.

7 QUESTION: But of their persons.

8 MR. FRIED: Not without much greater threshold
9 circumstances than we have here.

10 It is an important part of our argument not
11 only that the government's need is an important one, but
12 that intrusion is minimal.

13 QUESTION: Well, your argument then is that
14 the intrusiveness of this search is much less than the
15 intrusiveness of a search that would reveal financial
16 information. That's what you're arguing.

17 MR. FRIED: Indeed.

18 QUESTION: Yes.

19 MR. FRIED: Yes, it is. This is a very
20 minimally --

21 QUESTION: Which I might point out is the
22 exact opposite of the position Justice Scalia suggested
23 earlier.

24 MR. FRIED: Justice Scalia, I think, was
25 saying that the financial search which he and I and you

1 also undergo regularly is far more intrusive. This is
2 much less intrusive. This is much less intrusive, and
3 being much less intrusive, requires a correspondingly
4 lesser degree of urgent necessity. That -- that is,
5 indeed, our contention.

6 QUESTION: Are you saying, General Fried, that
7 one of the principal interests the government has here
8 is to vindicate the idea and the image of an elite corps
9 within the government?

10 MR. FRIED: Well, yes, I think one can put
11 that in a way which makes it seem rather showboating and
12 insubstantial or something which is very, very sensible.
13 I think there's a sensible aspect here and that is these
14 are people who are involved personally in interception
15 of drugs. And they should, therefore, not be the
16 customers of the very illicit trade which they are the
17 front line of interdicting. And this is a way of
18 indicating that any involvement, not just the day
19 before, but perhaps up to 60 days, is incompatible, and
20 it's really one of the most secure ways of showing that
21 there is no such involvement.

22 QUESTION: Well, Mr. Fried, I guess this
23 program though extends to employees other than those on
24 the front lines of drug interdiction, for example, in
25 the classified information area. Apparently it extends

1 even to messengers and food service workers.

2 MR. FRIED: The three categories which the
3 program designates are persons actually involved in drug
4 interception, persons who carry or use firearms and
5 persons who have access to classified information.

6 Now, it may be that certain individuals have
7 been included under those major categories improperly or
8 who shouldn't have been. And then we could have a
9 discussion about that, and that would be a basis for a
10 complaint if somebody said that, look, I -- I carry
11 sealed envelopes and I shouldn't be included. And maybe
12 they should and maybe they shouldn't.

13 QUESTION: Is this purely a facial challenge
14 so that we leave room for those degrees of difference --

15 MR. FRIED: The challenge has not been
16 litigated at all on the basis that it's a little bit
17 over-inclusive here and might have been a little bit
18 more -- more inclusive there. So, it is in the nature
19 of a facial challenge.

20 As we consider the intrusion -- and this is
21 the point that Justice Stevens was concerned about -- it
22 is minimally intrusive for a number of reasons. First,
23 the very fact of self-selection makes an important point
24 about how unintrusive it is. You choose the time of
25 your application. You are given advanced warning, and

1 if you find this offensive or threatening --

2 QUESTION: But, Mr. Solicitor General, that
3 argument would apply to financial searches too.

4 MR. FRIED: It would apply to financial
5 searches which are much more intrusive and much more --

6 QUESTION: But why -- why is -- you were going
7 to explain why this is less intrusive than a financial
8 search and give -- give me an argument that would apply
9 equally to both.

10 MR. FRIED: Well, it's much less intrusive on
11 another basis and that is that these are persons who are
12 subject to a large number of other background checks
13 and --

14 QUESTION: Also true with respect to financial
15 searches.

16 MR. FRIED: Also true of financial searches.

17 And also, of course, it is a search which is
18 akin to the physical examination, which Justice Blackmun
19 was talking about. So, the actual process of collection
20 of the urine is hardly something which people are not
21 familiar with.

22 A great deal was made about the humiliating
23 circumstances of the collection process, and I'd like to
24 say something about that. No doubt the process of
25 urination is something which has a customary aura of

1 privacy in our society, and that's -- we don't quarrel
2 with that. We don't try to belittle it.

3 In fact, the HHS regulations under which this
4 and all employee drug -- federal employee drug testing
5 must take place was developed as a result of a
6 rulemaking procedure in which these very concerns, these
7 very privacy, dignitary concerns were taken into account
8 and there was an adjustment. Judge Gezell noted in a
9 case involving random drug testing of air traffic
10 controllers that this program was designed to somehow
11 accommodate and acknowledge these dignitary concerns.

12 At first it was thought that the collection
13 would take place under direct observation, and as a
14 result of hearing exactly the kind of objections which
15 Ms. Williams eloquently put forward, the government
16 stepped back. It averted its eyes, as it were, and
17 said, no, there will not be direct observation unless
18 there's some reason to believe that something unusual is
19 going on.

