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A Special Needs Exception to the Warrant and Probable Cause Requirements for Mandatory and Uniform Pre-Arraignment Drug Testing in the Wake of *Skinner v. Railway Labor Executives' Association* and *National Treasury Employees' Union v. Von Raab*

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I. INTRODUCTION

Until 1989, the Supreme Court had not addressed Fourth Amendment limitations on the use of mandatory, suspicionless urine testing by the federal government aimed at detecting drug use. Recently, however, in *Skinner v. Railway Labor Executives' Association*[1] and *National Treasury Employees' Union v. Von Raab*,[2] the Court upheld federal regulations which broadly expanded the circumstances and conditions under which urine testing could occur in the public sector and the government regulated workplace.[3]

Until recently, the systematic testing of arrestees for drug use was uncommon. However, due to the epidemic of drug use,[4] and the rapid advances made in testing technology,[5] sev

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1. 489 U.S. 602 (1989).

2. 489 U.S. 656 (1989).

3. For recent articles written on *Skinner* and *Von Raab* see Michael A. Mass, *Public Sector Drug Testing: A Balancing Approach and the Search for a New Equilibrium*, 42 BAYLOR L. REV. 231 (1990); George E. Warner, Jr., Note, *The Ratification of the "Special Needs" Analysis to Employer Substance Abuse Testing:* Skinner v. Railway Labor Executives' Association, *109 S. Ct. 1402*, 13 HAMLINE L. REV. 167 (1989); Alyssa C. Westover, Note, National Treasury Employees Union v. Von Raab—*Will the War Against Drugs Abrogate Constitutional Guarantees?*, 17 PEPP. L. REV. 793 (1990). For articles focusing on drug testing in the criminal justice system see Cathryn Jo Rosen, *The Fourth Amendment Implications of Urine Testing for Evidence of Drug Abuse in Probation*, 55 BROOK. L. REV. 1159 (1990); Cathryn Jo Rosen & John S. Goldkamp, *The Constitutionality of Drug Testing at the Bail Stage*, 80 J. CRIM. L. & CRIMINOLOGY 114 (1989); Richard B. Abell, *Pretrial Drug Testing: Expanding Rights and Protecting Public Safety*, 57 GEO. WASH. L. REV. 943 (1989).

4. Recently, the Bush Administration's "Drug Czar" observed some success in the "War on Drugs" by noting that from 1985 to 1990 the estimated number of illicit drug users dropped from 23 million to 13 million. Governor Bob Martinez, Director of the Office of National Drug Control Policy, Address at the Southern Christian Leadership Conference Convention in Birmingham, AL, Federal News

eral jurisdictions now routinely request arrestees to submit to pre-arraignment drug tests. Fueling this trend has been research showing a positive correlation between drug use by arrestees and their propensity to either fail to appear for court hearings or commit additional criminal acts while released pending trial.[6] Moreover, President Bush's call for increased drug testing at every stage of the criminal justice process—including pretrial testing—signals the political momentum behind the drug testing push.[7]

This comment examines Fourth Amendment limitations on the current practice in the District of Columbia of mandatory drug testing of all adult arrestees for the purpose of gathering bail related information before each arrestee makes an initial appearance before a bail-setting judge. Part II briefly describes the background to the establishment of pre-arraignment drug testing in the District of Columbia and in other jurisdictions. Part III reviews the current practice of pre-arraignment drug testing programs based on the District of Columbia model. Part IV introduces the facts and analyses of *Skinner* and *Von Raab*. Part V applies the *Skinner* and *Von Raab* rationale to the District of Columbia drug testing program. Finally, this comment concludes that careful and structured use of pre-arraignment drug testing will fit well within the Fourth Amendment drug testing parameters established by the Supreme Court in *Skinner* and *Von Raab*.

Service, August 15, 1991, *available in* LEXIS, Nexis Library, Federal News Service File. He cautioned, however, that addicts pose the greatest threat to society and their numbers have not significantly decreased. *Id.*

5. *See* Rosen, *supra* note 3, at 1162 n.9 and accompanying text.

6. *See generally* JOHN A. CARVER, U.S. DEP'T OF JUSTICE, DRUGS AND CRIME: CONTROLLING USE AND REDUCING RISK THROUGH TESTING (Sep./Oct. 1986); BERNARD A. GROPPER, U.S. DEP'T OF JUSTICE, PROBING THE LINKS BETWEEN DRUGS AND CRIME (Feb. 1985); Douglas A. Smith et al., *Drug Use and Pretrial Misconduct in New York City* 5 J. QUANTITATIVE CRIMINOLOGY 101, 102 (1989); MARY A. TOBERG & MICHAEL P. KIRBY, U.S. DEP'T OF JUSTICE, DRUG USE AND PRETRIAL CRIME IN THE DISTRICT OF COLUMBIA (Oct. 1984); Christy A. Visher, *Using Drug Testing to Identify High-Risk Defendants on Release: A Study in the District of Columbia* 18 J. CRIM. JUST. 321 (1990); ERIC D. WISH, U.S. DEP'T OF JUSTICE, DRUG USE FORECASTING: NEW YORK 1984 TO 1986 (Feb. 1987); ANTHONY M.J. YEZER ET AL., U.S. DEP'T OF JUSTICE, DOC. NO. 107,746, PERIODIC URINE TESTING AS A SIGNALING DEVICE FOR PRETRIAL RELEASE RISK 24 (May 1988).

7. *National Drug Control Strategy*, 25 WEEKLY. COMP. PRES. DOC. 1308, 1309 (Sept. 5, 1989). Also, the United States allocated nearly ten billion dollars in 1990 alone towards battling the drug problem. THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 7 (Jan. 1990).

II. BACKGROUND

Typically, an arrest is made before anyone ever faces a criminal prosecution. Once within the criminal justice system the arrestee experiences a certain degree of tension between his or her liberty interests and at least two institutional requirements of many court systems in the United States: (1) securing the return of the arrestee for trial; and (2) insuring that the arrestee's behavior on release does not pose a threat to the community. Occasionally, these governmental interests are adequately served only by pretrial detention.[8] In *United States v. Salerno*,[9] Chief Justice Rehnquist cautioned that: "In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."[10] Accordingly, arrestees are free of guilt until a conviction is secured, but there is not an absolute right to bail.[11]

Conditions and procedures for setting bail are established by federal and state statutes. Traditionally, arrestee flight before trial was the principal concern in judicial pre-trial release determinations. During the late-1960's, however, communities became increasingly anxious over risks posed by accused criminals who committed further crimes while released on bail.[12] Consequently, at least thirty-two states, the District of Columbia, and the federal government passed laws establishing public safety as an additional factor to be considered by a judge when setting bail or establishing other pretrial release conditions.[13] In *Salerno*, the Supreme Court validated the behavioral factor by holding that the prevention of public danger to the community can outweigh an arrestee's interest in liberty.[14]

In attempting to predict either type of pretrial misconduct,

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8. *See* Bell v. Wolfish, 441 U.S. 523, 523 (1979).
9. 481 U.S. 739 (1987).
10. *Id.* at 755.
11. *See* United States v. Salerno, 481 U.S. 739, 754-55 (1987) (holding that the eighth amendment grants no absolute right to bail); Carlson v. Landon, 342 U.S. 524, 541-42, 544-46 (1952) (holding that when aliens are dangerous, their detention pending a deportation hearing does not violate the eighth amendment); Stack v. Boyle, 342 U.S. 1, 4 (1951) (holding that bail is a conditional right).
12. BARBARA GOTTLIEB, U.S. DEPT. OF JUSTICE, PUBLIC DANGER AS A FACTOR IN PRETRIAL RELEASE: A COMPARATIVE ANALYSIS OF STATE LAWS 1, 17-20 (July 1985); *see also* John S. Goldkamp, *Danger and Detention: A Second Generation of Bail Reform*, 76 J. CRIM. L. & CRIMINOLOGY 1, 56-64 (1985).
13. *See* GOTTLIEB, *supra* note 12, at 17-20.
14. 481 U.S. at 748.

