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I. INTRODUCTION

The 1980s were noted for the escalation of the war on drugs. The dominant public perception was that drug use is a hideous evil that must be stopped, even at a great cost of public resources and personal

liberties.[1] Parents, politicians, and law enforcement officials rallied to battle drug use.[2] Tremendous expenses and limited victories did not slow the war on drugs.[3]

It cannot be disputed that drug abuse is widespread. More than seventy million Americans have experimented with illegal drugs, and twenty-three million currently use an illegal drug.[4] The costs to society include drug-related crimes, accidents, lost productivity, increased health costs, and personal suffering.[5] Drug users' employers bear a large portion of the costs resulting from lost productivity, accidents, illnesses, and related expenses.[6]

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1. Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights*, 38 HASTINGS L.J. 889, 891 (1987). The war on drugs will cost billions of dollars and already is severely burdening the courts and prisons. Anderson, *Uncle Sam Gets Serious: A Report From the Front Line*, A.B.A. J., Feb. 1990, at 60; Flicker, *To Jail or not to Jail*, A.B.A. J., Feb. 1990, at 64. These costs reflect political decisions about allocating resources. The most alarming cost of the war on drugs, however, is the loss of civil liberties, especially fourth amendment protections, which this Note will address.

2. The war on drugs has even led to random drug tests of public school athletes. *See* Schaill *ex rel.* Kross v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).

3. Wisotsky, *supra* note 1, at 891-95. Public support for the war on drugs is far from unanimous. Commentators have criticized the effort's expense and effectiveness and its assault on the Bill of Rights. *See, e.g., id. passim*; Comment, *The Constitutionality of Federal Employee Drug Testing:* National Treasury Employees Union v. Von Raab, 38 AM. U.L. REV. 109, 138-40 (1988) [hereinafter Comment, *Constitutionality*]; Comment, *Do You Abandon All Constitutional Protections by Accepting Employment with the Government?: Mandatory Drug Testing of Government Employees Violates the Fourth Amendment*, 28 SANTA CLARA L. REV. 169 (1988) [hereinafter Comment, *Do You Abandon?*].

Parallels between the war on drugs and Prohibition are obvious, although the war on drugs, unlike Prohibition, enjoys strong public support. Still, proposals to legalize recreational drugs have significant support, including that of United States District Court Judge Robert W. Sweet of the Southern District of New York and economist Milton Friedman. Among those considering the idea of legalization are former Secretary of State George P. Schultz and K. Brooks Thomas, regional counsel for the Customs Service in Miami. France, *Should We Fight or Switch?*, A.B.A. J., Feb. 1990, at 43; France, *Sweet Sours on War*, A.B.A. J., Feb. 1990, 44.

4. M. ROTHSTEIN, MEDICAL SCREENING AND THE EMPLOYEE HEALTH COST CRISIS 95 (1989). Despite these staggering figures, it is uncertain whether overall drug use is increasing. One study of high school seniors from 1979 to 1987 found substantial decreases in the use of marijuana, hallucinogens, and cocaine, and a slight decline in alcohol use. *Id.* at 95-96.

5. *Id.* at 97. For countless individuals, the results of drug abuse have been tragic. *See, e.g.*, Anderson, *Tom-Tom's Story*, A.B.A. J., Feb. 1990, at 62 (recounting the story of an addict who began selling illegal drugs at age 12).

6. One estimate is that substance abuse costs United States businesses $99 billion annually in lost productivity, including absenteeism, with two-thirds of this cost caused by alcohol use. M. ROTHSTEIN, *supra* note 4, at 96.

Although businesses lost $81 billion because of accidents in 1984, it is uncertain how much of this loss was because of substance abuse. *Id.* Dramatic anecdotal evidence of drug- and alcohol-related accidents in the transportation industry does exist. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1407-08 (1989). Studies of the mining and chemical industries, however, found that few accidents involved drugs. M. ROTHSTEIN, *supra* note 4, at 98. Still, there is a widespread perception that substance abuse causes great dangers in the workplace. Employers may bear other costs because of employees' substance abuse, including increased insurance costs, employee theft, and *respondeat superior* liability for employees' actions. *Id.* at 98-100.

Some employers have responded by requiring employees to be tested for drug use.[7] The federal government, the Nation's largest employer, is leading the way in drug testing.[8] Serious fourth amendment issues arise, however, when the government forces employees to submit to drug testing as a condition of employment. The typical urinalysis of a government employee constitutes a search without a warrant, probable cause, or individualized suspicion that a particular employee violated a law or even a workplace rule. Nevertheless, the United States Supreme Court in 1989 upheld government drug testing programs in *National Treasury Employees Union v. Von Raab*[9] and *Skinner v. Railway Labor Executives' Association.*[10] These cases were among a flood of recent federal and state court decisions allowing mandatory testing of federal, state, and municipal employees and private employees in pervasively regulated industries. These rulings have led several commentators to note that a "drug exception" to the fourth amendment may be emerging.[11]

Part II of this Note details the executive branch's efforts to perform drug tests on its employees and on private employees in pervasively regulated industries. Part III traces the Supreme Court's recent erosion of traditional fourth amendment protections against search and seizure. Part IV describes the Supreme Court's analysis of the executive branch's efforts at drug testing. Part V examines the analytical structure that courts use to determine the constitutionality of drug testing by the government. Part VI traces judicial trends in unsettled legal areas. Finally, Part VII concludes that the Court's reasonableness balancing test provides no concrete limit on government searches.

II. THE EXECUTIVE'S WAR ON DRUGS

Against the backdrop of the get-tough attitude sweeping the government,[12] President Reagan signed Executive Order No. 12,564, mandating drug tests for at least a million civilian federal employees.[13] This

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7. Private sector drug testing may not be as widespread as the public perceives it to be. In a one-year period spanning 1987-1988 only one percent of private sector workers were tested. Large companies institute most drug testing programs. A survey by the United States Department of Labor's Bureau of Labor Statistics found that 59.8% of employers with 5000 or more employees tested workers for drug use, but only 2.7% of firms with less than 100 workers had drug testing programs. Anderson, *Drug Screening*, A.B.A. J., June 1989, at 38.

8. Exec. Order No. 12,564, 3 C.F.R. 224, (1987), *reprinted in* 5 U.S.C. § 7301 (1988) [hereinafter Order].

9. 109 S. Ct. 1384 (1989).

10. 109 S. Ct. 1402 (1989).

11. *See, e.g.*, Wisotsky, *supra* note 1, at 891; *Skinner*, 109 S. Ct. at 1426 (Marshall, J., dissenting).

12. For a thorough examination of the scope of the war on drugs, see Wisotsky, *supra* note 1.

13. Order, *supra* note 8, § 7(e), *reprinted in* 5 U.S.C. § 7301 (1988); Comment, *Do You Aban-*

Order has proven to be the most controversial aspect of the government's multifaceted drug program.[14]

The Order stipulated that the use of illegal drugs by federal employees, on- or off-duty, results in lost productivity and poses risks to public health and safety and to national security. The Order also stated that drug use is responsible for many crimes, and that drug users are susceptible to coercion and irresponsible actions.[15] Noting that people who use illegal drugs are not suitable for federal employment,[16] the Order required all executive agencies to develop drug testing programs for employees in sensitive positions.[17] The Order included about a million of the 2.8 million federal employees.[18] Each agency was ordered to test all job applicants, to create a program to identify sensitive positions, and to establish criteria on which employees to test.[19] The testing procedures fell into three broad categories: testing based on some degree of suspicion that an individual employee had used drugs;[20] uniform testing based on triggering events such as applying for certain jobs or being involved in an accident;[21] and testing performed randomly.[22] The Order

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don?, *supra* note 3, at 171 & n.18.

14. For a discussion of the privacy and legal concerns expressed about the Order, see Comment, *Do You Abandon?*, *supra* note 3, at 170-71 & nn.9-14. The Fifth Circuit in National Treasury Employees Union v. Bush, 891 F.2d 99 (5th Cir. 1989), held that the Order was facially constitutional.

Commentators also have questioned the effectiveness of the drug testing plan because it does not test for abuse of alcohol or legal drugs, or for whether the illegal drug user is actually impaired by drug use.

15. Order, *supra* note 8, at 3 C.F.R. 224-25.

16. *Id.* § 1(c).

17. *Id.* § 3(a). A position is sensitive when (1) an agency head designates it as such; (2) the position involves or may involve access to classified material; (3) the position is obtained by Presidential appointment; (4) the position is for a law enforcement officer; or (5) the position involves law enforcement, national security, the protection of life and property, public health or safety, or "a high degree of trust and confidence." *Id.* § 7(d).

18. M. ROTHSTEIN, *supra* note 4, at 101; Comment, *Do you Abandon?*, *supra* note 3, at 171-72 n.23.

19. Order, *supra* note 8, § 3(a), (d). Agencies may test job applicants, employees who volunteer to be tested, employees for whom a reasonable suspicion of drug use exists, employees involved in an accident or unsafe practice, and employees undergoing drug counseling. *Id.* § 3(b)-(d).

20. Drug testing based on individualized suspicion is the least objectionable form of involuntary drug testing because the employees' actions caused doubts about ability to do the job. Although the criteria for testing are subjective, employees in drug testing cases prefer individualized suspicion testing because it is closer to probable cause than the other two categories. *See infra* Part V(A).

21. In uniform testing, the employees' actions trigger drug testing; a supervisor generally has no discretion over whom to test. The most common triggering event is applying for certain jobs. This category includes many nonemployees seeking jobs as well as employees seeking promotions or transfers. Other common triggering events are accidents, safety violations, and employees' returns from leave. Because employees sometimes can predict, and perhaps avoid, these situations, the tests are not as intrusive as random tests. The uniformity of the testing protects employees from supervisors' potential abuse of discretion. At the same time, the uniformity makes a nonuser

did not apply to testing within criminal proceedings,[23] and agencies are not required to report violations of federal drug laws to the attorney general.[24] The Order did not, however, explicitly forbid an agency from releasing test results to law enforcement personnel either voluntarily or under subpoena.[25]

Pursuant to the Order, the Department of Health and Human Services (HHS) created guidelines for agency drug testing programs.[26] These Guidelines detail procedures for collecting, transporting, and testing specimens. The employee urinates in a stall or behind a partition, unless the tester suspects an adulterated specimen. If adulteration is suspected, the tester directly observes the employee urinating.[27] An HHS certified laboratory then tests the specimen for illegal drugs.[28] No other tests may be performed on the urine unless otherwise authorized by law.[29] Any sample that tests positive for drug use must be confirmed by a second test using another procedure.[30] Employees testing positive must undergo counseling and refrain from future drug use; otherwise, they must be fired.[31]

Some agencies already were testing employees before the Order, and others were quick to begin testing. By 1988 forty-two federal agencies had begun testing their own employees as well as employees in pervasively regulated private industries, such as the merchant marines,

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more likely to be tested than the individualized suspicion standard. *See infra* Part V(B).

22. In random testing, a particular employee's test date is completely unpredictable and is based on random factors, rather than individualized suspicion or triggering events. Employees and courts find this test the most objectionable of the three types because it is the most likely to suhject nonusers to testing. The phrase "random testing" sometimes is used to describe uniform testing, but the two types of testing are distinct. *See infra* note 225 and accompanying text. For a discussion of uniform and random testing, see *infra* Parts V(B) and (C).

