DePaul Law Review

Volume 39
Issue 1 *Fall 1989*

Article 7

Just Say Yes to Drug-Testing Legislation: The Skinner and Von Raab Decisions

Jeffrey S. Pavlovich

JUST SAY YES TO DRUG-TESTING LEGISLATION: THE *SKINNER* AND *VON RAAB* DECISIONS

INTRODUCTION

> Drug abuse has reached its tentacles into middle America . . . .
> . . . The costs of drug abuse to our society include the unmeasurable [sic] effects of disregard for the law, corruption of public officials, loss of confidence in government, high crime rates, undermined military preparedness, family and community disruption, threats to national and public security, and the pain and suffering of countless individuals.[1]

The "drug-effect" in America, as depicted above, is an undeniable reality. This reality is reflected in statistics. Annual losses of productivity and medical expenses are estimated between $33 and $100 billion in the United States.[2] It is further estimated that between three and seven percent of American workers use illicit drugs on a regular basis,[3] and, alarmingly, that sixty-five percent of young adults entering the work force have experimented with illicit substances.[4] Statistical support is also found in on-the-job performance,

---

1. *President's Comm'n on Organized Crime: Hearing Before the Comm. on the Judiciary,* 98th Cong., 2d Sess. 99, 112 (1984) (statement of Francis M. Mullen, Jr., Administrator, Drug Enforcement Admin.). The seriousness of the drug problem, and the concurrent need for combative measures, is further emphasized in Wisotsky, *Crackdown: The Emerging "Drug Exception" to the Bill of Rights,* 38 HASTINGS L.J. 889 (1987). Wisotsky notes extensive measures taken by social forces which highlight the drug abuse problem. The article recognizes measures taken by numerous parent groups and the Drug Enforcement Administration ("DEA"). It notes the DEA hired hundreds of drug agents, placed the FBI in charge of the DEA, established the National Narcotics Border Interdiction System, utilized the CIA for intelligence information about coca and marijuana crops under cultivation, employed armed forces in drug enforcement operations, and even pressured foreign governments to eradicate illegal drug crops. *Id.* at 891-93.

2. 5 T. DENENBERG & R. DENENBERG, ALCOHOL AND DRUGS: ISSUES IN THE WORKPLACE (1983); Comment, *Use and Abuse of Urinalysis Testing in the Workplace: A Proposal for Federal Legislation Limiting Drug Screening,* 35 EMORY L.J. 1011 (1986).

3. *Effect of Alcohol and Drug Abuse on Productivity: Joint Hearing Before the Senate Subcomm. on Alcoholism and Drug Abuse and the Senate Subcomm. on Employment and Productivity,* 97th Cong., 2d Sess. 13, 15 (1982) (statement of William Mayer, M.D., Administrator, U.S. Alcohol, Drug Abuse, and Mental Admin.); Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment,* 48 U. PITT. L. Rev. 201, 203 (1986).

4. *OSHA Oversight Hearing on the Impact of Alcohol and Drug Abuse on Worker Health and Safety: Hearings Before the Subcomm. on Health and Safety of the House Comm. on Education and Labor,* 99th Cong., 1st Sess. 24-28 (1985) (statement of Elaine Johnson, Acting Deputy Director, National Institute on Drug Abuse, U.S. Dept. of Health and Human Services); Lewis, *Drug Testing in the Workplace: Legal and Policy Implications for Employers and Employees,* 1987 DET. C.L. REV. 699, 701 (1987).

where drug and alcohol abusers are three times more likely to be injured than non-abusers,[5] are one-third less productive,[6] suffer four times more work-related accidents,[7] and file compensation claims at a five times higher rate.[8] These statistics, combined with glaring publicity[9] and public outcry, have served as the catalyst for combative measures in both the public and private sectors. Indicative of these retaliatory measures is the institution of urinalysis testing by more than twenty-five percent of the Fortune 500 companies,[10] the issuance of an Executive Order for a "Drug-Free Federal Work Place"[11] and the establishment of drug-testing programs in the Customs Service and the railroad industry.

While the goals of eliminating illegal drug use and its associated problems are laudable ends, the means used to attain these ends must be examined. The destructive effect of drugs is apparent,[12] and the need to combat this destruction is equally urgent. However, "[i]n order to win the war against drugs, we must not sacrifice the life of the Constitution in the battle."[13] Drug testing, and specifically urinalysis testing, raises constitutional issues on many levels,[14] and especially brings into focus the fourth amendment's requirement that government searches and seizures are reasonable.

This Comment will focus on the fourth amendment dilemma presented by drug testing, beginning with a brief overview of fourth amendment search and seizure law.[15] The overview will place special emphasis on the reasona-

---

5. Lewis, *supra* note 4, at 702.

6. *Id.*

7. *Id.*

8. *Id.*

9. Lewis, *supra* note 4, at 700 n.1.

10. McGovern, *Employee Drug-Testing Legislation: Redrawing the Battlelines in the War on Drugs*, 39 STAN. L. REV. 1453, 1453 n.1 (1987); Miller, *supra* note 3, at 202.

11. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986). The impact of the Executive Order has been manifested in both the institution of drug-testing programs and in litigation challenging the constitutionality of these testing programs. Unfortunately, the scope of this Comment allows only minimal attention to the Order. For a more extensive analysis, see Note, *The Drug-Free Federal Workplace: A Question of Reasonableness*, 29 WM. & MARY L. REV. 215, 242-48 (1987).

12. *See supra* notes 2-8.

13. Capua v. City of Plainfield, 643 F. Supp. 1507, 1511 (D.N.J. 1986).

14. Drug-testing programs are challenged on a number of constitutional provisions, including the fourth amendment's protection against unreasonable searches and seizures, the fifth amendment's safeguard prohibiting self-incrimination, the fifth and fourteenth amendments' guarantees of due process and equal protection, and the constitutional protection of the penumbral rights of privacy. *See infra* notes 61-139 and accompanying text (exploring fourth, fifth and fourteenth amendment constitutional challenges).

15. This Comment does not present itself as an exhaustive study of fourth amendment search and seizure law. For a more comprehensive examination of the fourth amendment and its development, see J. HIRSCHEL, FOURTH AMENDMENT RIGHTS (1979); W. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (2d ed. 1987); N. LASSON, THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION (1937); B. WILSON, ENFORCING THE FOURTH AMENDMENT; A JURISPRUDENTIAL HISTORY (1986).

bleness requirement of the fourth amendment and its crucial role in the drug-testing arena. Next, the Comment will examine the recent Supreme Court opinions in *Skinner v. Railway Labor Executives Association*[16] and *National Treasury Employees Union v. Von Raab*[17] and the high court's application of the "special needs" exception to the fourth amendment in these cases. Finally, the Comment will discuss the impact of the Supreme Court's decisions, and then propose national legislation to govern urinalysis drug testing.

I. BACKGROUND

A. The Fourth Amendment

The fourth amendment to the United States Constitution provides,

> "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[18]

This constitutional provision has become the focal point of both the promotions of, and challenges to, urinalysis drug testing.[19] However, it is important to note the limited circumstances[20] which receive the fourth amendment's protection. Specifically, the fourth amendment applies only when governmental action[21] results in an unreasonable search or seizure.[22] If there

---

16. 109 S. Ct. 1402 (1989) (reported below *sub nom.* Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988)). In 1989, Samuel Skinner replaced James Burnley as the Secretary of Transportation.

17. 109 S. Ct. 1384 (1989).

18. U.S. CONST. amend. IV.

19. The framers of the Bill of Rights undoubtedly did not envision the application of fourth amendment protection to urinalysis drug-testing. Instead, the fourth amendment was largely a result of American pre-revolutionary struggles with England, and the use of general warrants and writs of assistance. Bookspan, *Behind Open Doors: Constitutional Implications of Government Employee Drug Testing,* 11 NOVA L.J. 307, 321 (1987); Note, *Good Faith, Reasonableness, and the Lesson of* Maryland v. Garrison: *Know Thy Neighbor,* 38 DE PAUL L. REV. 517, 519-20 (1989).

20. The determination of these limited circumstances is crucial, for if an activity is determined not to be a search or seizure, the government may have an unfettered right to carry out that activity. Specifically, the activity is "excluded from judicial control and the command of reasonableness." Horton v. Goose Creek Ind. School Dist., 690 F.2d 470, 476 (5th Cir. 1982) (per curiam), *cert. denied,* 463 U.S. 1207 (1983).

21. *See, e.g.,* United States v. Jacobsen, 466 U.S. 109, 113-15 (1984) (actions of DEA agent constituted government action); United States v. Janis, 428 U.S. 433 (1976) (government action in state criminal law enforcement officer obtaining evidence); Coolidge v. New Hampshire, 403 U.S. 443, 487-90 (1971) (petitioner's wife not acting as instrument or agent of state in offering police petitioner's clothing and guns); Burdeau v. McDowell, 256 U.S. 465 (1921) (documents procured by private individuals, and subsequently transferred to Assistant Attorney General, not entitled to fourth amendment protection).

22. American Fed'n of Gov't Employees, AFL-CIO, Council 33 v. Meese, 688 F. Supp. 547 (N.D. Cal. 1988); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986).

is a lack of government action, or no search or seizure, there is no fourth amendment problem. In addition, "reasonable" governmental searches do not violate the fourth amendment. These three factors form the basis of any fourth amendment analysis.

1. The Governmental Action Requirement[23]

The first prerequisite for fourth amendment application is the governmental action requirement. This requirement stems from the function of the fourth amendment,[24] which is to prevent the government state and "all of its creatures" from infringing on the privacy and dignity of individuals.[25] Expressed in this function is the "state-actor" requirement, and the reality that actions of private citizens, acting on their own initiative, fall outside the purview of the fourth amendment.[26] To determine the existence or absence of state action, the court must question whether the actor, in light of all the circumstances of the case, must be regarded as having acted as an "instrument" or agent of the state.[27] A failure to meet this state actor requirement precludes consideration of the search and seizure and reasonableness factors, and effectively precludes fourth amendment application.