judges must somehow fill the information vacuum relating to each arrestee in order to establish pretrial release conditions. Typically, judges assess the risks posed by arrestees while on pretrial release by weighing a variety of factors, such as, the nature of the charge, the arrestees employment status, family and community ties, or past criminal activities. However, predictions based upon these criteria are largely subjective and could lead to inconsistent results.[15] The D.C. bail statute, similar to the statutes of many other jurisdictions, allows judges to base pretrial release on financial or nonfinancial conditions. Nonfinancial conditions include release by restricting travel, association, place of abode, or by requiring the arrestee to maintain employment, to stay off drugs, or to abide by "any other condition".[16]

Quite often judges have incomplete and unconfirmed information about arrestees when they are arraigned. In attempting to substantiate information, most major cities now have neutral fact-finders, or pretrial services agencies, which assist the judge in making pretrial release decisions. The D.C. Pretrial Services Agency performs typical pretrial information gathering by: (1) interviewing all arrestees to gather factual matter relevant to pretrial release; (2) taking the gathered data and submitting release recommendations to the court; and (3) monitoring compliance with whatever conditions are actually imposed by the court.[17]

For several years, the Department of Justice has actively promoted greater use of pre-arraignment drug testing as a means of gathering release relevant information. In order to determine the viability of the concept, the Justice Department funded a pilot program in Washington, D.C. in 1984. After the program's successful implementation, it was implemented in the federal pretrial system. The department funded similar programs in three additional jurisdictions in late 1987[18] and added another three in 1988.[19] Currently, federal funds are

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15. *See* James K. Stewart, *Quid Pro Quo: Stay Drug-Free and Stay on Release*, 57 GEO. WASH. L. REV. 73 (1988).

16. *See* D.C. CODE ANN. § 23-1321(a) (1981).

17. MARY A. TOBERG ET AL, U.S. DEPT. OF JUSTICE, ASSESSMENT OF PRETRIAL URINE TESTING IN THE DISTRICT OF COLUMBIA vi (Dec. 1989).

18. The new sites were Portland, Oregon; Tucson, Arizona; and Wilmington County, Delaware.

19. These additional sites were Milwaukee, Wisconsin; Phoenix, Arizona; and Prince Georges County, Maryland. The last six programs established were funded

used in the operation of five arrestee drug testing programs.[20]

The federal government has substantiated the relevance of drug testing to release decision making by exploring the drug-crime connection through various studies. For example, the Department of Justice has screened thousands of anonymous arrestees for illegal drug use through its Drug Use Forecasting program.[21] Alarmingly, the research shows that in every participating city the majority of all arrestees use drugs. In some cities well over three-quarters of all arrestees test positive for drugs.[22] More recently, a survey of jail inmates conducted by the Bureau of Justice Statistics reveals a clear connection between the use of illegal drugs and the incidence of theft and violent crime.[23] The study found that one in three convicted robbers and burglars admitted that the need to buy drugs was a motive behind their crime, one in four violent offenders and one-third of those convicted of property crimes were on drugs when committing their crimes, four in ten convicts had used drugs during the month before their offense, and nearly one-third of offenders had been using illegal drugs every day during the month before their crime.[24]

III. THE CURRENT USE OF PRETRIAL DRUG TESTING

Although some differences exist, the operation of the test-

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pursuant to the Anti-Drug Abuse Act of 1986, Pub. L. No. 100-690, 102 Stat. 4309 (1988).

20. All of the drug testing programs established through the Justice Department funding are still in operation, with the exception of the Wilmington, Delaware program. The Washington, D.C. program is now operated with local funding. For specific details on the status of these programs see Cynthia Durrant Jensen, Comment, *Survey of Current and Prior Pretrial Drug Testing Sites*, 5 B.Y.U. J. PUB. L. ??? (1991).

21. The Drug Use Forecasting (DUF) program tested 300 to 400 arrestees detained in jails in 21 cities for drug use four times a year to detect the level of drug use in the criminal population. In contrast to the pre-arraignment testing, the tests are done anonymously, with no results being reported to the court. *See* NATIONAL INST. OF JUSTICE, U.S. DEPT. OF JUSTICE, DRUG USE FORECASTING PROGRAM: FIRST QUARTER, 1989 (1989).

22. *Id.* The percentage of male arrestees testing positive for drugs was over 75% for 8 of the 12 cities. Chicago and San Diego lead the nation with arrestee use rates over 80%. *Id.* Every city in the survey, but Phoenix, showed drug use rates of over 60%. *Id.*

23. *Inmate Study Links Crime, Drug Habits*, L.A. TIMES, Aug. 26, 1991, at A13. The findings were based on 5,675 questionnaires returned by inmates of local jails. *Jail Inmate Survey Links Drugs and Crime*, U.S. Newswire, Aug. 23, 1991, *available in* LEXIS, Nexis Library, U.S. Newswire File [hereinafter *Survey*].

24. *Survey*, *supra* note 23.

ing programs are generally modeled after the D.C. testing program. This program has two principal goals. The first is to provide bail-setting judges with a less subjective method to determine recent drug use by defendants. The second is to provide the court with a simple and effective new release condition that can reduce both the risk of failure to appear and pretrial criminal activity.[25]

The drug testing process begins soon after the arrestees are brought to the courthouse lock-up. While awaiting a pretrial release hearing, every arrestee is informed about the drug testing procedure and for what purpose the results will be used. Then the arrestee is asked by a pretrial services worker to voluntarily submit a urine sample for drug testing.[26] If the arrestee refuses to submit a sample, that refusal is recorded and reported to the bail-setting judge who usually will order the defendant to take a urine test as a basis of any nonfinancial release.

In order to ensure the integrity of the sample,[27] the arrestee urinates in full view of a pretrial services worker and often in the incidental view of four or five other inmates awaiting their turn. The urine is hand-delivered to a lab housed in the building and immediately tested for the presence of various specific illicit drugs.[28] Urine samples are screened using the

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25. TOBERG, *supra* note 17, at 1.

26. The pretrial services worker is required to give the following warning before collecting any sample:

> My name is _____ and I work for the Pretrial Services Agency. I am here to collect a urine sample from you. That sample will be tested and the results will be ready for court. The results will be used only to make a release recommendation and cannot be used against you in your case.

DISTRICT OF COLUMBIA PRETRIAL SERVICES AGENCY, PRETRIAL SERVICES TRAINING MANUAL 125 (1989) [hereinafter MANUAL).

27. John A. Carver, Esq., Director of the D.C. pretrial services, observed that nearly every day a defendant attempts to tamper with the procedures through such devices as attaching some apparatus to the body, using a proxy, or through bribery. United States v. Centurino, No. 87-0043-14-LFO, 1987 WL 12486, at *2, *3 (D.D.C. May 21, 1987) (letter appended to the order of the district court). In order to establish chain of custody, the pretrial services worker verifies the name of the arrestee by checking the defendants wristband, gives the defendant a cup to fill, then when the sample is returned, the worker verifies the testee's identity by checking the wristband. Next, the arrestee inspects the label for correctness, after which he or she attaches it to the sample. The worker then checks off the arrestee's name on the lock-up list. During this process a worker maintains a clear view of the cellblock urinal although the established procedures do not require actual observation of the genital area. *See generally id.* at 125.

28. The arrestees' urine is tested for the presence of opiates, cocaine, PCP,

enzyme-multiplied immunoassay test (EMIT).[29] Samples that test drug-positive are retested. The test results are reported to the judge at or before the arraignment of the arrestee. To keep the test results out of the public record, the result is verbally reported to the judge by the pretrial services representative in the courtroom. Test results are required by law to be used solely for setting conditions of release and are kept confidential by the court.[30]

Generally, arrestees testing positive for drug use are required, as a condition of release, to report to the pretrial services agency for subsequent drug testing or to a drug treatment program. Failure to report for urinalysis or to abstain from drug use is grounds for temporary or permanent revocation of pretrial release under the contempt power of the court.[31]

Results of the testing program in Washington, D.C. show that it is accomplishing its goals. The experience of the District of Columbia shows that urine testing leads to greater predictability of pretrial misconduct by making a "consistent, significant, incremental contribution to pretrial risk classification" above that achieved through weighing traditional factors, such as, community ties, past criminal record, and the like.[32] Drug testing also provides an alternative release mechanism for those who might otherwise remain in jail because they are unable to raise funds for bail.[33]

Judges in the District of Columbia are responding favorably to the information gained through pre-arraignment drug testing. The vast majority of judges place significant reliance on the drug test information as one of the factors used in mak-

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amphetamines, and methadone.