23. Order, *supra* note 8, § 5(h).

24. *Id.*

25. For a discussion of the fifth amendment implications of government drug testing, see *infra* Part VI(B).

26. Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (1988) [hereinafter Guidelines]. The Guidelines affect only testing of executive branch employees authorized by Executive Order No. 12,564. The Guidelines specifically exclude military personnel and criminal proceedings. *Id.* at Subpart A, § 1.1(a), (e).

27. *Id.* at Suhpart B, § 2.2(f)(7), (13); *see also* Order, *supra* note 8, § 4(c).

28. Random tests and tests of job applicants must he able to detect marijuana and cocaine and also may test for opiates, amphetamines, and phencyclidine (also known as PCP or angel dust). A test predicated by reasonable suspicion, accident, or unsafe practice may target any drug in Schedule I or II of the Controlled Substances Act, which includes hundreds of drugs. Guidelines, *supra* note 26, at Subpart B, § 2.1(a).

29. *Id.* at Subpart B, § 2.1(c).

30. *Id.* at Subpart B, § 2.4(f); *see also* Order, *supra* note 8, § 5(e). At this point, an employee may produce evidence of legal drug use or other factors that might affect the test. Guidelines, *supra* note 26, at Subpart B, § 2.7(a)-(c).

31. Order, *supra* note 8, § 5.

railroads, airlines, and pipelines.[32] Some agencies, such as the Federal Aviation Administration and the Federal Highway Administration, focused on testing these private employees.[33] The regulations promulgated by these agencies addressed safety concerns in such hazardous transportation industries as airlines, busing, and trucking. Other agencies, such as the Department of Defense, conducted sweeping, random drug tests of agency employees whose positions implicate national security, health, or safety, including all employees with access to classified information.[34] Some agencies reported that an extremely small number of people tested positive for drug use.[35]

III. Traditional Concepts of Search and Seizure

A. Drug Testing As a Search

The fourth amendment prohibits unreasonable searches and seizures.[36] In defining what is unreasonable, the Supreme Court has retreated far from its decision in *Katz v. United States*,[37] in which the Court held that warrantless searches are per se unreasonable. The Court has retained from *Katz*, however, the idea that the fourth amendment protects both people and objects in which a person has a reasonable expectation of privacy.[38]

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32. M. Rothstein, *supra* note 4, at 102.

33. Sand, *Current Developments in Safety and Health*, 15 Employee Rel. L.J. 125, 133 (1989). In these pervasively regulated industries, the government compels the private employers to test their employees, thus constituting state action. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989). The meaning of "pervasively regulated" is unclear. *See infra* notes 257-65 and accompanying text.

34. Sand, *supra* note 33, at 133.

35. At the United States Customs Service, only 6 of the first 5300 people tested had positive results. Neal, *Mandatory Drug Testing: Court Weighs Civil Liberties Objections*, A.B.A. J., Oct. 1, 1988, at 58, 63. At the Department of Transportation, drug use was found in 61 of the first 8064 people tested. Mohr, *Drug Testing Policy Caught in Snags*, N.Y. Times, Dec. 18, 1988, at 17, col. 1. Testing every federal employee, which may have been the Reagan Administration's goal, would cost $300 million. These figures prompted one commentator to question the need for such testing: "It is hard to imagine that in the private sector, in the absence of any evidence of a need to test, such a low yield could justify the expense and intrusiveness of testing." M. Rothstein, *supra* note 4, at 118. The government does not measure the success of its testing programs by the number of drug users detected. Instead, the government maintains that each actual drug user poses such a great threat that the detection or deterrence of even a few users would justify drug testing. *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989).

36. The fourth amendment reads:

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

U.S. Const. amend. IV.

37. 389 U.S. 347 (1967).

38. *Id.* at 351-52. *Katz* created a two-part test of reasonableness: (1) whether the person has

The Supreme Court has held that penetrating a person's skin to extract blood is a search protected by the fourth amendment.[39] Likewise, breath analysis is a search, even though it does not require physical intrusion into the body.[40] The Court also has held that urine testing constitutes a search under the fourth amendment.[41] The privacy interest in urination may be far more compelling than even the interest implicated by the extraction of blood.[42] Nevertheless, most drug testing programs require the employee to urinate under aural or visual supervision.[43]

Once the sample of blood, urine, or breath is collected, actual chemical analysis is a further invasion of the employee's privacy interest.[44] Although the government policy is to test only for illegal drugs,[45] analysis of these samples can reveal other medical facts in which the employee has a legitimate privacy interest.[46] Because a drug test in its entirety is clearly a search that invokes the protections of the fourth amendment, courts have found it unnecessary to analyze the tests spe-

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an actual, subjective expectation of privacy and (2) whether that expectation is objectively reasonable, *i.e.*, whether society is prepared to respect that expectation. *Id.* at 361 (Harlan, J., concurring).

39. Schmerber v. California, 384 U.S. 757, 768 (1966) (holding that withdrawing and analyzing blood from an unconsenting drunken driving suspect constituted a search); *cf.* Winston v. Lee, 470 U.S. 753, 760 (1985) (holding that surgically removing a bullet from a wounded robbery suspect would be an unreasonable search).

40. *See* 1 W. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 2.6(a) (2d ed. 1987); *see also* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986); Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 478 U.S. 986 (1986).

41. *Skinner*, 109 S. Ct. at 1413 & n.4.

42. The Fifth Circuit stated:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part*, 109 S. Ct. 1384 (1989).

43. *See* Guidelines, *supra* note 26, at Subpart B, § 2.2.

44. *Cf.* Arizona v. Hicks, 480 U.S. 321 (1987). The Court in *Hicks* held that police who already were in a person's apartment legally performed an additional search by moving the person's stereo to read the serial number. *Id.* Likewise, a legal justification to obtain a person's bodily fluids arguably does not automatically justify an analysis of the sample. *See Skinner*, 109 S. Ct. at 1425 (Marshall, J., dissenting).

45. This pledge can be broken. The District of Columbia police department secretly used urine from its drug tests to test female job applicants for pregnancy. *Applicants for D.C. Police Secretly Tested for Pregnancy*, Wash. Post, Nov. 5, 1987, at A1, col. 1.

46. *See* Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986) (noting that employees have a privacy interest in the information that can be revealed by urinalysis). As part of some urinalysis programs, the employee may be required to list the medications taken recently in order to avoid a false reading. This information can reveal private facts. The HHS Guidelines do not require such disclosure, but the employee may disclose medical information to explain a test result that indicates drug use.

cifically as seizures of the bodily fluid[47] or seizures of the person.[48]

B. *The Erosion of the Warrant Requirement*

Before performing a search, the government ordinarily must obtain a warrant from a neutral and detached magistrate. To obtain the warrant, the government must demonstrate that it has probable cause to believe a law has been violated.[49] The Supreme Court has greatly relaxed this traditional requirement in recent cases.[50] Faced with situations in which the government's special needs make a warrant impractical, the Court has created numerous exceptions to the traditional warrant requirement.[51]

When a warrant requirement is impractical, the Court has turned to the reasonableness clause of the fourth amendment. Rather than insist that a magistrate determine before a search that probable cause exists, the Court instead evaluates the reasonableness of the search after it has taken place.[52] When the warrant requirement would frustrate

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47. The Supreme Court has acknowledged that the government's taking of a blood or urine sample may constitute a "meaningful interference with the employee's possessory interest in his bodily fluids," but this privacy interest only duplicates the privacy interest present during the search. *Skinner*, 109 S. Ct. at 1413 n.4; *cf.* United States v. Jacobsen, 466 U.S. 109, 125 (1984) (destroying a trace amount of cocaine in a field test had only a *de minimis* impact on any protected property interest). An argument may be made that a person has no genuine interest in retaining possession of urine, because he or she normally would dispose of it. *Cf.* California v. Greenwood, 486 U.S. 35, 40-41 (1988) (holding that a person retains no privacy interest in garbage left at the curb for collection). An analogy to *Greenwood* would be flawed, however, because the urine in drug testing is never exposed to public view and is seized before the person attempts to dispose of it.

48. While the government necessarily interferes with the employee's movement in order to take the sample, it is unclear whether this interference, by itself, is a seizure of the person. *Cf.* United States v. Dionisio, 410 U.S. 1, 9-11 (1973) (holding that a grand jury subpoena is not a seizure of the person, even though it restricts the person's movement). Like the seizure of urine, the possible seizure of the person does not create an independent fourth amendment issue in drug testing cases. The restriction of movement, however, is a factor in determining the intrusiveness of the search. Skinner, 109 S. Ct. at 1413; cf. United States v. Place, 462 U.S. 696, 707-09 (1983) (concluding that seizure of traveler's luggage interfered with traveler's freedom of movement).

49. Comment, *Do You Abandon?*, *supra* note 3, at 180.

50. *See, e.g.*, Katz v. United States, 389 U.S. 347 (1967) (establishing the traditional requirement); *see also* Comment, *Constitutionality*, *supra* note 3, at 110 n.4.

51. *See* United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985) (border searches); New Jersey v. T.L.O., 469 U.S. 325, 337-43 (1985) (search of student's purse); Illinois v. Lafayette, 462 U.S. 640, 643 (1983) (inventory search of arrested person's possessions); Schneckloth v. Bustamonte, 412 U.S. 218, 227-34 (1973) (search with person's consent); Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) ("plain view" search); Terry v. Ohio, 392 U.S. 1, 20 (1968) ("stop and frisk" search); Camara v. Municipal Court, 387 U.S. 523, 537-38 (1967) (administrative search); Weeks v. United States, 232 U.S. 383, 395 (1914) (search incident to a lawful arrest). *See generally* Comment, *Constitutionality*, *supra* note 3, at 118 & n.66.

52. Under this disjunctive reading of the fourth amendment, the phrase "no Warrants shall issue, but upon probable cause" restricts only the warrant process, not all searches. Thus, only warranted searches require probable cause, and the only constitutional restriction on warrantless

the purpose for the search,[53] the Court abandons the warrant requirement in favor of a balancing test that weighs the government's interest in performing the search against the privacy interests of the person being searched.[54]

The government most often cites its interest in public safety to justify testing law enforcement officers,[55] firefighters,[56] truck drivers,[57] railway workers,[58] and chemical weapons plant employees.[59] Interests cited in other cases include providing a drug free environment in public schools[60] and maintaining the integrity of the horse racing industry.[61] The interest on the other side of the balancing test is the employee's privacy.[62] Employees subject to drug testing by the government, however, generally hold jobs that diminish their expectations of privacy. Expectations of privacy can be diminished, for example, when the employment already requires physical examinations, security investigations, or other intrusive regulation.[63]

When using the balancing test, the courts turn to one of three standards: (1) traditional probable cause without a warrant, (2) reasonable suspicion, or (3) reasonableness alone. All three are less restrictive than the warrant requirement. In drug testing cases before 1989, lower federal courts did not require either a warrant or probable cause.[64] Instead, the courts were divided over which of the two least restrictive standards to apply. Some courts required that drug tests be based upon a reasona-

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searches is that they not be "unreasonable." *See* 1 W. LAFAVE, *supra* note 40, § 3.1(a); Comment, *Constitutionality*, *supra* note 3, at 118-19 & nn.67 & 73.

53. Camara v. Municipal Court, 387 U.S. 523, 533 (1967) (citing Schmerber v. California, 384 U.S. 757, 770-71 (1966)).

54. *Camara*, 387 U.S. 536-37; Comment, *Do You Abandon?*, *supra* note 3, at 181.

55. *See, e.g.*, National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989); National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990); Guiney v. Roache, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989); Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989).