2. The Search or Seizure Requirement

The next prerequisite for fourth amendment application is the existence of a search or seizure. For a proper understanding of fourth amendment law, it is essential to realize that the words "searches and seizures" are terms of limitation.[28] Specifically, a state action not classified as a search or seizure escapes the reasonableness requirement of the fourth amendment.

---

23. This requirement is afforded only cursory treatment in many of the drug cases and in this Comment. This minimal attention is warranted by the obvious government action in the subject cases which involve testing by government agencies.

24. The fourth amendment is binding on the states through the due process clause of the fourteenth amendment. Mapp v. Ohio, 367 U.S. 643 (1961) (overruling Wolf v. Colorado, 338 U.S. 25 (1949)).

25. *See* Winston v. Lee, 470 U.S. 753, 759 (1985) (protection of the individual against official intrusions based on a balancing of needs); New Jersey v. T.L.O., 469 U.S. 325, 335 (1985) (fourth amendment applies to the actions of many civil and criminal authorities); Camara v. Municipal Court, 387 U.S. 523, 528 (1967) (fundamental purpose of the fourth amendment is to safeguard individual privacy); Schmerber v. California, 384 U.S. 757, 767 (1966) (a blood test invokes fourth amendment issues); Burdeau v. McDowell, 256 U.S. 465, 475 (1921) (act of a private individual does not involve the fourth amendment); *see* sources cited *supra* note 19 (discussing the framer's concerns over privacy invasion).

26. Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971). The fourth amendment offers protection from arbitrary government overreaching, and is accordingly implicated only in instances of government action: However, the policy underlying the fourth amendment is in no way intended to discourage citizens from aiding in the apprehension of criminals. *Id.* at 488.

27. *Id. See supra* note 20 and accompanying text.

28. Amsterdam, *Perspectives on the Fourth Amendment,* 58 MINN. L. REV. 349, 356 (1974); Note, *supra* note 19, at 521.

This "search or seizure" determination, therefore, is of utmost significance. A "seizure"[29] of property is deemed to occur when there is some meaningful interference with an individual's possessory interests in that property.[30] A "search" occurs[31] "when an expectation of privacy that society is prepared to consider reasonable is infringed."[32]

One of the more significant opinions addressing "search" law is *Katz v. United States.*[33] In *Katz,* the Supreme Court dismissed the notion that there existed "constitutionally protected areas," and instead emphasized that the fourth amendment protected people, not simply areas. This ruling effectively terminated the trespass doctrine, which dictated that a search occurred only if the government invaded a property interest of the defendant.[34]

The petitioner in *Katz* violated a federal statute by transmitting wagering information by telephone from Los Angeles to Miami.[35] At trial, the government was permitted to introduce evidence of the petitioner's end of telephone conversations.[36] The government obtained this evidence by attaching an electronic listening and recording device to the outside of a public telephone booth.[37] The Supreme Court reversed petitioner's conviction.[38] The Court reasoned that the fourth amendment served to protect people, not places, and material knowingly exposed to the public was not a subject of

---

29. This Comment's attention to "seizure" analysis is minimal, as the drug-testing issue is almost exclusively viewed from the "search" angle. The Court noted this fact in *Skinner,* and listed various federal courts of appeals cases finding urine testing to be a search. 109 S. Ct. 1402, 1413 (1989). The Court further noted in *dicta* that while taking a urine sample might also be viewed as a fourth amendment seizure, such a characterization was unnecessary, because the same privacy expectations would be considered in labeling the action a search. *Id.* at 1413 n.4.

30. United States v. Jacobsen, 466 U.S. 109, 113 (1984); *see also* United States v. Place, 462 U.S. 696, 716 (1983) (Brennan, J., concurring in judgement) (taking of luggage by narcotics agents in airport deemed seizure); Texas v. Brown, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring) (police officer's securing of drug balloon after detected in car by flashlight held as seizure).

31. For instances of governmental action qualifying as a nonsearch, see for example, United States v. Place, 462 U.S. 696, 707 (1983) (canine sniff of luggage not a search); United States v. Lee, 274 U.S. 559, 563 (1978) (use of spotlight to examine a ship on "high seas" does not constitute search); Hester v. United States, 265 U.S. 57, 59 (1924) (fourth amendment's protection against unreasonable searches is not extended to "open fields").

32. *Jacobsen,* 466 U.S. at 113; Illinois v. Andreas, 463 U.S. 765, 771 (1983); United States v. Knotts, 460 U.S. 276, 280-81 (1983) (quoting Smith v. Maryland, 442 U.S. 735, 739-41 (1979)); Terry v. Ohio, 392 U.S. 1, 9 (1968); Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

33. 389 U.S. 347 (1967).

34. *See, e.g.,* Silverman v. United States, 365 U.S. 505, 509-12 (1961) (evidence obtained by attaching listening device to heating duct excluded); Olmstead v. United States, 277 U.S. 438, 465 (1928) (tap on telephone wires not search because wires were not part of defendant's property).