29. The Syva Company, maker of the enzyme-multiplied immunoassay test (EMIT), claims that the test is 95% accurate while others argue the EMIT's reliability may be as low as 82%. Rosen, *supra* note 3, at 1167 n.26 and accompanying text.

30. The PSA enabling legislation requires that "[a]ny information contained in the agency's files, presented in its report, or divulged during the course of the hearing shall not be admissible on the issue of guilt in any judicial proceeding." D.C. CODE ANN. § 23-1303(d) (1981). The PSA interprets this provision as proscribing them from using pretrial urine tests on the issue of guilt or innocence in any subsequent proceeding. TOBERG, *supra* note 17, at 2. Release of test information is strictly regulated and under no condition is the confidential information released to families of defendants, victims, third party custodians, the media, or the police. *Id.*; *see generally* MANUAL, *supra* note 26, at 129-30.

31. TOBERG, *supra* note 17, at 1-2.

32. TOBERG, *supra* note 17, at 10-11.

33. Abell, *supra* note 3, at 956.

ing release decisions.[34] In addition, judges tend to feel more comfortable releasing drug-related offenders before trial.[35] Moreover, a majority of judges surveyed in the District of Columbia felt that the pretrial drug testing program is responsible for a reduction in pretrial criminality and failures to appear.[36]

IV. *Skinner v. Railway Labor Executives' Ass'n* AND *National Treasury Employees v. Von Raab*

Although the courts have rendered many decisions concerning drug testing under varied circumstances, only in *Berry v. District of Columbia*,[37] has any significant constitutional challenge to the pretrial drug testing procedure been presented before a federal circuit court of appeals. The *Berry* court, however, never decided the constitutional issues raised by pretrial drug testing but remanded those issues back to the district court where the case was eventually dismissed for failure to prosecute.[38] However, the Supreme Court in *Skinner* and *Von Raab* has established the analysis by which Fourth Amendment challenges to government drug testing programs are assessed.

A. *The* Skinner *Facts*

In *Skinner v. Railway Labor Executives' Association*,[39] railway labor unions brought suit in federal district court to enjoin the enforcement of regulations promulgated by the Fed-

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34. Mary A. Toberg & John P. Bellassai, Pretrial Urine-Testing in the District of Columbia: The Perspectives of Judicial Officers, 22-23 (August 1989) (draft, on file with author) [hereinafter Judicial Perspectives].

35. Visher, *supra* note 6, at 19.

36. Judicial Perspectives, *supra* note 34, at 19.

37. 833 F.2d 1031 (D.C. Cir. 1987).

38. 107 F.R.D. 663 (D.D.C. 1987); *see also* Abney V. District of Columbia, Civ. No. 87-2339 SSH, 1989 WL 17750 (D.D.C. 1989) (dismissing case challenging pre-arraignment drug testing, in part, because some parties and issues overlapped the *Berry* case). The court of appeals held that the compulsory urinalysis involved in post-release testing program was a Fourth Amendment search, requiring a showing of reasonableness in order to pass constitutional muster. *Berry*, 833 F.2d at 1034-36. Finding the record barren of factual findings relating to the testing program and its operation, the court of appeals remanded the case back to the district court to make such factual findings. *Id.* Since the defendant did not submit a urine sample before his arraignment, the court refused to consider the issue of the constitutionality of the pre-arraignment testing portion of the program. *Id.*

39. 489 U.S. 602 (1989).

eral Railroad Administration (FRA) aimed at determining the involvement of drugs or alcohol in specific types of train accidents.[40] Under the regulations, the immediate chemical testing of blood and urine specimens for the presence of alcohol and illicit drugs is mandated for all railroad employees involved in a serious train accident.[41] In addition, the regulations authorize testing of any employee who a supervisor reasonably suspects is under the influence of drugs or alcohol.[42] The railroad transports each employee to be tested to an independent medical facility where each gives both a blood and urine sample.[43] The employees are required to fill out a form disclosing any medications they may have taken in the past thirty days. This information is used to help explain any false-positive test results.[44] Each employee is indirectly monitored as the urine sample is given, although direct observation is a more effective means of ensuring sample integrity.[45] The samples are then sent to an FRA laboratory for analysis. Samples testing positive are then confirmed through retesting.[46] Employees refusing to take the test cannot work at their present positions for nine months though they are entitled to a hearing related to that refusal.[47] The FRA regulations require that employees are notified of test results and allowed an opportunity to make a written response to those findings.[48] While the drug test information is not sought for prosecutorial purposes, the FRA regulations do not forbid the use of test results as evidence in any criminal prosecution.[49]

The district court granted summary judgment for the railroad and refused to enjoin the FRA from enforcing the new regulations. On appeal, the Ninth Circuit Court of Appeals reversed the district court judgement.[50] While the circuit court

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40. 49 C.F.R. §§ 219.101 to 219.307 (1989).
41. 49 C.F.R. § 219.201 (1989).
42. 49 C.F.R. § 219.301 (1989).
43. *Skinner*, 489 U.S. at 609.
44. *Id.* at 610.
45. *Id.*
46. *Id.* at 609-10.
47. *Id.* at 610-11.
48. *Id.* at 610.
49. *Id.* at 621 n.5. The Supreme Court approved of the testing program in *Skinner*, even though 49 C.F.R. § 219.211(d) (1987) provided that the test results could be used in criminal prosecution. The Court opined that the testing program was intended for an administrative purpose and, consequently, was not intended as a "pretext" to aid in criminal prosecutions. *Id.*
50. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988),

waived the warrant and probable cause requirements of the Fourth Amendment, it concluded that the tests were unreasonable because requiring a particularized suspicion did not impose an overly burdensome duty on the railroad.[51] The Supreme Court reversed.[52]

B. The Von Raab *Facts*

In 1985, The Customs Service, while not believing it had a drug problem within its ranks, instituted a mass drug testing program among employees seeking certain categories of employment.[53] Testing is mandatory for all applicants seeking positions having direct involvement in the "drug war", requiring the employee to carry a firearm, or involving access to classified material desirable to drug smugglers.[54]

Under the program employees are given five-days notice of their testing date.[55] All arrangements for the drug test are made through an independent contractor.[56] To ensure integrity of the sample, the test procedures include: requiring photo identification, removal of outer garments and personal belongings, placing dye in the toilet water, checking the sample for proper color and temperature, and placing the urine sample in a tamper proof container and a sealed plastic bag before sending it to a laboratory.[57] While the presence of a same sex monitor is required, the employee may urinate behind a partition or in a bathroom stall.[58] The current regulations do not require the employee to disclose any personal medical information unless the specimen test is drug-positive.[59] The samples are tested initially with the EMIT technique and drug-positive results are then confirmed using highly sophisticated gas chromatography/mass spectrometry (GC/MS).[60] The test re-

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rev'd sub nom. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

51. *Id.* at 588.
52. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).
53. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 660 (1989).
54. *Id.* at 660-61.
55. *Id.* at 664.
56. *Id.* at 661.
57. *Id.*
58. *Id.*
59. *Id.* at 661 n.1.
60. *Id.* at 662. Gas chromatography/mass spectrometry (GC/MS) is slightly more accurate than EMIT but can cost from $70 to $100 to perform while EMIT runs as little as $5. Rosen, *supra* note 3, at 1162 n.9 and accompanying text, 1167-68 nn. 26-31 and accompanying text.

sults are kept confidential by the Customs Service and may not be used for criminal prosecution without the employee's written consent.[61]