56. *See, e.g.*, Brown v. Winkle, 715 F. Supp. 195 (N.D. Ohio 1989).

57. *See* Owner-Operators Indep. Drivers Ass'n of Am. v. Burnley, 705 F. Supp. 481 (N.D. Cal. 1989); *see also* American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation employees); American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989) (Department of Education motor vehicle operators).

58. *See* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989); *see also* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988) (nuclear power plant employees).

59. *See* Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989).

60. Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987).

61. Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

62. *See* Griswold v. Connecticut, 381 U.S. 479, 484 (1965).

63. For example, employees lessen tbeir reasonable expectations of privacy by working in a highly regulated private industry, such as horse racing, *Shoemaker*, 795 F.2d at 1136, railroads, *Skinner*, 109 S. Ct. at 1402, or the nuclear power industry, *Rushton*, 844 F.2d at 562.

64. *See* Comment, National Treasury Employees Union v. Von Raab*: Specimen Surveillance—The Fifth Circuit Approves Urine Testing*, 33 LOYOLA L. REV. 1148, 1151 (1988).

ble suspicion of drug use by the individual or group being tested;[65] other courts required only that the testing be reasonable.[66]

C. Cases Applying the Individualized Suspicion Standard

In the past few years, the Court has found that numerous situations merit an exemption from the warrant and probable cause requirements. In many of these cases, the Court has employed a balancing test to hold that the search would have been reasonable and thus constitutional if the government had a reasonable, individualized suspicion of wrongdoing.[67] In *New Jersey v. T.L.O.*,[68] for example, the Court held that a public school official could conduct a warrantless search of a student's purse as long as the official had a reasonable suspicion that the purse contained drugs.[69] In the same year, the Court held that Customs agents could detain a suspected alimentary canal smuggler for sixteen hours based only on a reasonable suspicion that the subject was carrying drugs.[70] In 1987 the Court allowed the search of a government employee's work area based only on individualized suspicion of work-related misconduct.[71]

Before 1989 many courts applied the individualized suspicion standard to government drug testing cases.[72] In *Capua v. City of Plainfield*[73] a district court held that a city could not perform random, unannounced urine tests on its firefighters.[74] Balancing the city's needs against the intrusiveness of the search, the court held the city to an

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65. *See infra* Part III(C).

66. *See infra* Part III(D); *see also* Comment, *Constitutionality*, *supra* note 3, at 120. It is noteworthy that the drug testing cases do not involve a criminal investigation. Comment, *Do You Abandon?*, *supra* note 3, at 184. The employee generally faces only job-related sanctions. *But see Skinner*, 109 S. Ct. at 1415 n.5 (noting that government procedures allowed test results to be released to parties in litigation).

67. *See infra* notes 68-87 and accompanying text.

68. 469 U.S. 325 (1985).

69. *Id.* at 347.

70. United States v. Montoya de Hernandez, 473 U.S. 531 (1985). In *Montoya* Customs officials suspected that an airline passenger had swallowed balloons filled with drugs before entering the United States. Officials strip-searched her and detained her for 16 hours, waiting in vain for her to defecate, before seeking a warrant. *Id.* at 533-35.

71. O'Connor v. Ortega, 480 U.S. 709 (1987) (holding that the state's interest in investigating its employees outweighed an employee's privacy interest in his office); *see also* Griffin v. Wisconsin, 483 U.S. 868 (1987) (allowing warrantless searches of probationer's homes upon individualized suspicion).

72. This suspicion could be created by an employee's poor job performance; physical or mental impairment; an informant's report that particular city employees smoked marijuana on the job, Allen v. City of Marietta, 601 F. Supp. 482 (N.D. Ga. 1985); or an accident, Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

73. 643 F. Supp. 1507 (D.N.J. 1986).

74. *Id.* at 1522.

individualized suspicion standard.[75] The court in *Feliciano v. City of Cleveland*[76] used the same standard, prohibiting unannounced urine testing of police academy cadets. Suspicion that the cadet class as a whole included drug users was insufficient to justify the search, and the blanket search was not rendered constitutionally reasonable by an informant's tip that the cadet class included some unidentified drug users.[77]

The Ninth Circuit similarly struck down government-ordered drug tests of private railroad employees because the tests were not predicated on individualized suspicion in *Railway Labor Executives' Association v. Burnley*.[78] *Burnley*, later reversed by the Supreme Court's *Skinner* decision,[79] concerned a government requirement that railroads perform drug tests on employees after certain accidents or rule violations.[80] The court found that the government's interest in railroad safety did not outweigh the employees' privacy interests in avoiding testing.[81] Furthermore, the court found that the scope of the tests were not reasonably related to the drug problem because the tests detected only recent drug use, not actual on-the-job impairment.[82]

Courts allowed some testing programs that met the individualized suspicion standard. In *Division 241 Amalgamated Transit Union v. Suscy*,[83] the first drug testing case involving nonmilitary public employees,[84] the court allowed urine or blood testing of individual bus drivers suspected of drug use.[85] Likewise, the court in *Turner v. Fraternal Order of Police*[86] allowed urine testing of police officers suspected of using drugs.[87]

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75. *Id.* at 1517.

76. 661 F. Supp. 578 (N.D. Ohio 1987).

77. *Id.* at 580; *see also* City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985) (prohibiting drug testing in a police department absent reasonable suspicion of drug use in the department); Patchogue-Medford Congress of Teachers v. Board of Educ., 70 N.Y.2d 57, 510 N.E.2d 325, 517 N.Y.S.2d 456 (1987) (prohibiting school district from testing all probationary teachers).

78. 839 F.2d 575 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

79. 109 S. Ct. 1402 (1989); *see infra* notes 129-61 and accompanying text.

80. *Burnley*, 839 F.2d at 577-78.

81. *Id.* at 586, 588.

82. *Id.* at 588-89. The court followed Terry v. Ohio, 392 U.S. 1, 19-20 (1968), which defined a two-pronged test for reasonahleness in individualized suspicion searches: a search must be justified at its inception and must be reasonahly related in scope to the circumstances that prompted the search.

83. 538 F.2d 1264 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976).

84. Comment, *Constitutionality*, *supra* note 3, at 121.

85. *Suscy*, 538 F.2d at 1267.

86. 500 A.2d 1005 (D.C. 1985).

87. *Id.* at 1009.

D. Cases Applying the Reasonableness Standard in Administrative Searches

The government may conduct warrantless searches without any individualized suspicion in several situations, including searches of people crossing the United States border,[88] boarding airplanes,[89] and entering federal courthouses.[90] In these situations, courts apply a pure reasonableness standard, the lowest standard for a warrantless search. This category is sometimes called administrative searches because the search is part of a general administrative plan rather than an effort to gather evidence in a specific criminal investigation.[91] Because no crime is suspected in an administrative search, the government could not demonstrate probable cause to obtain a warrant. Therefore, the government simply must show that the search was part of an administrative plan that is both reasonable and based on neutral criteria.[92]

The seminal case on administrative searches is *Camara v. Municipal Court*,[93] which approved warrantless safety inspections of residential buildings.[94] The Court did not require a warrant, probable cause, or any individualized suspicion for these searches, which were designed not to investigate suspected violations but to deter violations through the threat of unannounced inspections.[95] The Court balanced the government's strong interest in public safety against the individual's privacy interest in the home and concluded that the nature of the search did not greatly invade the individual's privacy.[96]

The District of Columbia Circuit cited *Camara* in *Committee for*

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88. United States v. Montoya de Hernandez, 473 U.S. 531 (1985); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

89. United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); United States. v. Morena, 475 F.2d 44 (5th Cir.), *cert. denied*, 414 U.S. 840 (1973).

90. Downing v. Kunzig, 454 F.2d 1230 (6th Cir. 1972). *See generally* Comment, *Do You Abandon?*, *supra* note 3, at 185.

91. Camara v. Municipal Court, 387 U.S. 523, 535-37 (1967). One district court disputed the significance of an administrative search's noncriminal purpose, because investigations of government employees "always carry the potential to become criminal investigations." Allen v. City of Marietta, 601 F. Supp. 482, 491 (N.D. Ga. 1985).

92. Marshall v. Barlow's, Inc., 436 U.S. 307, 320-22 (1978) (holding that an administrative search of a business for a safety violation by the Occupational Safety and Health Administration required a warrant and reasonable legislative and administrative standards but not probable cause).

93. 387 U.S. 523 (1967).

94. *Id.* at 546. The Court, however, prevented the defendant's prosecution for refusing to permit the inspection. The Court ruled that the city needed to obtain a warrant after the defendant refused to allow peaceful entry. *Id.* at 534.

95. *Id.* at 537; *see* Banzhaf, *How to Make Drug Tests Pass Muster*, NAT'L L.J., Jan. 12, 1987, at 13, col. 1.

96. *Camara*, 387 U.S. at 537. The Court also noted the social and judicial acceptance of building inspections. *Id.*

GI Rights v. Callaway, the first drug testing case.[97] The court allowed the Army to test soldiers' urine without any level of individualized suspicion.[98] The court balanced the strong governmental interest in military readiness against soldiers' privacy interests in avoiding testing. Because soldiers routinely are subject to searches and discipline by superiors, their expectations of privacy are greatly diminished.[99] Lower federal courts and state courts did not immediately adopt the *Callaway* court's elimination of the individualized suspicion requirement, perhaps because military employment diminishes employees' privacy interests much more than other public employment does.

In the late 1980s several circuits began to allow government drug tests without individualized suspicion.[100] The Third Circuit, for instance, approved random urinalysis of racehorse jockeys in *Shoemaker v. Handel.*[101] The court found that the New Jersey racing commission had a legitimate interest in the integrity and safety of the horse racing industry. In the balancing test this state interest outweighed the jockeys' expectations of privacy, which already were diminished by the pervasive regulation of the industry.[102] The Eighth Circuit likewise established an exception to the individualized suspicion requirement for guards at medium and maximum security prisons in *McDonell v. Hunter.*[103] The court allowed random and uniform urinalysis tests to promote safety in prisons.[104] Similarly, in *Rushton v. Nebraska Public Power District*[105] the Eighth Circuit ruled that individualized suspicion was not a prerequisite for testing nuclear power plant employees. The court allowed testing based on a government finding that drugs played an increasing role in accidents at nuclear plants.[106] The Fifth Circuit followed this trend of allowing suspicionless testing in *National Treasury Employees Union v. Von Raab.*[107] The court allowed the Customs Service to test certain employees uniformly, with no individualized or general suspicion that any of the employees used illegal drugs.[108]

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97. 518 F.2d 466, 476 (D.C. Cir. 1975). Most early case law on urinalysis involved the Army program. Comment, *Constitutionality*, *supra* note 3, at 113.

98. 518 F.2d at 474.

99. *Id.* at 477.

100. *See* Comment, *Constitutionality*, *supra* note 3, at 127.

101. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

102. *Id.* at 1141-42.

103. 809 F.2d 1302 (8th Cir. 1987).

104. *Id.* at 1308. The court held that prison employees in less sensitive positions could not be tested without individualized suspicion. *Id.*

105. 844 F.2d 562 (8th Cir. 1988).

106. *Id.* at 563, 567.

107. 816 F.2d 170 (5th Cir. 1987), *aff'd in part, vacated in part*, 109 S. Ct. 1384 (1989). For a discussion of *Von Raab*, see *infra* notes 175-97 and accompanying text.

108. 816 F.2d at 173.