35. *Katz,* 389 U.S. at 348.

36. *Id.*

37. *Id.*

38. *Id.* at 359.

fourth amendment protection. However, the Court recognized that material an individual sought to preserve as private, even in an area accessible to the public, might be entitled to constitutional protection.[39]

While the majority's reasoning carried significant fourth amendment implications, it was the concurrence of Justice Harlan[40] which has since served as the benchmark for search consideration. Specifically, Justice Harlan set forth a two part test for determining protected "places." First, a protected place was one in which an individual exhibited an actual, or subjective, expectation of privacy. Second, the expectation must be one which society objectively would consider "reasonable."[41] It is the second, objective prong of this test which case law has utilized,[42] because the judiciary determined the first prong was too burdensome and inconsistent.[43]

As discussed above, the general analysis for "search" consideration was provided by *Katz*. However, it was the *Schmerber v. California*[44] Court, and its holding that blood sampling constituted a search, that provides a more specific analogy for determining whether urinalysis testing involves a search. In *Schmerber,* a police officer, after smelling liquor on petitioner's breath following his involvement in an automobile accident, directed a physician to take a blood sample from petitioner.[45] A chemical analysis indicating intoxication was admitted into evidence and was subsequently objected to as being a fruit of an unreasonable search.[46] The Court held that the extraction of blood was plainly within the constraints of the fourth amendment, as "such testing procedures plainly constitute searches of 'persons'. . . ."[47]

Courts reviewing the constitutionality of urinalysis drug testing have applied the *Schmerber* rationale in finding a search.[48] The United States District Court of New Jersey, in *Capua v. City of Plainfield,*[49] analogized blood taking to urinalysis testing and adopted the *Schmerber* rationale. Specifically, the court noted both blood and urine could be medically analyzed to discover

---

39. *Id.* at 351-52.

40. *Id.* at 360 (Harlan, J., concurring).

41. *Id.* at 361.

42. *See* cases cited *supra* note 32 and accompanying text.

43. *See* United States v. White, 407 U.S. 745 (1971) (Harlan, J., dissenting) (subjective expectations are based on laws and customs, which are objective). *But see* LaFave, *The Fourth Amendment Today: A Bicentennial Appraisal,* 32 VILL. L. REV. 1061, 1080 (1987) (requiring an individual to expect privacy from any and all observation in order to make an expectation of privacy reasonable is inconsistent with *Katz*).

44. 384 U.S. 757 (1966).

45. *Id.* at 758.

46. *Id.* at 759.

47. *Id.* at 767.

48. *E.g.,* McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986); Allen v. City of Marietta, 601 F. Supp. 482, 488-89 (N.D. Ga. 1985); Storms v. Coughlin, 600 F. Supp. 1214, 1218 (S.D.N.Y. 1984).

49. 643 F. Supp. 1507 (D.N.J. 1986). In *Capua,* city firefighters and police department employees challenged mass urine testing. *Accord Storms,* 600 F. Supp. at 1218.

numerous physiological facts about an individual.[50] The court emphasized that these physiological facts included, but were not limited to, recent ingestion of alcohol or drugs.[51] The court further reasoned that an individual does not reasonably expect to discharge urine under circumstances making it available for others to collect,[52] and, as with blood, has a reasonable expectation of privacy in his bodily fluids.[53] Hence, the court held that urinalysis testing, just as blood sampling, constituted a search.

Though there exists a near consensus that urinalysis is a search,[54] the *Schmerber* rationale is not the sole justification offered by the courts.[55] Courts[56] have also explicitly held the disclosure of other "physiological secrets" implicates the fourth amendment,[57] while other jurisdictions, on the weight of precedent, have simply adopted the same "search" holding without independent analysis.[58] Finally, various tribunals, and defendants, merely assumed the existence of a search and eschewed analysis.[59]

Hence, regardless of the rationale adopted, the search or seizure requirement, though a major factor in fourth amendment analysis, has had only a minor impact in the urinalysis-testing arena. Instead, it is the reasonableness requirement imposed by the fourth amendment which is the focus of most analyses.[60]

---

50. *Capua,* 643 F. Supp. at 1513.

51. *Id. See* American Fed'n of Gov't Employees, AFL-CIO, Council 33 v. Meese, 688 F. Supp. 547, 552 (N.D. Cal. 1988) (laboratory analysis may also reveal whether an individual suffers from diabetes, whether an individual is taking medication for epilepsy or depression, or whether a female is pregnant).

52. *Capua,* 643 F. Supp. at 1513, (quoting McDonnell v. Hunter, 612 F. Supp. 1122, 1127 (D. Iowa 1985), *aff'd,* 809 F.2d 1302 (8th Cir. 1987)).

53. *Capua,* 643 F. Supp. at 1513.

54. *See* Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1413 n.4 (1989) (listing cases that find that urinalysis is a search). *But cf.* Everett v. Napper, 632 F. Supp. 1481, 1484 (N.D. Ga. 1986) (no search occurred and therefore no fourth amendment violation when employee refused to submit to urinalysis test), *rev'd in part on other grounds,* 833 F.2d 1507 (11th Cir. 1987).