The National Treasury Employees Union was granted an injunction by the U.S. District Court for the Eastern District of Louisiana halting the Customs Service's drug testing program holding that it violated the Fourth Amendment prohibition against unreasonable searches and seizures.[62] On appeal, the U.S. Court of Appeals for the Fifth Circuit vacated the injunction and held the program was constitutional.[63] The circuit court found that the Customs Service's interest in deterring drug use among its employees outweighed the limited intrusion into their privacy.[64] The Supreme Court upheld the appellate court's decision with regard to workers who were either directly involved in the drug interdiction effort or who carried a firearm; but, the Court held that the record was too barren to determine the reasonability of applying the program to workers with access to classified materials.[65]

C. *The Court's Analysis in* Skinner *and* Von Raab

1. *Urinalysis Constitutes a Fourth Amendment Search*

Prior to *Skinner* and *Von Raab*, the lower courts were inconsistent on a number of issues relating to drug testing. Confusion existed concerning such matters as the necessity of requiring particularized suspicion,[66] the strength of the required nexus between the government objective and the means of furthering that objective,[67] the relevance of least restrictive alternatives,[68] the type of evidence required on which to base conclusions that a drug problem exists, and the kind of proof needed to support a connection between the problem and the means of addressing it.[69] The *Skinner* and *Von Raab* Courts

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61. *Id.* at 663.
62. National Treasury Employees Union v. Von Raab, 649 F. Supp. 380 (E.D. La. 1986).
63. National Treasury Employees' Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987).
64. *Id.* at 177-78.
65. National Treasury Employees' Union v. Von Raab, 489 U.S. 656, 677-78 (1989).
66. Carver, *supra* note 6, at 343-44; Westover, *supra* note 3, at 809 n.141.
67. Rosen, *supra* note 3,at 1231-32.
68. Rosen, *supra* note 3, at 1232-33.
69. Rosen, *supra* note 3, at 1234-36.

cast light on how issues related to mandatory and suspicionless drug testing must be resolved under the Fourth Amendment.

In accordance with lower court decisions,[70] the Supreme Court held for the first time that urinalysis compelled by the government constitutes a search under the Fourth Amendment.[71] Traditionally, only those tests which necessitated an actual physical intrusion, such as a blood test, were afforded Fourth Amendment protection.[72] Justice Kennedy, writing for the majority, quoted the Fifth Circuit:

> "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."[73]

The Court held that a urinalysis is a search[74] under the Fourth Amendment because it implicates expectations of privacy in both the act of urination and in the subsequent chemical analysis of the urine specimen which could reveal highly personal information about the testee.[75]

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70. On the circuit court level see Lovvorn v. City of Chatanooga, 846 F.2d 1539, 1542 (6th Cir. 1988); R.L.E.A. v. Burnley, 839 F.2d 575, 580 (9th Cir. 1988), *rev'd*, 489 U.S. 602 (1989); N.F.F.E. v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987), *vacated sub nom.* Jenkins v. Jones, 490 U.S. 1001 (1989); Berry v. District of Columbia, 833 F.2d 1031, 1034 (D.C. Cir. 1987); Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986); and Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264, 1267 (7th Cir.), *cert. denied*, 429 U.S. 1029 (1976). At the district court level see Feliciano v. City of Cleveland, 661 F. Supp. 578, 586 (N.D. Ohio 1987); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); and McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985).

71. *Skinner*, 489 U.S. at 616-17.

72. *See, e.g.*, Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding that a blood test is a search because it intrudes into the skin and subsequent chemical analysis reveals private information).

73. *Skinner*, 489 U.S. at 617 (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

74. The Court noted that blood or urine testing could constitute a seizure under the Fourth Amendment because of one's possessory interest in his or her bodily fluids, *Skinner*, 489 U.S. at 617 n.4 (citing United States v. Jacobsen, 466 U.S. 109, 113 (1984)), but the Court determined that protections afforded expectations of privacy adequately protected any property interest in bodily fluids. *Id.*

75. *Skinner*, 489 U.S. at 617 (explaining that chemical analysis can reveal personal conditions, such as, pregnancy, epilepsy, or diabetes).

2. Drug Tests Are Reasonable Under the "Special Needs" Analysis

a. The presence of "special needs". The Constitution requires all searches to be reasonable. In *Skinner* and *Von Raab* the court reemphasized that "reasonableness" generally requires that searches be carried out pursuant to a warrant based on probable cause.[76] Nevertheless, Justice Kennedy stated that it is a "longstanding principle that neither a warrant nor probable cause, nor . . . any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."[77] One such circumstance is where the search furthers a "special need" of the government in a non-law enforcement situation in which the warrant and probable cause requirements are impractical.[78] In *Skinner* the government had a special need in maintaining the safe operation of the railroads.[79] Similarly, in *Von Raab* the Court held that the Customs Service had a special need in maintaining the integrity of the borders and in ensuring public safety.[80]

b. Drug tests reasonable absent a warrant. The Court noted that an essential purpose behind the warrant requirement is to assure citizens that they are not being subjected to arbitrary or random government acts.[81] A government search under a warrant informs citizens that the search is lawful and narrowly tailored in purpose and scope.[82] The Court found that in both *Skinner* and *Von Raab* the purposes of a warrant were otherwise served due to such factors as: only specific circumstances triggered the imposition of the drug tests; the intrusion was limited by specific and narrow definition in the regulations; moreover, the regulations put employees on notice as to the procedures; and only minimal discretion existed over imposing the drug tests on employees.[83]

Heightening the need to dispense with the warrant requirement was the Court's finding that requiring the government to procure warrants was likely to frustrate the legitimate

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76. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665.
77. *Von Raab*, 489 U.S. at 665 (citing *Skinner*, 489 U.S. at 618-24).
78. *Skinner*, 489 U.S. at 619; *Von Raab*, 489 U.S. at 665-66.
79. *Skinner*, 489 U.S. at 618-21.
80. *Von Raab*, 489 U.S. at 666-67.
81. *Skinner*, 489 U.S. at 621-22; *Von Raab*, 489 U.S. at 667.
82. *Skinner*, 489 U.S. at 622.
83. *Id.*; *Von Raab*, 489 U.S. at 667.

government purposes in administering the tests. In *Skinner* the Court held that since government activity had been adequately circumscribed, it was unreasonable to require the railroad to obtain warrants when such a duty would significantly hinder the purposes of the testing program.[84] Likewise, the *Von Raab* Court found that the delay and expense in seeking search warrants for routine employment matters unduly diverted the resources of the Customs Service away from its most pressing responsibilities of drug interdiction and maintaining the borders.[85]

c. Special needs outweigh individual privacy interests. Even after finding a warrant contextually unnecessary, the Court stressed that probable cause is generally required though it is peculiarly germane to criminal investigations.[86] The Court looked to a variety of factors relating to privacy interests and the special needs of the government before concluding that the pertinent drug tests were justified.

(1) The government's interests. After balancing the interests, a search may require no suspicion where the government's special need relates to the discovery of unseen conditions or to deter the development of such conditions[87] where the special need for the intrusion would be jeopardized by requiring any particularized suspicion.[88] For instance, in *Von Raab* the Court found that the potential drug-related harms of impairing the judgment and integrity of Customs Service employees' was a substantial problem outweighing the implicated privacy interests despite any evidence of an existing problem.[89] The *Skinner* Court noted that because great human loss may result from drug or alcohol impairment before any visible signs may emerge, testing without individualized suspicion is a compelling state interest.[90] In addition, the Court held that particularized suspicion may be dispensed with where it is a serious impediment to gaining valuable information about the cause of train accidents.[91]

(2) Privacy interests. While recognizing the gravity

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84. *Skinner*, 489 U.S. at 624.
85. *Von Raab*, 489 U.S. at 666-67.
86. *Id.* at 667-68.
87. *Id.* at 668.
88. *Skinner*, 489 U.S. at 624; *see Von Raab*, 489 U.S. at 668.
89. *Von Raab*, 489 U.S. at 674-75.
90. *Skinner*, 489 U.S. at 628.
91. *Id.* at 631.