Although the Third, Fifth, and Eighth Circuits allowed the government to perform random and uniform testing of employees, the Ninth Circuit insisted on individualized suspicion.[109] This circuit split set the stage for the 1989 Supreme Court decisions in *Skinner v. Railway Labor Executives' Association*[110] and *National Treasury Employees Union v. Von Raab*.[111]

IV. The Supreme Court's Response

The Supreme Court resolved the circuit split over the proper standard for government drug testing by reversing the Ninth Circuit's requirement of individualized suspicion for government-ordered drug testing of railroad workers.[112] On the same day the Court affirmed in part the Fifth Circuit's ruling that the Customs Service could randomly test its work force despite a very low incidence of drug use.[113] Justice Anthony Kennedy, in his first prominent majority opinions,[114] wrote that the compelling government interests in each case outweighed the employees' diminished expectations of privacy, making the searches reasonable even in the absence of individualized suspicion.[115]

A. Skinner v. Railway Labor Executives' Association

1. Facts and Procedural History

Employee alcohol and drug abuse traditionally have troubled the railroads despite industry efforts to combat the problem.[116] Because the Federal Railroad Administration (FRA) found that alcohol and drugs contribute to many railroad accidents and fatalities,[117] it ordered the railroads to test employees in certain situations.[118] For example, after

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109. *See* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 589 (9th Cir. 1988), *rev'd sub nom.* Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

110. 109 S. Ct. 1402 (1989), *rev'g sub nom.* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988).

111. 109 S. Ct. 1384 (1989), *aff'g in part, vacating in part*, 816 F.2d 170 (5th Cir. 1987).

112. *See Skinner*, 109 S. Ct. at 1402.

113. *See Von Raab*, 109 S. Ct. at 1384.

114. *See* Stewart, *Slouching Toward Orwell*, A.B.A. J., June 1989, at 44, 46.

115. *Skinner*, 109 S. Ct. at 1413-21; *Von Raab*, 109 S. Ct. at 1391-96.

116. *Skinner*, 109 S. Ct. at 1407. A 1979 study by the FRA estimated that 23% of operating personnel were "problem drinkers." One in eight railroad workers drank on the job in the previous year. *Id.* at 1407 n.1 (citing 48 Fed. Reg. 30,724 (1983)).

117. The FRA blamed railroad employees' alcohol and drug use for 45 train accidents and incidents, 34 fatalities, 66 injuries, and more than $28 million in property damages (in 1983 dollars) from 1975 through 1983. *Skinner*, 109 S. Ct. at 1408.

118. *Id.* The regulations, 49 C.F.R. §§ 219.1-.505, predated Executive Order No. 12,564 and were promulgated under the FRA's power to regulate "all areas of railroad safety." *Skinner*, 109 S. Ct. at 1407 (citing 45 U.S.C. § 431(a) (1988)). After their passage, the HHS Guidelines required the Department of Transportation to conform its testing program to the HHS requirements. Guide-

significant accidents, all covered railroad employees must submit blood and urine samples to independent medical personnel.[119] Also, the railroad has the discretion to order covered employees to submit to breath and urine tests after certain rule violations.[120] Finally, the railroad may order an employee whom a supervisor reasonably suspects is impaired to be tested at any time.[121] The railroad mails the samples to the FRA for analysis.[122] Samples that indicate drug use must be confirmed by a second test using different procedures.[123] The testing program was intended to aid accident investigations and employee discipline. FRA regulations, however, allow the agency to release the results to law enforcement authorities.[124] An employee who refuses to submit to blood or urine tests may not perform certain duties for nine months.[125]

The Railway Labor Executives' Association sued to enjoin the testing. The district court ruled that the governmental interest in railway safety outweighed the railroad employees' interests in preserving their bodily integrity.[126] The Ninth Circuit reversed, holding that such searches without individualized suspicion violated the fourth amendment.[127] The Supreme Court again reversed, reasoning that because the government's interest in railroad safety outweighed the employees' privacy interests, the searches were reasonable under the fourth amendment.[128]

2. The Supreme Court's Analysis

The Court first held that the government's involvement in the testing program constituted government action.[129] The Court then held

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lines, *supra* note 26, at Subpart A, § 1.1(b).

119. *Skinner*, 109 S. Ct. at 1408-09. In relatively minor accidents, a railroad representative has the discretion not to test employees who had no role in the accident. *Id.* at 1408-09 & n.2.

120. *Id.* at 1409.

121. *Id.*

122. *Id.*

123. *See id.* at 1409 n.3. Alcohol tests are confirmed by a second test.

124. *Id.* at 1415 n.5. The FRA regulations specifically allow test results to be released to "a party in litigation upon service of appropriate compulsory process . . . ." The Court did not consider this self-incrimination issue because it was not presented by the facts of this case. *Id.* at 1415 n.5 (quoting 49 C.F.R. § 219.211(d) (1987)). For a discussion of tbe fifth amendment, see *infra* Part VI(B).

125. *Skinner*, 109 S. Ct. at 1409. The employee, however, is entitled to a hearing concerning such refusal. *Id.*

126. The court granted summary judgment to the defendant Secretary of Transportation. *Id.* at 1410.

127. 839 F.2d 575 (1988).

128. *Skinner*, 109 S. Ct. at 1402.

129. *See id.* at 1411-12. Althougb the railroads are privately owned, the FRA requires testing after major accidents and encourages discretionary testing. *Id.* at 1408-09. The FRA regulations allowing discretionary testing preempt state law and supercede collective bargaining and arbitra-

that the tests constituted searches under the fourth amendment because they intruded into the employees' bodily integrity, violated personal dignity, and revealed private medical facts.[130] Although the tests were searches and thus required warrants and probable cause under the traditional view, the Court found that railroad safety presented a special need that justified an exception to the warrant requirement.[131] The Court reasoned that the lack of concrete facts on which to base a warrant made the requirement problematic.[132] Further, a delay caused by a warrant requirement would allow intoxicating substances to be eliminated from the employees' bodies.[133] The Court concluded that the warrant requirement would frustrate the governmental purpose in requiring the search.[134]

After the Court dispensed with the warrant requirement, it held that these drug tests did not require either probable cause or any "quantum of individualized suspicion."[135] Instead, the Court instituted a pure reasonableness standard, balancing governmental interests against the individual's privacy interests.[136] The government's sole stated interest in *Skinner* was the safety of the public and of the railroad employees.[137] Protecting this important safety interest justified some degree of governmental intrusion, to be determined by a balanc-

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tion agreements. *Id.* at 1409. Under the regulations, a railroad must discipline an employee who refuses to submit to tests. *Id.* at 1411-12.

130. *Id.* at 1412-13. Because the testing fully invoked fourth amendment protection, the Court found it unnecessary to determine whether the tests were a seizure of the person or the person's bodily fluids. *Id.* at 1413 & n.4. The Court noted, though, that because most jobs restrict the employee's freedom of movement, restricting an employee's movement for a drug test did not significantly infringe on these already diminished privacy interests. *Id.* at 1417.

131. *Id.* at 1414.

132. According to the Court, there were "virtually no facts for a neutral magistrate to evaluate." *Id.* at 1416. Some situations give a railroad supervisor discretion on whether to order a search, based on the supervisor's determination of whether an employee contributed to the accident. The Court noted that the supervisor's discretion was limited by FRA regulations. Still, the decision to use the force of law to require a citizen to submit to a bodily search is normally made by a detached magistrate, not a private employer, and is based on constitutional requirements, not agency regulations. The Court addressed this concern, ruling that it would be "unreasonable to require railroad supervisors unfamiliar with the law to follow warrant procedures." *Id.* at 1416 & n.5. Fear of officials' unbridled discretion to search, however, is the reason for the warrant requirement. Camara v. Municipal Court, 387 U.S. 523 (1967). A similar fear certainly exists in this situation.

133. *Skinner*, 109 S. Ct. at 1416.

134. *Id.* at 1416 (quoting *Camara*, 387 U.S. at 533).

135. *Id.* at 1417 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1976)).

136. *Id.* The Court stated: "[A] showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." When an important government interest outweighs minimal privacy interests, a search may be reasonable without individualized suspicion. *Id.*

137. The government did not state an interest in prosecuting employees who tested positive. *Id.* at 1415.

ing test.[138]

Using the reasonableness standard, the Court allowed the mandatory blood testing, comparing it to the mandatory blood testing of a suspected drunken driver.[139] The Court declared that the blood test was a limited intrusion into the employee's privacy, involving very little risk, trauma, pain, or undue invasion of the employee's bodily integrity.[140] The Court also allowed breath testing, because it requires less bodily intrusion than a blood test and reveals only whether the person has used alcohol.[141]

The Court was more troubled by the urine tests because of the unique privacy interest in excretory functions. The Court noted, however, that FRA collection procedures reduced the urine test's intrusiveness, and it dismissed concerns about other procedures that employees might find intrusive.[142] Furthermore, it found that railroad employees' expectations of privacy were diminished by their employment in a pervasively regulated industry that often requires physical examinations of its employees.[143]

The Court balanced this limited privacy interest in urination against the government's interest in testing without individualized suspicion and found that the government's interest was compelling.[144] The Court reasoned that railroad employees' substance abuse has resulted in significant safety threats.[145] Furthermore, the industry's attempts to detect and deter employees' substance abuse had failed, because employees' performances could be impaired without noticeable signs.[146] The Court agreed with the FRA that the test results give railroads valuable information that might otherwise be lost in the "chaotic aftermath" of a train accident.[147] The Court also found that the testing

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138. *Id.*

139. *Id.* at 1417 (citing Schmerher v. California, 384 U.S. 757, 771 (1966), which held that extracting blood from a suspected drunken driver without a warrant is not a significant or dangerous intrusion).

140. *Id.* at 1417 (quoting *Schmerber*, 384 U.S. at 771).

141. *Id.* at 1417-18.

142. *Id.* at 1418. The Court stressed that urine samples were taken in a medical environment. The Court scarcely noted, however, that the FRA Field Manual clearly recommended visual observation of the employee's urination. *Id.*; *see also id.* at 1428 & n.8 (Marshall, J., dissenting). Furthermore, the Court did not find it a significant invasion of privacy that employees giving blood or urine samples must disclose all medications taken within 30 days. *Id.* at 1418 n.7.

143. *Id.* at 1418 & n.8. Physical examinations, particularly eyesight examinations, historically have been justified by the great danger involved in operating a train. *Id.* at 1418-19 & n.8.

144. *Id.* at 1419.

145. *Id.* at 1407-08, 1419.

146. *Id.* at 1419. The Court did not require the government to use the least intrusive means to accomplish its goals, as this limit would seriously hinder the government's search and seizure powers. The FRA did consider and reject less intrusive alternatives to drug testing. *Id.* at 1419 n.9.