55. *See* Feliciano v. City of Cleveland, 661 F. Supp. 578, 584 (N.D. Ohio 1987) (offering numerous justifications for finding urinalysis testing a search and citing substantial precedent).

56. *See* National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987) (urinalysis testing may disclose whether an employee is under treatment for epilepsy or depression, suffering from diabetes, or pregnant), *aff'd,* 109 S. Ct. 1384 (1989); McDonell v. Hunter, 809 F.2d 1302, 1307 (8th Cir. 1987) (testing can reveal numerous physiological facts) (quoting Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986)); Bostic v. McClendon, 650 F. Supp. 245, 249 (N.D. Ga. 1986) (reveals numerous physiological facts, including but not limited to ingestion of alcohol or drugs) (quoting *McDonnell,* 612 F. Supp. at 1127).

57. *E.g.,* American Fed'n of Gov't Employees, AFL-CIO, Council 33 v. Meese, 688 F. Supp. 547, 552 (N.D. Cal. 1988); *Capua,* 643 F. Supp. at 1513.

58. *E.g.,* National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 942 (D.C. Cir. 1987); Spence v. Farrier, 807 F.2d 753, 755 (8th Cir. 1986); Railway Labor Executive's Ass'n v. Long Island R.R., 651 F. Supp. 1284, 1285-86 (E.D.N.Y. 1987); Pella v. Adams, 638 F. Supp. 94, 98 (D. Nev. 1986).

59. *E.g.* Shoemaker v. Handel, 795 F.2d 1136, 1142-43 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986); City of Palm Bay v. Bauman, 475 So. 2d 1322, 1324 (Fla. Dist. Ct. App. 1985).

60. *See infra* notes 61-70 and accompanying text.

3. The Reasonableness Requirement

Finding a search merely begins the court's fourth amendment inquiry into urinalysis testing.[61] Next, it is incumbent upon the judiciary to determine whether the reasonableness dictates of the fourth amendment are satisfied.[62] It is a general rule that warrantless searches, such as the urinalysis testing discussed in this Comment, are per se unreasonable and therefore violative of the fourth amendment.[63] This per se disposition promotes the desire to have inferences of probable cause drawn by a "neutral and detached magistrate."[64] Nonetheless, the warrant requirement is not irreducible,[65] and well-delineated exceptions have been forged.[66]

In laymen's terms, these exceptions permit the state to prove the reasonableness of a search or seizure without showing probable cause or obtaining a warrant. Instead, to determine a search's reasonableness or lack thereof, courts apply a balancing test in which they weigh the need for a particular search against the invasion of personal rights that the search entails.[67] This balancing, however, is fraught with complexity, and is not capable of routine, consistent application.[68] In applying the balancing test, the courts consider the "scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted."[69]

---

61. New Jersey v. T.L.O., 469 U.S. 325, 337 (1985).

62. *Id.*

63. Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971); Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985).

64. Aguilar v. Texas, 378 U.S. 108, 110-11 (1964) (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)).

65. New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

66. Allen v. City of Marietta, 601 F. Supp. 482, 489 (N.D. Ga. 1985). For examples of exceptions to the warrant requirement, see New York v. Burger, 482 U.S. 691 (1987) (administrative searches of closely regulated industries); United States v. Montoya de Hernandez, 473 U.S. 531 (1985) (border searches); New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches of schoolchildren's possessions at school); Illinois v. Lafayette, 462 U.S. 640 (1983) (inventory searches); United States v. Mendenhall, 446 U.S. 544 (1980) (consent); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view); Warden v. Hayden, 387 U.S. 294 (1967) (hot pursuit); Carroll v. United States, 267 U.S. 132 (1925) (the "automobile exception"); Weeks v. United States, 232 U.S. 383 (1914) (search incident to lawful arrest).

67. *E.g.*, Ortega v. O'Connor, 480 U.S. 709, 719 (1987); United States v. Place, 462 U.S. 696, 703 (1983); United States v. Villamonte-Martinez, 462 U.S. 579, 588 (1983); Camara v. Municipal Court, 387 U.S. 523, 534-35 (1967); Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

68. Bell v. Wolfish, 441 U.S. 520, 559 (1979).

69. *Id.* at 559; *see, e.g.*, United States v. Ramsey, 431 U.S. 606 (1977) (justification of public safety); United States v. Martinez-Fuerte, 428 U.S. 543 (1976) (justification of controlling entrance of contraband over border); United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (conducting border searches in a random manner violated the fourth amendment); Terry v. Ohio, 392 U.S. 1 (1968) (limited police stops justified by exigencies of situation); Katz v. United States, 389 U.S. 347 (1967) (even though place was a public phone booth, there was an expectation of privacy); Schmerber v. California, 384 U.S. 757 (1966) (state interest and manner of testing justified warrantless blood testing).