20 Now, it seems to me that that very stepping
21 back is exactly the kind of acknowledgement that there
22 is a privacy concern which should go a long way to
23 assuage the sense that something unpleasant is going
24 on. There -- you go into a stall, and that -- it's an
25 area which is designated to be private. Now, it's not

1 the most private thing in the world, but it is more
2 private than it might have been, and it is made
3 private. There is a kind of a tip of the hat to the
4 proposition that, look, we understand this might be
5 embarrassing, and we're trying to acknowledge that. And
6 that goes I think a long way to saying we're not going
7 to just run roughshod over you. We understand this is
8 disturbing and we try to accommodate to that.

9 Then finally, there is an objection to the
10 search of the specimen itself. We see in the briefs the
11 phrase that this is a periscope into the private lives
12 and off-duty behavior of the employees. Now, that's a
13 striking metaphor, but it's both misleading and
14 fallacious.

15 The tests are designed to come up with only
16 one thing: evidence of controlled substance use. It
17 will not show any other kind of substances. That's the
18 first thing.

19 Second, of course, many of those substances
20 might be used for legitimate purposes under a doctor's
21 prescription, for instance. That's correct. The
22 information that you give the test persons about that is
23 something which, if you -- if you wish, you may withhold
24 until the time that you meet the medical review officer,
25 and you may at that time say, well, it's true. It's

1 come up positive for opiates, but I am taking cough
2 medicines of that sort, and here's the doctor's
3 prescription.

4 And that information, unless the MRO concludes
5 that it's not true or that you are a drug user -- that
6 information stops there at the medical review officer's
7 desk. It does not get to the agency.

8 And therefore, this periscope is designed to
9 allow the employer to see only one thing: illegal drug
10 use. And we suggest that the employer is entitled to
11 inquire into that. They inquire of the person under
12 penalties of perjury, of his neighbors, of his family,
13 and we think may also inquire of a urine sample.

14 QUESTION: Mr. Fried, do you take the position
15 that the government can do that for all its employees or
16 only those in certain, select categories?

17 MR. FRIED: We do not take the position that
18 it may do so for all its employees because we don't have
19 that case before us. We think it's very important that
20 the Court --

21 QUESTION: To the extent that you rely on
22 efficiency of government operations as a rationale, it
23 would certainly extend, it seems to me, to everyone.

24 MR. FRIED: That is an element of our
25 argument. It is not by any means the whole of our

1 argument. I think it's terribly --

2 QUESTION: Well, that should be a concern for
3 us, should it not?

4 MR. FRIED: It certainly should be a concern.
5 We have essentially three kinds of drug
6 testing programs.

7 There's a drug testing program which is
8 triggered by an alarming incident or some kind of
9 suspicion, and you've just had a case on that argued to
10 you.

11 We have threshold drug testing programs, and
12 that's what this is, where a person freely -- I won't
13 use the word "voluntarily" because that's legally
14 freighted -- freely comes up to a threshold, applies for
15 a job, applies for a -- for a promotion. That's this
16 case.

17 And then there's the random kind of testing,
18 and that case is not before you.

19 We think it's very important that, though
20 inevitably you will deal in categories of cases, that
21 the Court consider the kind of case that it actually has
22 with the kind of record and the kind of justification
23 that is present. If we have a case in which a much
24 larger population is tested or where the method is
25 random drug testing, then I would hope the Court will

1 consider that case on the record that will then be
2 established after it has been sorted over and digested
3 by courts below. But we ask neither that we get a hint
4 or a signal helping us out in those cases, but we hope
5 that nothing will be said to preclude them either. That
6 really lies in the future.

7 No doubt both the Customs Service and the
8 Department of Transportation are contemplating much more
9 extensive programs. And those programs will have to
10 await the day of review in the Department of Justice and
11 review in the lower courts.

12 I would hope that the Court will consider this
13 case with this case's justification and its rather
14 special and urgent and frankly symbolic significance
15 because we are here dealing with the borders across
16 which these drugs must come.

17 QUESTION: Mr. Solicitor General, this -- this
18 program is limited to urine testing, isn't it?

19 MR. FRIED: Yes, it is.

20 QUESTION: Was there any consideration of
21 blood testing and any reason for not including it?

22 MR. FRIED: There was no consideration of
23 blood testing, and one reason is that the urine test is
24 really pretty good in showing not current impairment
25 because current impairment is not our focus. Our focus

1 is any involvement with drugs at all. We do not accept
2 the notion --

3 QUESTION: Well, I gather urine testing may
4 disclose something -- consumption as recently as back as
5 60 days. Is that it?

6 MR. FRIED: Yes, it -- it's curious.
7 Sometimes we're told that that fact means this is a bad
8 program and sometimes we're told that this is a good
9 program.