of the individual privacy interest involved in mandatory and suspicionless drug testing, the Court focused its attention on factors leading to the conclusion that the government intrusion was minimal. The Court noted government efforts to minimize the intrusion into the employees' privacy. For example, the urine testing was made less intrusive because neither the FRA nor Customs Service regulations required direct visual monitoring of urination, and the testing took place in a medical setting by independent contractors.[92] Moreover, employees would not be required to reveal in advance any medications they were taking and the sample could only be tested for the presence of specified illicit drugs.[93] Further minimizing the impact of the tests were the stringent restrictions placed on the use of the medical information obtained through the testing.[94] In addition, the Court found that the test results were not gathered to be used in any criminal prosecution but rather to further a non-law enforcement goal of the government.[95]

Another impetus behind the Court's finding of minimal intrusion on privacy was the recognition that the context of the drug testing program lessened the impact of the intrusion.[96] The Court noted that certain employees in the public sector and in highly regulated industries have a reduced expectation of privacy because they are subject to notice that safety, health and fitness are important aspects of their jobs.[97] In addition, employee privacy expectations in the railroad industry are further diminished because railway personnel have been a primary focus of regulatory concern in the industry.[98] In *Von Raab*, carrying firearms by Customs Service employees reduced their expectations of privacy relating to inquiries into personal fitness.[99] Moreover, employees involved in drug interdiction should reasonably expect scrutiny into their probity and fitness.[100]

Ultimately the Court determined the impracticality of a warrant or particularized suspicion by finding that the purpos-

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92. *Skinner*, 489 U.S. at 626-27; *Von Raab*, 489 U.S. at 661.
93. *Skinner*, 489 U.S. at 621 n.5; *Von Raab*, 489 U.S. at 661 n.1.
94. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 663.
95. *Skinner*, 489 U.S. at 621 n.5; *Von Raab*, 489 U.S. at 663.
96. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 671.
97. *Skinner*, 489 U.S. at 627.
98. *Id.* at 628.
99. *Von Raab*, 489 U.S. at 672.
100. *Id.*

es behind a warrant were otherwise served and that the government's special need in performing the pertinent searches outweighed any intrusions on relevant privacy expectations.[101] By a seven to two majority, the *Skinner* Court determined that the government's special need in maintaining the safe operation of the railroads outweighed the individual privacy interests of railroad workers.[102] Similarly, the *Von Raab* Court, by a five to four majority, found the government's special need in maintaining the integrity of the borders and in ensuring public safety was more significant than the privacy interests of job applicants. In reaching its conclusions in *Skinner* and *Von Raab*, the Court did not find any one factor to be dispositive,[103] but rather, held the aggregate weight of interests to be in favor of the government.

3. *The Dissents*

The majority positions in both *Skinner* and *Von Raab* were harshly criticized by the dissenting justices. Dissenting in *Skinner*, Justice Marshall, joined by Justice Brennan, declared "[t]he majority's acceptance of dragnet blood and urine testing ensures that the first, and worst, casualty of the war on drugs will be the precious liberties of our citizens."[104] The dissent posited that the majority impermissibly expanded the "special needs" exception so that it entirely excuses the probable cause requirement in civil contexts.[105] Moreover, Marshall charged the majority with creating a dangerous and malleable balancing test whose only justification is the policy results it per-

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101. The Supreme Court has found a special need exception under each search object covered in the express language of the Fourth Amendment, i.e., persons, houses, papers, and effects. *See e.g.*, *Skinner*, 489 U.S. at 620 (persons); *Von Raab*, 489 U.S. at 668 (persons); Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (houses) (holding that a warrantless search of probationer's home based on "reasonable grounds" did not violate the Fourth Amendment since the state has special needs in probation supervision); O'Connor v. Ortega, 480 U.S. 709, 725-26 (1987) (papers) (holding that a warrantless search of government employee's office did not violate Fourth Amendment because the federal government has special needs in the employee context); New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (effects) (holding that a warrantless search of student's purse based on "reasonable suspicion" did not violate Fourth Amendment because of special need of schools to respond immediately to disruptive behavior).

102. *Skinner*, 489 U.S. at 618-21.

103. *See* Willner v. Thornburgh, 928 F.2d 1185, 1190 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991).

104. *Skinner*, 489 U.S. at 635-36 (Marshall, J., dissenting).

105. *Skinner*, 489 U.S. at 640.

mits.[106]

Aside from Marshall and Brennan reiterating their *Skinner* dissent, *Von Raab* drew a dissenting opinion from Justice Scalia. For Justice Scalia, the probability of an existing problem to be addressed is a significant factor in the overall special needs equation. While supporting the majority in the *Skinner* decision, he criticized the *Von Raab* majority for allowing drug testing where no record of a concrete drug problem could be shown.[107] Scalia argued that government intrusions implicated in drug testing cannot be justified simply by their symbolic nature, but rather, the government must show the existence of a problem to be remedied before mandatory and suspicionless drug testing can be sanctioned.[108]

V. PRE-ARRAIGNMENT DRUG TESTING UNDER THE SPECIAL NEEDS ANALYSIS

After *Skinner*, *Von Raab* and their progeny,[109] suspicionless and mandatory urine testing of arrestees constitutes a search deserving some measure of Fourth Amendment protection. While Fourth Amendment rights are rarely shaped through mechanical tests,[110] the *Skinner* and *Von Raab* Courts greatly relaxed the analysis for government drug testing programs under its "reasonableness"[111] or "balancing" inquiry.[112] Indeed government drug testing programs are not

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106. *Skinner*, 489 U.S. at 640-41.

107. *Von Raab*, 489 U.S. at 680, 686-87 (Scalia, J., dissenting).

108. *Id.* at 686-87.

109. *See, e.g.*, Willner v. Thornburgh, 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991); Hartness v. Bush, 919 F.2d 170 (D.C. Cir. 1990), *cert. denied*, 111 S. Ct. 2890 (1991); National Treasury Employees Union v. Yeutter, 918 F.2d 968 (D.C. Cir. 1990); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990); Dunn v. White, 880 F.2d 1188 (10th Cir. 1989), *cert. denied*, 493 U.S. 1059 (1990); Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989).

110. Terry v. Ohio, 392 U.S. 1 (1968) (holding that specific content and incident's Fourth Amendment rights are shaped by the contexts in which they are asserted).

111. Unreasonable searches are those infringing on privacy expectations that "*society* is prepared to accept as reasonable." *See Skinner*, 489 U.S. at 616; *see also* United States v. Jacobsen, 466 U.S. 109, 113 (1984). The current test is primarily objective as opposed to the *Katz* two part test which focused on both subjective and objective expectations of privacy. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

112. The circuit court opinions in *Skinner* and *Von Raab* used tests different

likely to receive any greater scrutiny than some form of rational basis review. As one commentator noted, the new standard is based on "practicality and efficiency."[113]

As a preliminary matter, some question may arise as to the application of the Court's rationale in *Skinner* and *Von Raab* to the somewhat different context of pre-arraignment drug testing in the District of Columbia. The Supreme Court's use of "special needs" precedents shows that the special needs rationale applies in varying contexts so long as the search is being implemented pursuant to a government regulatory endeavor. For instance, in *Griffin v. Wisconsin*,[114] a case involving the government's special need to perform a warrantless search of a probationer's home, the Court incorporated into its own analysis the rationales from such contexts as the operation of prisons, schools, government offices, and highly regulated industries.[115] Consistent with *Griffin*, the *Skinner* and *Von Raab* Courts relied on special needs precedents outside the employment context.[116] Consequently, the *Skinner* and *Von Raab* rationale governs drug testing in the pre-arraignment context.

While contextual differences between the special needs cases exist, the contextual focus of *Skinner* and *Von Raab* makes application of precedent relating to other government drug testing programs a matter of comparison and contrast in the overall balancing endeavor. Indeed, the privacy interests implicated in pre-arraignment drug testing do not appear as

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from each other as well as from the Court's present test. *Von Raab* used the *Bell v. Wolfish* test which requires consideration of (1) the scope of the government intrusion; (2) the manner in which it is carried out; (3) the government's justification for initiating it; and (4) the place where the search is conducted. Bell v. Wolfish, 441 U.S. 520, 559 (1979). The *Skinner* Court used another prominent test, derived from *Terry v. Ohio*, requiring that (1) the government imposition be justified at its inception, and (2) the scope of the intrusion itself must be reasonably related to the conditions which justified the initial government action. Terry v. Ohio, 392 U.S. 1, 19-20 (1968). While these tests are still useful as analytical organizational tools, they are much more complicated than the Court's simple lining up of the competing interests.