147. *Id.* at 1420. According to Justice Anthony Kennedy, this information is valuable even if

techniques were reasonably accurate.[148] The Court concluded that drug tests were sufficiently effective in furthering the FRA's twin goals of detecting and deterring impairment so that testing without individualized suspicion was constitutional.[149]

Justice John Paul Stevens concurred in part, pointedly disagreeing that an alcohol or drug user would be deterred by the threat of being fired more than by the risk of causing a catastrophic train wreck.[150] In a scathing dissent, Justice Thurgood Marshall[151] wrote that the zeal to battle drug abuse led the majority to erode the foundation of the fourth amendment.[152] He criticized the majority for discarding the constitutional requirements of warrant and probable cause as impracticable and for replacing them with a malleable special needs balancing analysis of whether the search was reasonable.[153] Justice Marshall pointed out that the *Skinner* decision reinforced two serious incursions into fourth amendment protection: first, the balancing test was applied to the search of a person, not merely possessions; and second, the special needs analysis was applied with no requirement of individualized suspicion.[154]

Justice Marshall would replace the majority's balancing test with a traditional search analysis, requiring a warrant or an exception to the warrant requirement, probable cause, and reasonableness.[155] Acknowledging the exigency of a train wreck, Justice Marshall would not require a warrant to take blood or urine samples. He would, however, require a warrant supported by probable cause before a sample is tested.[156] To satisfy the probable cause requirement, Justice Marshall would require some degree of individualized suspicion for even a minimally intrusive

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it does not determine whether the employee was impaired at the time of the accident. *Id.* at 1420-21. A major criticism of drug testing is that it determines only whether the employee has used drugs in recent weeks, not whether the employee was impaired at work. M. ROTHSTEIN, *supra* note 4, at 106-07. The Court answered that evidence that an employee recently used drugs or alcohol can be relevant, but not conclusive, in determining whether the employee was impaired at the time of an accident. *Skinner*, 109 S. Ct. at 1421. The tests, therefore, are useful even if uncertain.

148. *Skinner*, 109 S. Ct. at 1421 n.10.

149. *Id.* at 1421 & n.10.

150. *Id.* at 1422 (Stevens, J., concurring).

151. Justice William Brennan joined Justice Thurgood Marshall's dissent.

152. *See Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting). Justice Marshall compared the loss of liberties in the war on drugs to Japanese-Americans' loss of liberty during World War II. *Id.* at 1422. He wrote that the majority underrated the privacy interests inherent in the collection of the samples, the unrelated but still private information that can be gleaned from blood or urine samples, and the medication questionnaire. *Id.* at 1428-29.

153. *Id.* at 1423.

154. *Id.* at 1425.

155. *Id.* at 1426.

156. *Id.* Justice Marshall viewed the collection and the analysis of bodily fluids as separate searches.

search, and he considered blood and urine testing to be extremely intrusive.[157]

Even if Justice Marsball accepted the majority's balancing test, he would find that the drug tests' extreme intrusiveness greatly outweighed the government's interest in deterring and detecting substance abuse.[158] The FRA's willingness to give the test results to criminal prosecutors would weigh heavily against the government in this balancing test.[159] Justice Marshall acknowledged the value of fighting drug abuse, but criticized the government's draconian methods.[160] He attacked the majority's method by extending it to its logical but disturbing conclusion: countless criminals could be caught if fourth amendment protections were eliminated altogether.[161]

B. National Treasury Employees Union v. Von Raab

1. Facts and Procedural History

The United States Customs Service is responsible for preventing illegal drugs from entering the country.[162] Some employees face physical injury, death, bribery, and the temptation of confiscated contraband.[163] Investigations of Service employees' wrongdoings result in the arrests of

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157. *Id.* at 1427. Justice Marshall compared the collection of blood with actions that the Court has described as "severe" intrusions, such as the search of a suspect's outer clothes, Terry v. Ohio, 392 U.S. 1, 24-25 (1968), and the search of scrapings from a suspect's fingernails, Cupp v. Murphy, 412 U.S. 291, 295 (1973). In Schmerber v. California, 384 U.S. 757, 769-70 (1966), the Court required individualized suspicion before testing the blood of a single drunken driving suspect. In *Skinner*, the Court allowed mass blood testing without individualized suspicion. *Skinner*, 109 S. Ct. at 1427-28 (Marshall, J., dissenting).

Justice Marshall was incredulous that the majority viewed the collection of urine as a "minimal" intrusion upon the employees' privacy. He found the majority's dismissal of the FRA Field Manual's instructions to urine collectors to observe the employees' urination visually especially distressing. This portion of the majority's analysis demonstrates "the shameless manipulability of its balancing approach." *Id.* at 1428-29 & n.8.

Finally, Justice Marshall found that the FRA's analysis of the fluid samples was a severe intrusion. The fluid can be analyzed to disclose medical information unrelated to drug use in which the employee has a privacy interest, such as epilepsy, diabetes, and depression. The employees' privacy is further invaded by the FRA requirement that they list medications used. *Id.* at 1429. This intrusiveness is not lessened by any diminished expectations of privacy occasioned hy examinations of employees' physical fitness or searches of their possessions. *Id.* at 1429-30.

158. *Id.* at 1430.

159. *Id.* at 1431 & n.10. Also weighing against the government is the overinclusiveness of the tests: the tests measure only whether drug use has occurred within 60 days of the test, rather than measuring current impairment. *Id.* at 1431-32. Justice Marshall echoed Justice John Paul Stevens's concern that a drug user undeterred by the threat of a train wreck would not be deterred by the threat of being fired. *Id.* at 1432.

160. *Id.* at 1433.

161. *Id.* at 1430.

162. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1387 (1989).

163. *Id.* at 1392.

significant numbers of employees and civilians.[164] Very few Service employees, however, used illegal drugs.[165] Nevertheless, the Service implemented a drug testing program for applicants for certain jobs.[166] The program requires uniform urine testing of all Service employees tentatively accepted for transfer to jobs in three categories: (1) positions requiring direct involvement in drug enforcement,[167] (2) positions requiring employees to carry a firearm,[168] or (3) positions requiring employees to handle classified material.[169] The program requires testers to monitor applicants' urination aurally but not visually. The samples are sent to a laboratory, where all positive samples are retested.[170] Employees testing positive for illegal drug use are fired, but the test results may not be released to any other agency or law enforcement authorities without the employee's permission.[171]

The National Treasury Employees Union and a union official sought to enjoin the testing, alleging that it violated the fourth amendment. The district court granted the injunction, ruling that such searches without individualized suspicion were unreasonable.[172] The Fifth Circuit vacated the decision, holding that the search was reasona-

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164. *Id.* at 1392-93. Hundreds of such investigations each year resulted in the arrest of 24 employees and 54 civilians in 1987, 37 employees and 17 civilians in 1986, and 15 employees and 51 civilians in 1985. *Id.* No evidence, however, linked any of these investigations to drug use by Service employees. *Id.* at 1400 (Scalia, J., dissenting).

165. *Id.* at 1387. The Service Commissioner acknowledged that the Service was "largely drug-free" when the testing began.

166. *Id.* at 1388. The program began in May 1986, several months before President Reagan's Executive Order and two years before the HHS Guidelines. Because the Service subsequently was required to conform its program with the HHS Guidelines, Guidelines, *supra* note 26, at Subpart A, § 1.1(b), to the extent that the Guidelines supplemented or displaced the Service's program, the Court considered the Service's program as though it followed HHS procedures. *Von Raab*, 109 S. Ct. at 1388 n.1.

The Service's original program required the applicant to disclose at the time of the test all medications taken within the past 30 days. This requirement was similar to the *Skinner* test but contrary to the HHS Guidelines. Under the HHS Guidelines, the applicant is not required to reveal medical information but may do so to dispute a positive test. *Von Raab*, 109 S. Ct. at 1388 n.1. Unlike the test in *Skinner*, the Service's test had no provision for alcobol testing.

167. *Id.* at 1388. The Service reasoned that a drug user in such a position could steal drugs and otherwise hinder the drug interdiction program. *Id.* at 1392-93.

168. *Id.* at 1388. The Service cited the dangers to agents and the public if an impaired person were employed in these first two categories. *Id.* at 1393.

169. *Id.* at 1388. The Service stated that illegal drug users in these positions would be susceptible to bribery or blackmail. *Id.* Positions that handled "classified material" included accountants, accounting technicians, animal caretakers, attorneys, baggage clerks, co-op students, electric equipment repairers, mail clerks and assistants, and messengers. *Id.* at 1397.

170. *Id.* at 1389.

171. *Id.* This provision differs from the testing procedure upheld in *Skinner* under which the agency may release the test results. *See supra* note 142 and accompanying text.

172. 649 F. Supp. 380 (E.D. La. 1986).

ble because of its limited scope.[173] The Supreme Court affirmed in part, remanding to determine whether the testing of employees who handle classified material was reasonable.[174]

2. The Supreme Court's Analysis

The Court reiterated its holding in *Skinner*[175] that urinalysis is a search designed to deter drug use and to prevent the promotion of drug users.[176] Without discussion, the Court declared that these goals constitute a special need that is excepted from the warrant and probable cause requirements.[177] The Court noted that obtaining warrants would not be difficult for Service employees, who are familiar with the warrant process, but stated that requiring them to seek warrants would only waste Service resources. Furthermore, warrants would add no protection to the testing program, because the program guidelines leave the Service no discretion and would provide a magistrate with no special facts to evaluate.[178]

In rejecting the individualized suspicion standard, the Court analogized urinalysis to building inspections and routine border stops, in which the government seeks to prevent, rather than detect, violations and is allowed to search without articulable grounds.[179] For employees involved in drug interdiction, the Court stressed their frequent exposure to criminals and the resultant potential for corruption.[180] For employees carrying firearms, the potential danger to others is apparent.[181] The Court concluded that the governmental interest in preventing drug use by these employees outweighed the job applicants' privacy interests, which were diminished by their seeking these particular jobs. Employees applying for such positions should expect the government to investigate their judgment and physical fitness.[182] Furthermore, the Court stressed that the testing program's objective criteria prevented abuse of the process.[183]

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173. 816 F.2d 170, 179 (5th Cir. 1987).

174. *Von Raab*, 109 S. Ct. at 1397-98.

175. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402 (1989).

176. *Von Raab*, 109 S. Ct. at 1390. Unlike the situation in *Skinner*, the Service did not aim to detect drug use, because no significant problem with drug use existed. Also unlike *Skinner*, the goal was not to deter or detect alcohol impairment.

177. *Id.* at 1390-91.

178. *Id.* at 1391. Unlike the railroads in *Skinner*, the employer in *Von Raab* has no discretion over which employees are tested. The Customs Service must test all employees who apply for certain jobs.

179. *Id.* at 1391-92.

180. *See id.* at 1392-93.

181. *Id.* at 1393.

182. *Id.* at 1394.

183. *Id.* at 1394 n.2. The Court stated that the intrusiveness of the urinalysis is minimized by

The Court rejected two contentions by the challengers. First, the Court denied that the searches were unreasonable because of the extremely low incidence of drug use among Customs Service employees.[184] The Court stated that the severity of the danger posed by a drug-using Service employee would compensate for the low incidence of drug use detected.[185] Second, the Court denied that the testing was ineffective and, thus, unreasonable because a drug user could deceive the test by altering the specimen or by abstaining from drug use before the test.[188]

Although it found the testing of applicants in the first two job categories to be reasonable, the Court was unable to determine the reasonableness of testing applicants for jobs that require handling classified material.[187] The Court agreed that employees who handle sensitive material may be required to undergo drug testing, especially if their privacy interests already have been diminished by background investigations or medical examinations.[188] The Court remanded the issue, however, to determine whether the Service's definition of such employees was overbroad.[189]

Justice Thurgood Marshall dissented, referring readers to his dissent in *Skinner*.[190] A surprise dissent came from Justice Antonin Scalia, who had joined the majority in *Skinner*.[191] He distinguished *Skinner* because it involved proven drug and alcohol use by the targeted employees resulting in proven harm.[192] Justice Scalia wrote that the Service's program in *Von Raab* was nothing more than a symbol of opposition to drug use[193] because the Customs Services had no real drug

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the Service's procedures: the Service has no discretion as to who is tested, applicants are notified of the test in advance, urination usually is not directly observed, samples may he tested only for drug use, and employees need not disclose personal medical information.