This variety of factors prevents a steadfast approach, and consequently, the reasonableness question becomes a case-by-case exercise.[70]

This case-by-case analysis has resulted in numerous fourth amendment approaches and a variety of exceptions to the fourth amendment's warrant and probable cause requirements. A most significant exception in the drug-testing context is the "special needs" exception.[71] This exception recognizes that there often exist "special needs" which make the warrant and probable cause requirements impracticable.[72] Recognizing this impracticability, a court overlooks the fourth amendment requirements of a warrant or probable cause, and instead applies a balancing test to determine a search's reasonableness. This exception is demonstrated in the *New Jersey v. T.L.O.*[73] decision. In *T.L.O.*, a public school official searched a student's purse after learning that she was smoking in the school lavatory. Upon finding cigarettes in the purse, the official also noticed cigarette rolling papers. This discovery prompted a more thorough search, and revealed a small quantity of marijuana, a pipe and numerous articles indicating the student was selling marijuana.[74] On the basis of this evidence, and a subsequent confession, the state brought delinquency charges against the student. The student argued the official's search violated the fourth amendment and moved to suppress the evidence.[75] It was this fourth amendment issue which eventually reached the Supreme Court.[76]

The Court, in considering the student's fourth amendment challenge, first held that searches conducted by public school officials were subject to the restraints of the fourth amendment.[77] Next, the Court inquired into the reasonableness of the search, balancing the student's legitimate expectations of privacy against the interest of maintaining an orderly classroom environment.[78] In employing this balancing test, Justice White discounted the need for a search warrant[79] or

---

70. In National Treasury Employees Union v. Von Raab, 816 F.2d 170, 177-80 (5th Cir. 1987), *aff'd in part, vacated in part,* 109 S. Ct. 1384 (1989), the court suggested a list of determinative factors, including the scope and manner of the test, the justification for the test, the location of the test, voluntary nature considerations, the existing employment relationship, the possible administrative nature of a search, the availability of less intrusive measures, and the effectiveness of the administered test. *Id.*

71. Griffin v. Wisconsin, 107 S. Ct. 3164, 3168 (1987).

72. New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).

73. 469 U.S. 325 (1985).

74. *Id.* at 328.

75. *Id.* at 329.

76. The Court originally granted certiorari on the issue of whether the exclusionary rule should bar admission into evidence in a juvenile delinquency proceeding of unlawfully seized information. 464 U.S. 991 (1983). The Court later changed its consideration to the broader issue of the scope of the fourth amendment with regards to school searches. 469 U.S. at 332.

77. *T.L.O.*, 469 U.S. at 333.

78. *Id.* at 339. Justice White noted the growing disorder in school rooms, and specifically mentioned the growth of drug use and violent crime in the schools. *Id.*

79. *Id.* at 340. The Court reasoned that the warrant requirement was particularly unsuited to the school environment, as requiring a teacher to obtain a warrant would unduly interfere with swift and informal disciplinary procedures needed in the schools.

probable cause,[80] and instead held that the legality of the search was a question of its reasonableness considering all the circumstances.[81] The Court held that both the search for the cigarettes and the search for the marijuana were reasonable.[82] In upholding the cigarette search, the Court reasoned that a teacher's report of the student's smoking made relevant the issue of whether the student was carrying cigarettes.[83] This relevancy, the Court opined, served as the "nexus" between the item searched for and the violation under investigation.[84] Finally, the Court held the marijuana search was reasonable in light of the suspicion provided by the rolling papers.

The "special needs" analysis, though not expressly forwarded in the plurality opinion, was emphasized in the concurrence of Justice Blackmun.[85] The concurrence stated that only when "special needs," beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."[86] These "special needs," Justice Blackmun argued, were inherent in the secondary school setting, because maintaining order was often difficult and the need for immediate response was urgent. Finally, the Court held this need for immediate response, and the potential harm to school children or the educational process itself in the absence of it, justified exception from the warrant and probable cause requirements.[87]

The "special needs" exception is further demonstrated in *Griffin v. Wisconsin*.[88] In *Griffin,* a probation officer, without a warrant, searched a probationer's home and uncovered a handgun. The search was conducted pursuant to a state statute which permitted warrantless searches of a probationer's home if there existed "reasonable grounds" to believe that contraband was present.[89] The purported "reasonable grounds" in *Griffin* were supplied by a detective's suggestion that the probationer's domicile contained firearms.[90]

In holding the search reasonable, the Court first noted that a state's operation of a probation system presented a "special need," outside normal law enforcement, that allowed departure from the usual warrant and probable cause requirements.[91] In justifying this departure, the Court noted a warrant

---

80. *Id.* Justice White noted probable cause was not an irreducible requirement for a reasonable search.

81. *Id.* at 341.

82. *Id.* at 347.

83. *Id.* at 346.

84. *Id.* at 345.

85. *T.L.O.*, 469 U.S. at 351.

86. *Id.*

87. *Id.* at 353.

88. 107 S. Ct. 3164 (1987).

89. *Id.* at 3166. For the state regulation, see WIS. ADMIN. CODE § HHS 328 (1987).

90. 107 S. Ct. at 3166.