113. Lois Yurow, Comment, *Alternative Challenges to Drug Testing of Government Employees: Options after* Von Raab *and* Skinner, 58 GEO. WASH. L. REV. 148 (1989); *see also* Mass, *supra* note 3, at 244-45.

114. 483 U.S. 868 (1987).

115. *Id.* at 873-74.

116. *See, e.g.*, *Skinner*, 489 U.S. at 620-21, 630 (citing Bell v. Wolfish, 441 U.S. 520 (1979) (body cavity searches of prisoners)); Griffin v. Wisconsin, 483 U.S. 868 (1987) (search of probationer's home).

substantial as those implicated in the employment context. For example, employees who are subjected to urine testing face possible disciplinary proceedings including discharge. However, arrestees who participate in the drug testing program may be released where they otherwise would not be due to judges requiring drug test monitoring during release instead of de facto detention through imposition of unpayable financially based release conditions.[117]

A. A "Special Need" in a Non-Law Enforcement Context

Prior to balancing the "special needs" of the government against the privacy interests of arrestees, several factors must be established in relation to the District of Colombia testing program. First, does the District of Columbia have a special need in the operation of its drug testing program? Second, is the warrant requirement redundant or unhelpful under the circumstances? Third, does requiring a warrant or probable cause frustrate the legitimate government purposes in performing the search?

The District of Columbia has a special need in operating its pre-arraignment testing program because it furthers the government's compelling interest in the regulation of its bail system. In *Salerno*, the Supreme Court reaffirmed the "legitimate" regulatory function of pretrial detention and the "compelling" governmental interest in preventing criminal activity by arrestees while on pretrial release.[118] Regulation of the bail system and public safety are behind the purposes of pre-arraignment drug testing.[119] Without mandatory and suspicionless drug testing, the District of Columbia would be deprived of an effective aspect of its bailment system. While a special need might not require a compelling state interest, the presence of such an interest presents a special need that may justify a warrantless and suspicionless search.

As mentioned in *Skinner* and *Von Raab*, the purpose behind the warrant requirement is to assure citizens that the government is not acting arbitrarily. In accordance with *Skinner* and *Von Raab*, pre-arraignment drug testing may be ac-

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117. Abell, *supra* note 3, at 956.

118. United States v. Salerno, 481 U.S. 739, 747, 749 (1987); *see also* Schall v. Martin, 467 U.S. 253, 264-65 (1984); De Veau v. Braisted, 363 U.S. 144, 155 (1960).

119. TOBERG, *supra* note 17, at 1.

complished without a warrant if perceptions of arbitrariness are avoided through procedures and circumstances which assure arrestees that the tests are lawful and narrowly tailored in purpose and scope. Several aspects of the drug testing program serve the purposes behind the warrant requirement. For instance, pre-arraignment testing takes place according to detailed instructions contained in the Pretrial Services Training Manual. Before arrestees are tested, they are informed of the test procedure, the limited use of the information in release hearings, and that the information cannot be used against them. Also, since all arrestees are tested, pretrial services' workers exercise no discretion as to who is tested. Aside from what the government has done to give notice of the search, arrestees should be on notice that certain administrative procedures will be required of them during the course of any arrest.[120]

Frustration of purpose is another aspect of the special needs analysis that will increase the likelihood that a warrant or probable cause will not be required in arrestee drug testing. In the District of Columbia, if an arrestee refuses to give a sample, judges routinely order him or her to submit to a drug test even without probable cause. However, requiring such a judicial presentment would hinder the orderly processing of arrestees without an appreciable benefit to individual privacy, especially where the court will order a drug test anyway.

Probable cause is also unhelpful in determining the reasonableness of pre-arraignment drug testing. For example, a fundamental purpose in testing all arrestees is to find those individuals who show no outward signs of drug use at the time of arrest. Moreover, the class of test subjects cannot be narrowed by looking to a specific category of offenses because congressional and empirical findings indicate that the connection between drugs and crime is not limited to specific types of crimes but can be related to nearly any property or violent crime.[121] To require a warrant or probable cause in the pre-arraignment drug testing context is irrelevant because "there are virtually

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120. *See* United States v. Anderson, 490 F.2d 785 (D.C. Cir. 1974) (holding that arrestees may be required to appear in a lineup in connection with an unrelated offense).

121. Brief and Appendix for the United States as Amicus Curiae at 16, 36, Berry v. District of Columbia, 833 F.2d 1031 (D.C. Cir. 1987). In 1988 Congress found a "well proven" connection between drugs and crime. Anti-Drug Abuse Act, Pub. L. No. 100-690, § 5251(a)(13), 102 Stat. 4309, 4309-10 (1988).

no facts for a neutral magistrate to evaluate."[122]

B. Balancing the Interests

Even if a warrant is not required in the context of pre-arraignment drug testing, the probable cause requirement presumptively applies though it is strongest in the context of criminal investigations. The requirements of probable cause, or any particularized suspicion, stands or falls as the result of the special needs balancing inquiry where the Court "substitute[s] its balancing of interests for that of the Framers."[123] In order for pre-arraignment drug testing to be constitutional, the government's interest which is the basis of the intrusion must outweigh the individual's interest in not allowing the drug tests.

1. Pretrial services' interest in performing the tests

Turning to the government side of the ad hoc *Skinner/Von Raab* balancing test, factors relevant to the constitutionality of arrestee drug testing can be grouped into four categories: (1) the nature of the government's interest; (2) the "operational realities" of the government endeavor; (3) a least restrictive means analysis; and (4) the strength of the end-means nexus. All of these categories support the proposition that pre-arraignment drug testing withstands Fourth Amendment scrutiny.

a. The nature of the government's interest. Under *Skinner* and *Von Raab*, a search might not require any particularized suspicion where the government's special need relates to discovering or preventing the development of hidden conditions, or where requiring particularized suspicion would jeopardize the search arising from the special need.

As in *Skinner* and *Von Raab*, pretrial services is attempting to discover a drug use condition in testees which is not readily apparent to natural observation. The District of Columbia has a compelling government interest in ensuring arrestee reappearance at trial and in protecting the public from further criminal activity by those on pretrial release. Since empirical evidence supports the validity of drug use as an indicator of pretrial misconduct, taking away its use will directly impact the public safety.

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122. *Skinner*, 489 U.S. at 622.
123. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

b. The "operational realities" of information gathering. The "operational realities" of gathering pretrial release information from the numerous arrestees passing through the courthouse lock-up may also play a part in determining the practicality of the warrant or individualized suspicion. The Court in *Von Raab* noted that, in order for the government to operate its offices, common-sense dictates that every work-related intrusion cannot become a matter of constitutional dimensions.[124] Analogizing to the operation of pretrial services and the courthouse lock-up, it would not make much sense for pretrial services workers to test before arraignment those arrestees suspected of drug use and to test the rest after a judge ordered a drug screening at the arraignment.

A similar rationale was followed in *Willner v. Thornburgh*[125] where the D.C. Circuit allowed mandatory urine testing of new applicants to the Justice Department for positions not subject to the supervision of a traditional office environment. The *Willner* court considered the role of the government as an employer in that applicants are "strangers" to their potential employer about whom the government must make a prediction as to future behavior without the added assurance of close post-hiring supervision.[126] Once hired a drug user may cost the government unwarranted expense, and once they are hired and working there may not be an opportunity for the government to supervise in any other way.[127]

While pretrial services is not an employer, it has similar needs and handicaps as the government did in *Willner*. At least until arraignment, the government acts on the probability that arrestees have voluntarily engaged in criminal activity justifying the governments limited intrusions on liberty and privacy in order to ensure their cooperation with the judicial system. The court requires information from these strangers in order to make a prediction as to the arrestees' future conduct. Pretrial services has found a measure of supervisory relief in the pre-arraignment and post-release testing procedures.[128]

c. No less intrusive method. Another factor pushing

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124. *Von Raab*, 489 U.S. at 666.
125. 928 F.2d 1185 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991).
126. *Id.* at 1193.
127. *Id.* at 1192.
128. In Vauss v. United States, 365 F.2d 956 (D.C. Cir. 1966), the court did not allow the release of an arrestee because no adequate program existed to ensure the arrestee's abstinence from drugs. *Id.* at 958.

towards the constitutionality of pre-arraignment drug testing is that no equally effective, but less intrusive means are available to achieve the government's objectives. While the Court stated that "reasonableness . . . does not necessarily or invariably turn on the existence of alternative less intrusive means,"[129] such an inquiry is another factor in the overall reasonableness assessment.[130] The *Skinner* Court noted that it would not "second-guess reasonable conclusions drawn . . . after years of investigation and study."[131] Investigation and study on the part of the federal government, among others, has shown that proposed lesser restrictive alternatives, such as, voluntary reporting, narrowing the class of test subjects, and the use of more expensive confirmatory tests are not effective alternatives to the current mandatory and uniform program.