184. *Id.* at 1394.

185. *Id.* at 1395. The Court compared the danger of an occasional drug-using employee being bribed or blackmailed to the danger posed by a single hijacker, which is great enough to justify searches of all public airline passengers. *Id.* at 1395 & n.3.

186. *Id.* at 1395, 1396. The Court stated that the HHS procedures adequately prevent alteration of the specimen. Also, the Court noted that addicts may be unable to abstain or may be unaware that drugs remain in their systems for up to 22 days. *Id.* at 1396.

187. *Id.*

188. *Id.* at 1397.

189. *Id.*

190. *Id.* at 1398 (Marshall, J., dissenting). Justice William Brennan joined Justice Thurgood Marshall's dissent, as he did in *Skinner*.

191. *Id.* (Scalia, J., dissenting). Justice John Paul Stevens, who concurred in part in *Skinner*, joined Justice Antonin Scalia's *Von Raab* dissent.

192. *Id.* at 1398.

193. *Id.* The Service Commissioner said that the drug testing program would "set an important example" in the war on drugs. *Id.* at 1401. Justice Scalia agreed that the war on drugs was a worthy cause, but argued that symbolism even for a worthy cause "cannot validate an otherwise unreasonable search." *Id.*

problem.[194] Justice Scalia also questioned the deterrent effect of drug testing.[195] Justice Scalia feared that the breadth of the majority's decision would lead to drug testing of a tremendous range of people.[196] For example, a large number of public employees outside the Customs Service carry firearms. The justifications for testing Service employees in this category could apply to anyone whose job performance might endanger others, such as automobile drivers, heavy equipment operators, construction workers, and school crossing guards. Similarly, the majority's approval, in principle, of testing employees with access to sensitive material could lead to testing of broad categories of federal employees.[197]

V. Analytical Structure for Drug Testing Cases After *Skinner* and *Von Raab*

The Supreme Court has made it clear that government drug testing is constitutional as long as it meets a reasonableness balancing test. Federal government programs generally follow Executive Order No. 12,564, including individualized suspicion, uniform, and random tests in each program.[198] Some decisions make little or no distinction among the categories.[199] Others incorporate the distinctions as factors in the balancing tests.[200] Because of the ad hoc nature of the balancing test, courts after *Skinner* and *Von Raab* have established no clear standards for drug testing.

A. The Individualized Suspicion Standard

The Supreme Court dealt a severe blow to the individualized suspicion requirement for the government's uniform drug testing of employ-

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194. *Id.* at 1399. Justice Scalia said that it was mere speculation that a drug user would be more susceptible to bribery by a drug smuggler than a diamond wearer would be susceptible to bribery by a diamond smuggler. *Id.*

195. *Id.* The majority did not cite "*even a single instance* in which any of the speculated horribles actually occurred. . . ." *Id.* at 1400 (emphasis in original). Justice Scalia thought that a gun-carrying agent whose drug use was not deterred by the risk of dying in a gun battle would not be deterred by the threat of losing his job. *Id.* at 1399. This argument parallels Justice Stevens's concurring opinion in Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1422 (1989); *see supra* text accompanying note 150.

196. *Von Raab*, 109 S. Ct. at 1400-01 (Scalia, J., dissenting).

197. *Id.* at 1401. Soon after the *Von Raab* decision, Justice Scalia said of the drug crisis: "I feel we have gone off the deep end a little to meet that crisis." Stewart, *supra* note 114, at 46.

198. *See, e.g.*, American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (Department of Transportation); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990) (Department of Justice).

199. *See infra* notes 224-25 and accompanying text.

200. *See infra* notes 207-13, 224 & 226.

ees.[201] Indeed, it is difficult to imagine a group in which fewer people invoke individualized suspicion than the Customs Service employees in *Von Raab*.[202] The decisions in *Von Raab* and *Skinner* prompted one scholar to ask: "[W]hat happened to the Fourth Amendment?"[203] What happened was that the Court further separated the fourth amendment's reasonableness clause from the warrant and probable cause clause, and for the first time applied the reasonableness balancing test with no warrant requirement to searches of the person, rather than searches of possessions.[204] After *Skinner* and *Von Raab* it should be easy for the government to harness the momentum of the war on drugs to tip the balance in favor of drug testing.[205] Individualized suspicion testing is more likely than uniform or random testing to be upheld in court. In fact, plaintiffs sometimes do not even challenge the individualized suspicion portions of testing programs, and courts spend little time upholding them.[206]

Although individualized suspicion is no longer a constitutional prerequisite to government drug testing, some lower courts have interpreted this part of the Supreme Court's rulings narrowly. These courts seem to have included a suspicion requirement in the reasonableness balancing test. In *Hartness v. Bush*[207] one court enjoined drug testing of executive branch employees, reading *Skinner* and *Von Raab* to require at least some substantial *generalized* suspicion of employee drug use.[208] The court also concluded that the Supreme Court did not intend to allow drug testing of all private citizens or even all government employ-

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201. *Skinner*, 109 S. Ct. at 1402; *Von Raab*, 109 S. Ct. at 1384.

202. *Von Raab*, 109 S. Ct. at 1399-1400 (Scalia, J., dissenting). Before the testing began, the Customs Service realized that its employees had no significant drug prohlem. *Id.* The early test results bore this out. Of the first 5300 Service employees tested, only 6 were found to have used drugs recently. Neal, *supra* note 35, at 63.

203. *Constitutional Law Conference*, 58 U.S.L.W. 2200, 2205 (Oct. 10, 1989) (synopsis of Conference assessing the Court's recent decisions and current direction) (remarks of University of Michigan law professor Yale Kamisar).

204. *Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting). Justice Thurgood Marshall complained that the Court has now replaced the warrant and probable cause requirements with the special needs analysis in all four of the enumerated areas protected hy the fourth amendment: "persons," *Skinner*, 109 S. Ct. at 1402; "houses," Griffin v. Wisconsin, 483 U.S. 868 (1987); "papers," O'Connor v. Ortega, 480 U.S. 709 (1987); and "effects," New Jersey v. T.L.O., 469 U.S. 325 (1985).

205. *Constitutional Law Conference*, *supra* note 203, at 2205.

206. *See, e.g.*, *Skinner*, 109 S. Ct. at 1409; National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989) (challenging only random testing, not uniform or probable cause testing). Most government testing programs, and all of those following Executive Order No. 12,564, include testing based on individualized suspicion. *See* Order, *supra* note 8, § 3(c)(1).

207. 712 F. Supp. 986 (D.D.C. 1989).

208. *Id.* at 991. This interpretation is a dubious reading of *Von Raab*, in which the agency head admitted that his employees in general had no significant drug problem. *See Von Raab*, 109 S. Ct. at 1399-1400 (Scalia, J., dissenting).

ees.[209] Thus, the *Hartness* decision preserves the individualized suspicion requirement for employees in categories for which the justifications for testing are less compelling.[210] The court further specified that in these cases the testing must be based only on the suspicion that the employee is under the influence of drugs while on duty.[211] Another court required individualized suspicion for testing postal workers.[212] A major factor in the balancing test was the weak governmental interest in testing; the mandatory pre-employment testing was done for research purposes only.[213]

B. Uniform Testing

Because the Supreme Court ruled that the standard for suspicionless uniform testing is reasonableness,[214] plaintiffs challenging uniform testing must argue that individual factors within the balancing test make the particular program challenged unreasonable. Uniform testing is more intrusive than individualized suspicion testing because it subjects more individuals who do not use drugs to testing. Also, a person may trigger testing with a completely innocent act such as applying for a job. The Supreme Court ruled, however, that uniform testing is only a minimal intrusion; therefore, a fairly weak governmental interest in testing can outweigh the subjects' privacy interests.[215] In several recent cases involving both uniform and random testing, the plaintiffs did not even challenge uniform testing.[216] Other courts specifically allowed uniform testing,[217] although some prohibited random testing in the same case.[218] After *Skinner* and *Von Raab* only a handful of courts

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209. *Hartness*, 712 F. Supp. at 990-91.

210. Although the court required some degree of suspicion for testing most employees, such as office and maintenance workers, it allowed random, suspicionless testing of employees who carry firearms. *Id.* at 993.

211. *Id.* at 992 (stating that testing must be based on a "reasonable, articulable, and individualized suspicion" that the employee is under the influence of drugs while on duty). *But see* National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989) (refusing to enjoin testing of Department of Energy employees suspected of using drugs on- or off-duty).

212. American Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989).

213. *Id.* at 90.

214. *See Skinner*, 109 S. Ct. at 1402; *Von Raab*, 109 S. Ct. at 1384.

215. *See Skinner*, 109 S. Ct. at 1402; *Von Raab*, 109 S. Ct. at 1384.

216. *See, e.g.*, American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989); *Cheney*, 884 F.2d at 603; Harmon v. Thornburgh, 878 F.2d 484, 486 n.1 (D.C. Cir. 1989), *cert. denied sub nom.* Bell v. Thornburgh, 110 S. Ct. 895 (1990).

217. *See, e.g.*, Brown v. Winkle, 715 F. Supp. 195 (N.D. Ohio 1989) (allowing uniform testing of firefighters); Draper v. City of Chicago, No. 88-C-10140 (N.D. Ill. May 3, 1989) (WESTLAW, Genfed library, Dist file) (allowing uniform testing of police officers).

218. *See, e.g.*, Transportation Inst. v. United States Coast Guard, 727 F. Supp. 648 (D.D.C. 1989) (allowing uniform testing of commercial ships' crew members but prohibiting random testing of the same group). *See generally infra* notes 226-29 and accompanying text.

have required uniform testing to be based on individualized suspicion.[219]

C. Random Testing

Even more intrusive than the uniform testing approved in *Skinner* and *Von Raab* is random testing, which is certain to be heavily litigated. Random testing invades the employees' privacy more than uniform testing because employees cannot predict when testing will occur. Furthermore, employees may be subject to testing during their entire careers, not just after a triggering event.[220] Random tests usually include more employees than uniform testing.[221] On the other hand, the randomness eliminates supervisors' discretion over whom to test often present in uniform programs.[222]

Although *Skinner* and *Von Raab* did not address random testing, the lower federal courts generally have allowed random testing, relying on the analytical framework used by the Supreme Court in evaluating uniform testing.[223] The District of Columbia Circuit stated that the randomness of a testing program was merely one factor to be included in the balancing test; this factor did not require a fundamentally different analysis from that used in *Von Raab*.[224] Some courts have upheld random testing without noting any difference between random and uniform testing.[225]

In some cases, the randomness of a testing program has tipped the balance to make the testing unreasonable.[226] The court in *Transporta-*

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219. *See supra* Part V(A).

220. Uniform testing is based on such triggering events as application for a job or promotion, return from leave, and commission of a safety violation. In such programs, the employee can predict, and perhaps avoid, situations requiring tests. A drug user predicting a test date could abstain from drug use long enough for the drugs to leave his or her body. Likewise, a drug using employee could avoid triggering a drug test by not seeking promotions. The Supreme Court has addressed only uniform government testing programs based on triggering events. *See Skinner*, 109 S. Ct. at 1402; *Von Raab*, 109 S. Ct. at 1384.

221. *See American Fed'n of Gov't Employees*, 885 F.2d at 891 n.9. Random testing includes entire categories of present employees, not just job applicants or employees involved in accidents.