10 QUESTION: Well, was that fact one of the
11 reasons that -- for the choice of urine testing? .

12 MR. FRIED: Absolutely, yes, because the urine
13 testing will show that this person does use drugs. And
14 we think the drugs are both used surreptitiously, which
15 is why people who use them may escape notice or
16 observation, but it's also insidious. And people who
17 used drugs on one occasion are -- may be inclined to use
18 them on other occasions, and we think that a 60 day
19 horizon is a good thing. It catches people. We think
20 that's excellent. And if it deters some people from
21 applying, that's good too. We don't think that's a bad
22 result. That's a good result.

23 If there are no further questions --

24 QUESTION: I have one more, if I may.

25 You said this case has symbolic significance.

1 What did you mean by that?

2 MR. FRIED: What I meant by that is that the
3 Customs Service is, indeed, entitled to take a very fine
4 filter, which this is, to show to itself, to its
5 employees and to the public that persons who will be in
6 -- who will be on the border across which these drugs
7 come are persons who, as far as we can tell, are not
8 themselves involved in drugs.

9 We don't do everything, but here is a simple,
10 nonintrusive, rather familiar kind of step that's taken
11 which gives some measure of assurance. Of course, other
12 things, but they are more draconic, would give greater
13 assurance. It is a balance. It's not very intrusive,
14 and it gives a fair measure of assurance.

15 QUESTION: That symbolic assurance would be
16 precisely the same for searches for financial
17 information too.

18 MR. FRIED: Well -- and, of course, higher
19 level employees must give that financial information and
20 financial disclosure forms. They don't consent to a
21 search of their home, but we think that's much more
22 intrusive. So, the -- the degree of the intrusion is an
23 important element in the balance. I don't try to --

24 QUESTION: But -- but the symbol that you seek
25 would really support a very wide range of investigative

1 activity.

2 MR. FRIED: Oh, it would support it --

3 QUESTION: To the extent that you rely on that
4 argument.

5 MR. FRIED: -- if the other factors were --

6 QUESTION: Yes.

7 MR. FRIED: -- present, if the symbol were
8 important, if the filter was effective, which we think
9 it is, and if it was as minimally intrusive as this one
10 is and, of course, with the very important element that
11 you present yourself for this test, you volunteer for
12 these positions. I'm not saying this is consensual, but
13 you do volunteer for these positions, and you may
14 withdraw your application any time prior to the test.
15 Put all of that together, and I think we have something
16 which is imminently reasonable.

17 I thank the Court.

18 QUESTION: Thank you, General Fried.

19 Ms. Williams, you have two minutes remaining.

20 REBUTTAL ARGUMENT OF LOIS G. WILLIAMS

21 ON BEHALF OF THE PETITIONERS

22 MS. WILLIAMS: Thank you, Mr. Chief Justice.
23 With that time, I would like to make just a
24 couple of points.

25 These employees -- the bulk of them are -- do

1 very important jobs, but customs inspectors are GS-5, 7
2 and 9. They are hardly to be compared with the -- the
3 jobs that carry the greatest responsibility in
4 government. It's responsible, but as Your Honor's
5 question points out, it is very hard then to see where
6 it would end.

7 I would like to -- to say that this is one
8 search where innocent persons have a great deal of
9 reason to be apprehensive. And it is notice that what
10 they -- what they are going to do does not really cure
11 that problem. Will I be able to do what is required of
12 me at this test, how will I feel about it, what if a
13 mistake is made, are entirely reasonable apprehensions
14 that everyone facing this test must have.

15 Now, I would like to say in closing that, of
16 course, the employer is entitled to inquire about all
17 sorts of things when one applies for this kind of job.
18 The question is saying that I have an interest in
19 whether or not you ever used drugs -- does that give me
20 the right to conduct searches to find out whether you
21 are telling me the truth? And one of the most
22 unsettling arguments the government makes is we can take
23 no risk. We can take no risk at all. The margin for
24 error built into an individualized suspicion requirement
25 is unacceptable in -- in the situation we have here.

1 The margin of error is unacceptable or singularly
2 unsuited, as I believe the brief says.

3 But that is a judgment we are not free to make
4 today. We are no -- we cannot say that we can no longer
5 afford the margin of error that is built into the Fourth
6 Amendment.

7 CHIEF JUSTICE REHNQUIST: Thank you, Ms.
8 Williams.

9 The case is submitted.

10 (Whereupon, at 11:57 o'clock a.m., the case in
11 the above-entitled matter was submitted.)
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 86-1879 - NATIONAL TREASURY EMPLOYEES UNION, ET AL., Petitioners V.
WILLIAM VON RAAB, COMMISSIONER, UNITED STATES CUSTOMS SERVICE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Judy Freilicher

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