In the experience of the District of Columbia, voluntary reporting has been shown to be highly inaccurate. In the D.C. program arrestees' responses as to their drug use were compared to their urine test results and it was found that less than one-half of the arrestees testing drug-positive had admitted to drug use during the initial interview.[132] Narrowing the class of test subjects would essentially defeat the purpose of the tests since the connection between drugs and crime relates not only to drug-specific crimes, but to property and violent crimes as well.

While some have questioned the accuracy of the EMIT drug analysis, courts find these tests to be highly accurate and generally accepted in the scientific community.[133] In *Skinner*, the Court noted, in relation to EMIT tests, that relevant evidence need only have a tendency to make an important fact more or less probable.[134] As used by pretrial services, the test screens out those who use drugs so that the bail-setting judge may require them to go through a testing or treatment program. Moreover, all positive tests are rechecked to ensure

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129. *Skinner*, 489 U.S. at 629 n.9 (quoting Illinois v. Lafayette, 462 U.S. 640, 647 (1983)).

130. National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990).

131. *Skinner*, 489 U.S. at 629.

132. TOBERG, *supra* note 17, at 5-6.

133. Stewart, *supra* note 15, at 73 n.24 and accompanying text (indicating that EMIT is 97% to 99% accurate when used with a confirmation test); *see also* Abell, *supra* note 3, at 947 n.19; *Skinner*, 489 U.S. at 610 n.3; *Von Raab*, 489 U.S. at 672 n.2.

134. *Skinner*, 489 U.S. at 631-32.

accuracy. Using other types of tests, such as the GC/MS, would not significantly add to this process while substantially increasing the cost of testing and training required to administer the tests.[135]

d. The nexus requirement. Another factor favoring the constitutionality of pre-arraignment drug testing is the strength of the connection between the means used toward achieving the goals of drug testing. The required strength of the nexus varies from context to context depending on the strength or weakness of other factors relating to the government's interest.[136] In *Von Raab*, the connection appeared weak revealing that when a governmental interest is otherwise strong (e.g., national security) the Court will allow suspicionless testing in the absence of any evidence that a drug problem exists or that the steps taken by the government to address the problem will have any impact. While the government's interest in pre-arraignment drug testing may not be as strong as the interest in *Von Raab*, there is substantial evidence to support the reasonableness of the connection between the means and goals of pre-arraignment drug testing.

In the experience of the District of Columbia program, and in other jurisdictions, there is significant evidence of a drug problem among the entire criminal population. Moreover, numerous studies have shown that a connection does exist between drugs and crime and between drugs and the failure to reappear for trial. Data from the District of Columbia testing program revealed large and statistically significant differences in pretrial performance between those who participated in the drug testing program and those who did not.[137] While some may challenge the accuracy and interpretation of these studies,[138] the Court in *United States v. Salerno* signalled its reluctance to challenge the accuracy of social science research.[139]

Judicial use and acceptance of pre-arraignment drug test-

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135. *See supra* note 60.

136. *See* Willner v. Thornburgh, 928 F.2d 1185, 1188 (D.C. Cir.), *cert. denied*, 112 S. Ct. 669 (1991).

137. TOBERG, *supra* note 17, at 14; *see also* Douglas A. Smith et al., *Drug Use and Pretrial Misconduct in New York City*, 5 J. QUANTITATIVE CRIMINOLOGY 101 (1989); MARY A. TOBORG ET AL., U.S. DEP'T OF JUSTICE, PRETRIAL URINE-TESTING IN THE DISTRICT OF COLUMBIA: ITS USEFULNESS FOR RISK CLASSIFICATION AND AS A "SIGNALING DEVICE" FOR RELEASE RISK (1989).

138. Rosen & Goldkamp, *supra* note 3, at 120-21.

139. *See* Rosen & Goldkamp, *supra* note 3, at 121; United States v. Salerno, 481 U.S. 739, 748 (1987); McClesky v. Kemp, 481 U.S. 279 (1987).

ing data in the District of Columbia further supports the reasonableness of the program. A majority of judges surveyed felt that the pretrial drug testing program is responsible for a reduction in pretrial criminality and failures to appear.[140] In addition, the vast majority of those judges surveyed place significant reliance on the results of pre-arraignment testing in making release decisions.[141]

2. The arrestee's interest in not giving a urine sample.

Balanced against the government's interest in using drug test information to make the pretrial release decisions is the arrestee's privacy interest. As mentioned earlier, the mandatory drug testing involves two searches—the sample taking and the subsequent analysis. In determining the weight of individual interests involved in the arrestee testing program a number of areas require consideration: (1) the reasonableness of the sample collection process; (2) the use of the test information once it is obtained by the government; and (3) the factor's tending to diminish an otherwise reasonable expectation of privacy.

a. The reasonableness of the process. Although downplaying the privacy interests in *Skinner* and *Von Raab*, the Court noted that urination is "an excretory function traditionally shielded by great privacy"[142] and that under some circumstances the urine collection process might be unjustifiably intrusive.[143] However, urinating in a public restroom is a common activity where one does not expect the same degree of privacy as in one's home. An even lesser expectation of privacy attaches to the restroom in a courthouse lock-up where routine security needs naturally require greater openess.

No matter how strong the government's interest is, an otherwise justifiable search cannot be conducted in an unreasonable manner. The Court has looked favorably on government attempts to reduce the intrusiveness of the actual urine collection process. In particular, both the *Skinner* and *Von Raab* Courts recognized the merit of procedures which do not call for direct observation of the urination, despite visual observation being the most desirable from a security viewpoint.[144]

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140. Judicial Perspectives, *supra* note 34, at 19.
141. *Id.* at 22-23.
142. *Skinner*, 489 U.S. at 626.
143. *Von Raab*, 489 U.S. at 671.
144. *Skinner*, 489 U.S. at 626; *Von Raab*, 489 U.S. at 672-73 n.2.

(1) Direct observation. A recent lower court decision shows that the courts are taking seriously the intrusive nature of directly observing the act of urination. In *National Treasury Employees Union v. Yeutter*,[145] the D.C. circuit court invalidated a requirement of observation because the government had taken other precautions to ensure sample integrity such as, collecting excess clothing, dye in the toilet water, and listening for the sounds of urination.[146] In *Von Raab*, the Court observed that such precautions were adequate to ensure sample integrity.[147] The testing program in the District of Columbia, and all other jurisdictions, requires the direct visual observation of the urination by pretrial services workers.

While it may be unworkable in the lock-up situation to take the kind of precautions undertaken in the employment context, other mitigation measures may be appropriate. For instance, in the District of Columbia drug testing procedures for juveniles, pretrial services workers view the urination through the reflection of a rounded mirror much like those used to watch for shoplifters in retail stores. There is still observation under such conditions, but it is not direct and it shows an effort to minimize the impact of the test procedure.

(2) Observation by uninvolved third parties. Another matter of concern is the visual observation of the urination by uninvolved third parties.[148] In the District of Columbia program, other arrestees can observe the sample collection process. However, the process is not viewed by members of the opposite sex. In addition, there are legitimate safety concerns for the pretrial services workers in being isolated with arrestees. Moreover, the presence of others helps avoid the possibility that there will be false claims of abuse by the arrestees. Also, in the District of Columbia, the lock-up urinals can be directly observed by the inmates at all times, not only during the sample taking procedures.