222. *Id.* at 891.

223. *See infra* notes 224-25 and accompanying text.

224. *American Fed'n of Gov't Employees*, 885 F.2d at 884; *Cheney*, 884 F.2d at 608, 609; *Harmon*, 878 F.2d at 489.

225. *See, e.g.*, Guiney v. Roache, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989); Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989). In fact, the Fourth Circuit confused uniform and random testing, mistakenly stating that *Skinner* and *Von Raab* involved random testing. Following this flawed perception, the court allowed random testing of civilian employees in a chemical weapons plant. Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989).

226. *See, e.g., Transportation Inst.*, 727 F. Supp. at 648. The court allowed uniform and individualized suspicion testing. *See* National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989) (enjoining the Department of Energy's random testing, but allowing individualized suspicion testing).

tion Institute v. United States Coast Guard[227] distinguished uniform testing, which it allowed, from random testing, which it prohibited.[228] The court ruled that crew members of commercial ships had diminished expectations of privacy, but only in such areas as licensing procedures and accident investigations. The crew members' privacy interests were stronger when random testing was involved.[229]

Federal agencies that use random testing usually have uniform testing as well.[230] In cases from these agencies, federal courts have used essentially the same analytical framework for both random and uniform testing,[231] although some of these courts view the randomness of the tests as weighing in the employees' favor.[232] The Supreme Court has indicated that it will not disturb these decisions, denying certiorari to three cases that allowed random testing.[233]

VI. Judicial Trends in Government Drug Testing Cases

A. *Reasonableness of Categories of Employees Subject to Testing*

The Court's decisions in *Skinner* and *Von Raab* established no clear guidelines as to which employees may be tested for drug use. Employee categories promise to be the most litigated aspect of governmental drug testing cases in the near future. The remand order in *Von Raab*[234] led to a series of lower federal court opinions seeking to define those job characteristics that create a compelling governmental need to test employees for drug use.

The justification for testing most frequently offered by the government is safety. This factor seems to be readily accepted by the courts, as long as the threat to the public is fairly immediate.[235] Courts have used the safety justification to allow testing of nuclear power plant em-

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227. *Transportation Inst.*, 727 F. Supp. at 648.

228. *Id.* at 655-56.

229. *Id.* at 654-56.

230. Agency testing also generally includes testing based on reasonable suspicion and unsafe practices, as authorized by Executive Order No. 12,564 § 3(c). *See, e.g., Cheney*, 884 F.2d at 605-06; *American Fed'n of Gov't Employees*, 885 F.2d at 886 & n.1. Cases involving municipal employees more often involve only random testing. *See, e.g., Guiney*, 873 F.2d at 1557; *Brown*, 715 F. Supp. at 832.

231. *See supra* note 224 and accompanying text.

232. *See supra* note 226 and accompanying text.

233. *Cheney*, 884 F.2d at 603; *Harmon*, 878 F.2d at 484, *cert. denied*, 110 S. Ct. 895; *Guiney*, 873 F.2d at 1557, *cert. denied*, 110 S. Ct. 404; Policeman's Benevolent Ass'n of N.J. v. Township of Washington, 850 F.2d 133 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 1637 (1989).

234. *Von Raab*, 109 S. Ct. at 1398.

235. *Compare Skinner*, 109 S. Ct. at 1402 (finding that impaired railroad workers pose a severe and immediate threat to public safety) *with Harmon*, 878 F.2d at 491 (finding that attorneys do not pose such a public safety threat).

ployees,[236] firefighters,[237] hazardous materials inspectors,[238] aircraft mechanics,[239] pilots,[240] air traffic controllers,[241] and railroad workers.[242] In the transportation field, testing has spread to areas in which the government's safety interest may be legitimate, but does not seem sufficient to justify suspicionless searches of private citizens' bodily functions. Courts have allowed government testing of school bus attendants,[243] airline attendants,[244] and government motor vehicle operators.[245] These cases confirm Justice Antonin Scalia's fears that the *Von Raab* decision would be used to authorize drug testing of such broad categories of citizens as automobile drivers, construction workers, and school crossing guards.[246]

After *Von Raab* several courts have upheld drug testing of law enforcement personnel, using the law enforcement justification, a hybrid of the safety justification.[247] This justification is stronger when the law enforcement officers are involved in drug interdiction.[248] Just as the transportation category is expanding, the law enforcement category also may grow to include all employees of the government or pervasively

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236. Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988).

237. Brown v. Winkle, 715 F. Supp. 195 (N.D. Ohio 1989). Testing of firefighters is not settled in the courts. *See* Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir.) (enjoining testing of firefighters absent any individualized or generalized suspicion), *vacated and reh'g granted*, 861 F.2d 1388 (6th Cir. 1988).

238. *American Fed'n of Gov't Employees*, 885 F.2d at 884. These employees supervise the handling of "poisonous, explosive, and highly flammable commodities," creating a clear risk to the public. *Id.* at 891.

239. A single error could have "calamitous consequences." *Id.* at 892.

240. *Cheney*, 884 F.2d at 603 (upholding testing of most of the sweeping categories of Army civilian employees).

241. *Id.*

242. *Skinner*, 109 S. Ct. at 1402.

243. Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989), *modifying sub nom.* Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987).

244. *Cheney*, 884 F.2d at 609-10.

245. American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989) (Department of Education); *American Fed'n of Gov't Employees*, 885 F.2d at 884 (Department of Transportation). Some Department of Transportation drivers transport foreign dignitaries or large numbers of bus passengers. Mail van drivers must undergo background investigations and have some degree of secret security clearance. *American Fed'n of Gov't Employees*, 885 F.2d at 892. For a discussion of sensitive information, see *infra* notes 250-52 and accompanying text. *See also Von Raab*, 109 S. Ct. at 1397 (approving in principle drug tests for employees with access to sensitive information).

246. *Von Raab*, 109 S. Ct. at 1401 (Scalia, J., dissenting).

247. *See, e.g.*, Guiney v. Roache, 873 F.2d 1557 (1st Cir.), *cert. denied*, 110 S. Ct. 404 (1989) (upholding testing of police officers who carry firearms or are involved in drug interdiction); *Cheney*, 884 F.2d at 603 (allowing random testing of civilian Army employees involved in law enforcement); Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989) (upholding testing of police officers).

248. *See Von Raab*, 109 S. Ct. at 1384; *Guiney*, 873 F.2d at 1557. It is a bitter irony that tbe front-line soldiers in the war on drugs are the first to lose their fourth amendment protections.

regulated industries who carry firearms. Because of the ad hoc nature of the balancing test, however, this trend is not clear.[249]

The most confusion surrounds testing employees who handle sensitive information, in light of the *Von Raab* Court's sparse guidelines and the government's myriad levels of secret, classified, and confidential information. The Supreme Court did explain that lower levels of government confidentiality cannot justify drug testing, but the highest levels will.[250] The intermediate levels of sensitive government information require further exploration. In *Harmon v. Thornburgh*[251] the District of Columbia Circuit clarified the sensitive information category that troubled the *Von Raab* Court. The court allowed the Department of Justice to test employees with access to top secret material, but stated that this category did not include all confidential or nonpublic material.[252]

Implicit in all government drug testing is the role model rationale: government employees should stand as symbols of the government's hopes for a drug free America.[253] Symbolism hardly seems like a constitutional justification for a groundless search, but it was significant in *Von Raab*, which allowed testing of a work force with a negligible drug problem.[254] Several courts, however, have ruled that the credibility and integrity of the government work force are not legitimate governmental interests justifying drug testing.[255] The danger of the role model rationale is that it replaces the fourth amendment with a test that provides no real protection or limits.[256]

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249. The Sixth Circuit has granted rehearings en banc for cases that prohibited suspicionless testing of police officers, Penny v. Kennedy, 846 F.2d 1563 (6th Cir.), *vacated and reh'g granted*, 862 F.2d 567 (6th Cir. 1988), and firefighters, Lovvorn v. City of Chattanooga, 846 F.2d 1539, *vacated and reh'g granted*, 861 F.2d 1388 (6th Cir. 1988). One district court doubted that *Penny* was valid law after *Von Raab*. Brown v. Winkle, 715 F. Supp. 195, 196 (N.D. Ohio 1989).

250. *Von Raab*, 109 S. Ct. at 1384. The Court never fully explained how to distinguish the different levels of sensitive information.

251. 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990).

252. *Id.* at 491-93. Prosecutors and employees with access to grand jury proceedings cannot be tested. *Id.* at 496. The court rejected arguments that testing was justified to maintain the integrity of the work force. *Id.* at 490.

253. *Constitutional Law Conference*, *supra* note 203, at 2206 (remarks of University of Michigan law professor Yale Kamisar).

254. *Von Raab*, 109 S. Ct. at 1399-1400 (Scalia, J., dissenting).

255. Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989); *Harmon*, 878 F.2d at 484; *Cheney*, 884 F.2d at 613. The *Cheney* court stated: "[T]aken to its logical end, the integrity rationale would justify the random testing of every federal employee—a result that would be inconsistent with *Von Raab*'s essential teachings." Ironically, this aspect of the ruling prohibited the drug testing of some members of the Army's Drug Testing Laboratories. *Cheney*, 884 F.2d at 615; *see also* Dimeo v. Griffin, 721 F. Supp. 958, 967-69 (N.D. Ill. 1989) (stating that preserving the integrity of the horseracing industry carries little weight in balancing test).

256. *Constitutional Law Conference*, *supra* note 203, at 2206. The employee categories to which the role model rationale could apply are almost limitless. It certainly would include posi-

The government has ordered testing of private employees in the railroad,[257] trucking,[258] and shipping[259] industries. Courts have held that the pervasive regulation of these industries diminishes the employees' expectations of privacy and have allowed testing. The Postal Service was ruled not pervasively regulated.[260] The limits of this category are difficult to ascertain.[261] Not all employees in these industries are subject to testing. For example, courts have ruled that regulation of the horse racing industry diminishes the privacy expectations of jockeys,[262] but not other racetrack employees.[263]

The courts have only begun to clarify the categories of public and private employees who may be subjected to mandatory drug testing. Minimum requirements for any testing program include well-defined categories of employees[264] and clearly articulated justifications for testing each category.[265]

B. Mandatory Drug Testing As Self-Incrimination

Arguably, drug testing invokes the self-incrimination clause, yet no drug testing case has presented a ripe fifth amendment fact situation.[266] The testing guidelines in *Skinner* expressly ordered the release of test

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tions of trust or real or perceived authority. Government mandated drug testing would expand exponentially if the role model rationale were applied to pervasively regulated industries such as the law, banking, securities, broadcasting, real estate, and day care centers.

257. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1418-19 (1989).

258. Owner-Operators Indep. Drivers Assoc. of Am., Inc. v. Burnley, 705 F. Supp. 481, 487-88 (N.D. Cal. 1989) (allowing reasonable suspicion testing and some forms of uniform testing, but enjoining random and postaccident testing).

259. Transportation Inst. v. United States Coast Guard, 727 F. Supp. 648 (D.D.C. 1989).

260. American Postal Workers Union v. Frank, 725 F. Supp. 87, 90 (D. Mass. 1989).

261. An analogy may be made to cases in which the Supreme Court has ruled that the pervasive regulation of motor vehicles diminished the owners' expectations of privacy. *See* California v. Carney, 471 U.S. 386 (1985) (mobile motor home); South Dakota v. Opperman, 428 U.S. 364, 368 (1976) (car). Although these cases related to searches of the vehicles rather than of the person, these holdings might be used in the reasonableness balancing test to broaden permissible searches in the pervasive regulation category.