91. *Id.* at 3168. The Court also noted that this departure, and its concurrent increase in supervision, reduced recidivism. *Id.*

requirement would decrease the deterrent effect of expeditious searches. Furthermore, the Court reasoned that a probable cause standard would also decrease a program's deterrence.[92] Specifically, the Court reasoned that the implementation of a probable cause standard would allow a probationer to continue his illegal activities as long as they were sufficiently concealed as to give rise to no more than a reasonable suspicion.[93]

An early drug-testing opinion,[94] though not employing the "special needs" exception, also demonstrates the balancing often found in fourth amendment analysis. In *Amalgamated Transit Union v. Suscy,* the Seventh Circuit upheld a program requiring bus drivers to submit to blood or urine tests following their involvement in a serious accident.[95] To determine the program's reasonableness, the court balanced the claims of the public against the interests of the individual bus driver.[96] In particular, the court noted that the state actor[97] possessed a paramount interest in protecting the public, and therefore ruled that the plaintiffs demonstrated no reasonable expectation of privacy.[98] Furthermore, the court held the program's requirement that the employee be suspected of "being under the influence" by two supervisory employees contributed to its reasonableness.[99]

Cases outside the drug-testing spectrum also demonstrate the balancing often inherent in analysis of the fourth amendment's reasonableness requirement. Specifically, the Supreme Court, in *O'Connor v. Ortega,*[100] focused on the government employer/employee relationship and its effect on a search's reasonableness.[101] In *O'Connor,* the respondent, a state employee

---

92. *Id.* at 3170.

93. *Id.*

94. Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976).

95. *Id.* at 1267.

96. *Id.*

97. A majority of the cases discussed in this Comment, including the subject opinions, deal with public employees. Hence, the attention afforded private sector drug-testing programs and private employees is slight. It is important to note, however, that the private sector's programs fall outside the purview of the fourth amendment, and are thereby not governed by its limitations. This reality is dictated by the fact that a private sector program in no way involves state action. Nonetheless, it is likely that the Supreme Court's instant opinions will have a major effect on these programs. For a more in-depth analysis of drug-testing in the private sector, see Lewis, *supra* note 4; Note, *Employee Drug Testing—Issues Facing Private Sector Employers,* 65 N.C.L. REV. 832 (1987).

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

99. *Id.* This limitation is the requirement of reasonable, individualized suspicion. *See also* McDonell v. Hunter, 809 F.2d 1302, 1308-09 (8th Cir. 1987) (urinalysis testing in prison warranted by reasonable suspicion); Guiney v. Roache, 686 F. Supp. 956, 959 (D. Mass. 1988) (testing of police based on individual suspicion), *vacated,* 873 F.2d 1557 (1st Cir. 1989); Egloff v. New Jersey Nat'l Guard, 684 F. Supp. 1275, 1280 (D.N.J. 1988) (reasonable suspicion required to test National Guard employees). *But see* Amalgamated Transit Union v. Cambria County Transit Auth., 691 F. Supp. 898, 902 (W.D. Pa. 1988) (no individualized suspicion necessary to test transportation employees).

100. 107 S. Ct. 1492 (1987).

101. *Id.* at 1495-96.

responsible for training physicians in a psychiatric residency program, was placed on administrative leave pending investigation of alleged improprieties.[102] During this leave, hospital officials searched respondent's office, including his desk and file cabinets, and secured property leading to his discharge.[103] Subsequently, respondent challenged the officials' actions as being an unreasonable search in violation of the fourth amendment.

The Supreme Court summarily rejected a contention that public employees were precluded from any reasonable expectation of privacy in their place of work,[104] and, instead, asserted this expectation of privacy must be determined on a case-by-case basis. In *O'Connor,* the Court held a search occurred, reasoning respondent's reasonable expectation of privacy in his office was violated. The Court next articulated a reasonableness standard for determining the constitutionality of the search. Specifically, the court required a balancing of the invasion of the employee's legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the work place.[105] The Court remanded the case with instructions to apply this reasonableness standard in determining the constitutionality of the search. Nonetheless, the opinion is still significant for its utilization of a balancing test and its recognition that a search of a government employee's office may be reasonable both without a warrant and without probable cause.[106]

The underpinnings and rationale of the administrative search exception[107] have also influenced the reasonableness of urinalysis drug-testing programs.[108] In *Shoemaker v. Handel,*[109] jockeys brought suit challenging state regulations which permitted a State Racing Steward to direct any official, jockey, trainer, or groom to submit to breathalyzer and urine testing.[110] The Steward chose jockeys for post-race urine tests through random selection, the process being controlled by numerous procedural safeguards.[111] In addressing the jockeys' fourth amendment challenge, the court held a requirement of individualized suspicion was unnecessary for a valid search. The court noted the exception

---

102. *Id.* at 1496.

103. *Id.*

104. *Id.* at 1498.

105. *Id.* at 1499.

106. It is important to note this reduction applies only to searches for non-investigatory, work-related purposes, and investigations of work-related misconduct. *Id.* at 1502-03.