(3) Consent. A mitigating factor in the testing procedure is that the arrestees are asked to voluntarily submit a urine sample. While the consent process may or may not rise to

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145. 918 F.2d 968 (D.C. Cir. 1990).

146. *Id.* at 976.

147. *See Von Raab*, 489 U.S. at 676.

148. Storms v. Coughlin, 600 F. Supp. 1214 (S.D.N.Y. 1984) (finding that inmates and female nurses could view the sample taking which significantly heightened the humiliating nature of the test when no legitimate need existed).

the level of consent required that will result in a waiver of Fourth Amendment rights, it serves to reduce the impact of the intrusion by minimizing any "unsettling show of authority".[149] The effectiveness of the consent may be questioned, however, because of the "forced" or "coercive" nature of the entire arrest process.

In order for consent to be an effective waiver of Fourth Amendment rights the government must prove that such consent was "free" and "voluntary".[150] In some cases pretrial services workers may tell the arrestees that if they do not consent, the judge will order them to take the test later, or that such a refusal may reflect unfavorably in the pretrial release hearing. The courts are split as to whether such threats constitute coercion.[151] Ultimately, as in "special needs" analysis, the Court uses a totality of the circumstances approach in deciding whether consent has been validly given.[152] Individual traits such as education, maturity, intoxication, or knowledge of the law are relevant. Consideration of such factors must be made according to each individual, making it difficult to assess the overall validity of the consent made by many persons in the mass testing procedures of Pretrial Services.[153] Nevertheless, the consent under these conditions can be plausibly construed as mitigating factor in the special needs balancing test.

b. Use of the drug test results. While the testing of the urine is a search, pretrial services take steps to minimize the intrusion. The most important factor under this section is that the tests are used for non-criminal purposes by a neutral fact-finding agency. Opponents of these drug screening programs argue that because the information gained may be used to impeach the arrestee at trial, there is a law enforcement purpose related to the testing program. However, such a charge is

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149. *See Von Raab*, 489 U.S. at 672 n.2 (quoting Delaware v. Prouse, 440 U.S. 648, 657 (1979)).

150. Schneckloth v. Bustamonte, 412 U.S. 218, 247-48 (1973); *see also* Rosen & Goldkamp, supra note 3, at 171-174 (concluding that some type of written informed consent form is the surest course).

151. *See* Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968) (concluding that consent is not free and voluntary when given only after the official conducting the search asserted that he possessed a warrant); United States v. Boukater, 409 F.2d 537 (5th Cir. 1969) (holding that threatening to obtain a warrant may be coercive unless the officer (1) actually has grounds to obtain a warrant, or (2) makes statement in non-threatening manner).

152. *Schneckloth*, 412 U.S. at 227.

153. *See* Rosen & Goldkamp, supra note 3, at 171-72.

unlikely to place the program in a law enforcement category because the Supreme Court has consistently allowed evidence excluded for substantive purposes to be used as impeachment evidence against a defendant.[154]

Moreover, the *Skinner* Court approved a drug testing scheme which arguably allowed for the release of drug test results for law enforcement purposes rather than mere impeachment. The Court found that law enforcement was not the testing program's "primary" purpose nor was it a "pretext" towards that end.[155] On the other hand, the District of Columbia forbids by statute the use of information acquired by pretrial services to be used for the guilt phase of any adversarial proceeding. Moreover, the information gathered through drug testing is stringently controlled so that only certain non-adversarial court personel have access to it.

Additionally, the tests are designed to find only the presence of specific drugs so that other personal information which could be discovered through drug testing is not. Most importantly, access to the information is strictly controlled by law and agency procedure so that only those within the court who need to know (excluding the defense and prosecutors unless the defendant consents) the results will have access to it.

An aggravating factor under this heading is that it is necessary to ask personal medical information, such as, whether or not the arrestee is taking medications. In *Skinner* and *Von Raab* such questions were only asked after a positive test result. It is possible, however, that the arrestee has a reduced expectation of privacy in the questions asked about drug use and possible cross reactants because the information relating to other personal matters that may bear on arrestee stability is routinely asked. Moreover, asking questions as to medications only after a false positive could impede operations of pretrial services information gathering function.

c. Diminished expectations of privacy. Arrestees have a diminished expectation of privacy because of the context of the bail-setting process. The *Skinner* Court observed that certain

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154. *See, e.g.*, Harris v. New York, 401 U.S. 222 (1971) (indicating that illegally seized evidence may be used by prosecutor to impeach defendant on cross-examination). In Jones v. United States, 548 A.2d 35 (D.C. 1988), the District of Columbia Court of Appeals, based on generally accepted reliability of EMIT results and facts put in issue by the defendant, allowed admission of evidence relating to the defendant's positive pretrial drug test result.

155. *Skinner*, 489 U.S. at 621 n.5.

employees in the public sector and in highly regulated industries have a diminished expectation of privacy, especially where the employees have been the objects of government regulation. While initially aimed at the workplace, the "highly regulated industry" doctrine has been applied to such individuals as jockeys, prison inmates, and most recently to employees in the railroad industry.

One commentator suggests that the lower court cases of *Shoemaker v. Handel*[156] and *McDonell v. Hunter*[157] are among the most influential cases in the area of upholding the constitutionality of suspicionless drug testing.[158] These two cases come from the administrative search realm of Fourth Amendment jurisprudence. They are relevant because the *Skinner* and *Von Raab* Courts favorably cited *Shoemaker* and other similar cases while at the same time not limiting itself to the requirements of the administrative search exception to the warrant and probable cause.[159]

Shoemaker dealt with the suspicionless testing of jockeys, among others, aimed at maintaining the integrity and public confidence in the New Jersey horse racing industry. The *Shoemaker* court applied the administrative search exception to the individuals in the industry because they were essentially the object of the pervasive regulation in the industry and they voluntarily accepted employment in the industry.[160] *McDonell* dealt with several categories of drug testing one of which was suspicionless testing of guards having daily contact with prisoners. The *McDonell* court analogized the government object in *Shoemaker* to the government's interest in the security of prisons arguing that prison safety was at least as important as the goals involving the horse racing industry.[161]

The *Salerno* Court recognized the "regulatory" nature of pre-trial release decisions.[162] Like prisons, the process of bail-setting can be a "regulated industry". In *Skinner* actual notice of drug testing in the industry to further safety interests seemed not to be required. A mere knowledge that health and

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156. 795 F.2d 1136 (3d Cir.), *cert. denied*, 479 U.S. 986 (1986).
157. 809 F.2d 1302 (8th Cir. 1987).
158. Warner, *supra* note 3, at 188-89.
159. *See* Mass, *supra* note 3, at 241.
160. *Shoemaker*, 795 F.2d at 1142.
161. *McDonell*, 809 F.2d at 1308.
162. *See* United States v. Salerno, 481 U.S. 739, 748 (1987).

fitness were part of the job was sufficient.[163] Like employees in the railroad industries, arrestees have been the target of legislation which ought to apprise them of the realities of the bailment system. Arrestees should be aware that they are required to give assurances that they will return for trial and that they will be law abiding while on release. Thus, it is reasonable to conclude that arrestees have a diminished expectation of privacy by virtue of their being held within the bailment system.

VI. CONCLUSION

The practice of testing for drug use in order to allow courts to make a more informed pretrial release decision is becoming more pervasive. With the advent of the Supreme Court's decisions in *Skinner* and *Von Raab*, it is likely that these programs will pass constitutional muster as long as they are not arbitrary. However, the treatment of these mass drug screenings by the courts is highly fact-specific. The use of direct visual monitoring of the arrestee's act of urination and the requirement that arrestees reveal the use of any medications in advance of the test result may enhance the intrusiveness of the search. However, by carefully structuring the testing program to mitigate as much as possible any intrusions on the arrestee's privacy interest, pre-arraignment drug testing withstands Fourth Amendment scrutiny under a special needs analysis.

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163. *See Skinner*, 489 U.S. at 627.