262. Shoemaker v. Handel, 795 F.2d 1136, 1142 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).

263. *Griffin*, 721 F. Supp. at 970-71.

264. *See, e.g.*, *Taylor*, 888 F.2d at 1189 (finding that the county may not test all corrections officers); *Cheney*, 884 F.2d at 614-15 (remanding to determine the reasonableness of testing a broad employee category that included nuclear reactor operators, chemical ammunition maintenance specialists, secretaries, research biologists, and animal handlers); *Harmon*, 878 F.2d at 490 (stating that the *Von Raab* court did not intend for all federal employees to be tested); *Transportation Inst.*, 727 F. Supp. at 648 (stating that all crew members on commercial ships is too broad a category to submit to random testing); American Fed'n of Gov't Employees v. Thornburgh, 720 F. Supp. 154 (N.D. Cal. 1989) (finding that the federal Bureau of Prisons may not subject all employees to testing).

265. *See Cheney*, 884 F.2d at 611.

266. The fifth amendment reads in part, "nor shall [any person] be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V.

results to a party in litigation.[267] This rule might create a situation in which employees would invoke the fifth amendment, as the release of information obtained from their bodies would lead to incrimination. The *Skinner* Court, however, did not consider the fifth amendment issue because the testing did not appear to be a pretext to gather evidence for a criminal investigation.[268]

The HHS Guidelines provide that test results may not be released to law enforcement authorities without the employee's permission.[269] The Guidelines, though, are based on Executive Order No. 12,564, which does not specifically shield test results from law enforcement authorities.[270] In light of the public's and the government's attitudes toward the war on drugs, drug enforcement agencies are likely to begin to subpoena governmental drug testing results.

When a ripe fifth amendment claim arises, courts may cite precedent holding that an administrative search does not become unconstitutional solely because the search uncovers evidence later used in a criminal trial.[271] Courts also may rely on *Schmerber v. California*,[272] which held that a blood test of an unwilling drunken driving suspect did not constitute compelled testimony. Following the Supreme Court's lead in sacrificing certain liberties in the war on drugs, lower courts may find no fifth amendment violations in the release of employee drug test results.

C. *Drug Addiction As a Handicap*

Employees have argued, with mixed results, that drug addiction is a handicap protected from discrimination by the Rehabilitation Act of

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267. *Skinner*, 109 S. Ct. at 1415 n.5 (quoting 49 C.F.R. § 219.211(d) (1987)).

268. *Id.* at 1415 n.5. Many courts have justified relaxing fourth amendment protections on the ground that government drug testing is not related to criminal investigations. *See, e.g., id.*; American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 889 (D.C. Cir. 1989); National Fed'n of Gov't Employees v. Cheney, 884 F.2d 603, 608 (D.C. Cir. 1989). One could argue, though, that the government's interest in promoting an actual criminal prosecution is stronger than its interest in an administrative search. Using this logic, courts might allow the use of the results of employee drug tests in criminal prosecutions, thus creating ripe fifth amendment issues. *See* Stewart, *supra* note 114, at 50.

269. *American Fed'n of Gov't Employees*, 885 F.2d at 889 (citing Guidelines, *supra* note 26, at Subpart B, § 2.8).

270. The Order provides that agencies are "not required" to report violations of federal drug laws to the Attorney General. Order, *supra* note 8, § 5(h).

271. New York v. Burger, 482 U.S. 691 (1987) (holding that evidence discovered in an administrative search of an unregistered junkyard may be used in subsequent criminal trial). Professor Kamisar made an analogy to administrative searches of airline passengers, which were designed to detect weapons but often detect illegal drugs. *Constitutional Law Conference*, *supra* note 203, at 2205.

272. 384 U.S. 757, 761 (1966).

1973.[273] The Act covers people who are impaired or regarded as being impaired,[274] but are otherwise qualified for employment.[275] This definition includes substance abusers.[276] The Supreme Court has held that the Act requires individual inquiries into each handicapped employee's fitness.[277] On the other hand, the Court has allowed the Veterans' Administration to classify alcoholism as willful misconduct and thereby deny certain benefits to alcoholics.[278]

Lower federal courts generally have had little difficulty deciding that the Rehabilitation Act does not prevent drug testing and subsequent sanctions against employees.[279] Although the Act has had little effect on testing programs themselves, the Act may protect individuals in certain situations. In *Nisperos v. Buck*[280] an attorney for the Immigration and Naturalization Service (INS) admitted his drug problem to his superior and sought treatment, but was later arrested on drug charges and fired from his job.[281] The court ruled that the INS violated the Rehabilitation Act by firing the attorney.[282] Similarly, an employee who tests positive and undergoes treatment arguably may not be fired without violating the Act.

D. Reasonableness of the Testing Procedures

In early drug testing cases, employees attacked both the reasonableness of the collection procedures in urine testing and the accuracy of all types of drug tests. As testing procedures have become more uniform, especially under the HHS Guidelines, employees have not raised these issues. Most courts have held that the degree of privacy given employees in urine tests under the HHS Guidelines is satisfactory.[283]

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273. 29 U.S.C. §§ 701-795(i) (1988).

274. Zimmerman, *Urine Testing, Testing-Based Employment Decisions and the Rehabilitation Act of 1973*, 22 COLUM. J.L. & SOC. PROBS. 219, 220, 247 (1989).

275. 29 U.S.C. § 794 (1988).

276. Zimmerman, *supra* note 274, at 248. Congress considered excluding all substance abusers from the Act, but instead excluded only substance abusers who are unable to work or who threaten others' safety or property. *Id.* at 248-49.

277. School Bd. v. Arline, 480 U.S. 273, 281 (1987) (stating that the court must determine whether a school teacher is qualified for her joh despite being afflicted with tuberculosis).

278. Traynor v. Turnage, 485 U.S. 535 (1988).

279. *See* American Fed'n of Gov't Employees v. Skinner, 885 F.2d at 897 (stating that although the testing program does not violate the Rehabilitation Act, a case may arise in which the Act does protect a person from testing).

280. 720 F. Supp. 1424 (N.D. Cal. 1989).

281. *Id.* at 1425-26.

282. *Id.* at 1428-32; *cf.* Doe v. Roe, Inc., 143 Misc. 2d 156, 539 N.Y.S. 2d 876 (Sup. Ct. 1989) (finding that a drug abuser who was denied a job is covered by New York laws protecting the handicapped).

283. The Guidelines allow the employee to urinate in a stall, under aural but not visual supervision. Visual supervision occurs only when alteration of a specimen is suspected. Guidelines,

Early disputes over the accuracy of the drug tests also have been settled.[284]

Courts also have agreed that the tests are reasonable even though they detect only recent drug use, not on-the-job impairment.[285] Nor are courts concerned that most government drug tests do not detect abuse of alcohol or prescription drugs.[286] This factor is a serious flaw in the government's argument that testing is done to improve safety and productivity, not for law enforcement purposes. Alcohol abuse severely affects safety and productivity, and alcohol testing can be done at the same time as drug testing.[287]

VII. CONCLUSION

It is alarming how easily the impracticality of obtaining a warrant becomes a special need allowing a suspicionless search.[288] Perhaps warrants are impractical for administrative searches, including drug tests, because the fourth amendment was written to prohibit such dragnet searches. The entire fourth amendment consists of limits on law enforcement agents. Such limits have the inevitable result of allowing some guilty parties to go free in order to preserve the liberties of the innocent. Unwilling to allow such a tradeoff in drug enforcement cases, the Court replaced the concrete fourth amendment protections of warrant and probable cause with the shamelessly malleable balancing test. With the nationwide drug hysteria weighing on the government's side of the balance, even a group as innocent as the Customs employees in *Von*

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supra note 26, at Subpart B, § 2.2(f)(16).

Routinely requiring testers to watch the employees urinate invokes extreme privacy interests that are more difficult to overcome. *See* American Fed'n of Gov't Employees v. Thornburgh, 720 F. Supp. 154, 155 n.1 (N.D. Cal. 1989) (striking down a testing program because, among other factors, it required the visual observation of all employees' urination). *Contra Skinner*, 109 S. Ct. at 1428 n.8 (Marshall, J., dissenting) (noting that the majority ignored the FRA Field Manual's recommendation that officials visually supervise employees' urination).

284. One court reversed its earlier ruling that the commonly used test was too inaccurate to be constitutionally reasonable. Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989), *modifying sub nom.* Jones v. McKenzie, 833 F.2d 335 (D.C. Cir. 1987).

285. *See, e.g.*, Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1420-21 (1989); *American Fed'n of Gov't Employees*, 885 F.2d at 896; National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610-11 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990); *see also supra* note 147. *But see* Dimeo v Griffin, 721 F. Supp. 958, 969 (N.D. Ill. 1989) (finding that testing the employees of a horse racing track does little to promote safety, because testing does not measure employees' present impairment).

286. *See, e.g., American Fed'n of Gov't Employees*, 885 F.2d at 895.

287. *See* M. ROTHSTEIN, *supra* note 4, at 102-03.

288. Indeed, the very notion that impractical constitutional protections can be disregarded undermines the foundation of the Bill of Rights. *See Skinner*, 109 S. Ct. at 1423 (Marshall, J., dissenting).

Raab cannot escape drug testing.[289]

Courts often justify suspicionless drug tests on the grounds that the tests are necessary to address special needs beyond normal law enforcement procedures.[290] From an employee's point of view, this rationale is transparent. No law enforcement action is more normal than deterring, detecting, and punishing people who break the law. As courts have eroded the fourth amendment in recent years, the legislative and executive branches have erected an extraconstitutional law enforcement system for drug crimes. This system uses the power of law to compel employees to undergo suspicionless searches. A laboratory technician declares the employee guilty. The employer is then required to discipline the employee, including dismissal, a substantial deprivation of property. Finally, the agency may give the test results to traditional law enforcement agencies, which may result in the deprivation of the employee's liberty or of more property through criminal penalties.[291] Such actions would be declared unconstitutional if performed completely by police.[292]

The ad hoc nature of the balancing test gives courts, police, and citizens no clear indication of how far the government can go in demanding drug tests. Courts have veered so far from the traditional fourth amendment model that it would be quixotic to suggest that drug testing should require a warrant and probable cause. An individualized suspicion requirement seems unlikely, given the Supreme Court's acceptance of uniform testing.[293] The outer limit to drug testing appears to be some type of random testing. The disturbing result is that mundane, nondrug searches must be based on a warrant and probable cause, but highly intrusive searches of excretion are based on randomness, the total absence of suspicion.

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289. Still, the presence or absence of a suspicion of drug use by an individual or group should weigh heavily in the balancing test. *See supra* Part V(A).

290. *Skinner*, 109 S. Ct. at 1414 (citing Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

291. *See supra* Part VI(B).

292. This scenario would resemble a scene from the movie *Brazil*: Police would storm a fire station or railroad yard unannounced, demanding urine samples from all employees. Anyone who refuses to cooperate or fails the test would be disciplined. At no point does an impartial magistrate approve the police action. *Cf.* Benner, *Diminishing Expectations of Privacy in the Rehnquist Court*, 22 J. MARSHALL L. REV. 825, 850 & n.132 (1989) (stating that under *Skinner* it may be constitutional for police to set up a roadblock and demand urine specimens from all drivers).

293. *See supra* notes 201-05 and accompanying text.

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