107. *See, e.g.,* Donovan v. Dewey, 452 U.S. 594, 602-05 (1981) (coal mines); Delaware v. Prouse, 440 U.S. 648 (1979) (highway license checks); Colonnade Catering Corp. v. United States, 397 U.S. 72, 76-77 (1970) (liquor industry); Camara v. Municipal Court, 387 U.S. 523 (1967) (health inspection of residential buildings).

108. *E.g.,* Rushton v. Nebraska Pub. Power Dist., 844 F.2d 562 (8th Cir. 1988); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986); Guiney v. Roache, 686 F. Supp. 956 (D. Mass. 1988), *vacated,* 873 F.2d 1557 (lst Cir. 1989).

109. 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986).

110. *Id.* at 1138 nn.1-2.

111. In particular, jockeys are allowed to disclose valid prescription medicine on a certified form and test results are strictly confidential. *Id.* at 1140.

to the warrant requirement in closely regulated industries,[112] and held this administrative search exception extended to the warrantless testing of persons engaged in the regulated activity.[113] In making this determination, the court emphasized the state interest in the integrity of the individuals in the horse racing industry.[114] Furthermore, the court noted the state had historically exercised its rule making authority, and thereby reduced justifiable expectations of privacy.[115]

The lack of a reasonable, individualized suspicion weighed heavily in the court's balancing in *Capua v. City of Plainfield*[116] and effectively undermined the constitutionality of a urinalysis-testing program. Absent any provision in their collective bargaining agreement, or any prior notification, the firefighters of the City of Plainfield were required to submit to compulsory urine testing.[117] The firefighters challenged the testing as violative of the fourth amendment, and sought declaratory and injunctive relief.[118] The court conceded a search occurred, and then, to determine the search's reasonableness, weighed the intrusion of the compulsory urine testing against the governmental interest in combating drug abuse.[119]

The court emphasized the traditionally private nature of passing urine, and further noted the unrelated medical information which the testing divulged. The court further reasoned that the lack of testing provisions in either the collective bargaining agreement or a policy statement heightened the intrusiveness of the search.[120] Against these intrusive traits, the court weighed the city's interest in protecting the welfare and public safety of the citizenry.[121] The court held the intrusions were more significant, as the lack of any specific, individual suspicion allowed the program to function in an uncontrolled, sweeping manner. The court reasoned that, "[t]he invidious effect of such mass, roundup urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest."[122]

---

112. *See* cases cited *supra* note 107.
113. *Shoemaker,* 795 F.2d at 1142.
114. *Id.*
115. *Id.*
116. 643 F. Supp. 1507 (D.N.J. 1986).
117. *Id.* at 1511-12.
118. *Id.* at 1512.
119. *Id.* at 1514.
120. *Id.* at 1515.
121. *Id.* at 1515-16.
122. *Id.* at 1517. For additional cases finding searches of public employees invalid due to the lack of an individualized suspicion, see Lovelorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988); Penny v. Kennedy, 846 F.2d 1539 (6th Cir. 1988); Railway Labor Executives Ass'n v. Burnley, 839 F.2d 575 (9th Cir. 1988), *rev'd,* 109 S. Ct. 1402 (1989); Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington, 672 F.Supp. 779 (D.N.J. 1987), *rev'd,* 850 F.2d 133 (3d Cir. 1988); Amalgamated Trans. Union, 1227 v. Sunline Tran. Agency, 663 F. Supp. 1560 (C.D. Cal. 1987); Feliciano v. City of Cleveland, 661 F.

As suggested above, the reasonableness requirement of the fourth amendment is often the determinative factor in assessing the constitutionality of a drug-testing program. This reality increases the complexity of drug-testing analysis, and prevents the fourth amendment issues from being framed in easy and mechanical rules. Instead, courts employ various balancing tests and view the totality of circumstances.[123] This approach reduces the constitutional analysis of urinalysis drug-testing programs to a case-by-case exercise.

B. *Alternative Constitutional Challenges*

The fifth and fourteenth amendments to the United States Constitution provide that no State shall deprive a person of life, liberty, or property without due process of law nor deny to any person within its jurisdiction the equal protection of the laws.[124] Complainants to drug-testing programs, though not as frequently or as successfully, have asserted that these programs violate the above constitutional provisions.

1. The Due Process Challenge

It is well-settled law that one's property interest in his or her job cannot be abrogated by a government employer without due process.[125] Often, it is argued that drug-testing programs run afoul of this protection. For example, in *Capua,* firefighters argued their property rights in their jobs, and in their individual reputations, were abrogated and arbitrarily and capriciously infringed by government officials.[126] The court accepted this argument, holding that the government violated the dictates of due process because the unannounced mass urinalysis testing was devoid of procedural due process safeguards.[127] The court noted the program lacked confidentiality provisions, and was unilaterally imposed as a condition of employment. Furthermore,

---

Supp. 578 (N.D. Ohio 1987).

The existence of reasonable suspicion has been explained as follows: "There is reasonable suspicion when there is some articulable basis for suspecting that the employee is using illegal drugs. Put another way, there is reasonable suspicion when there is some quantum of individualized suspicion as opposed to an inarticulate hunch." Smith v. White, 666 F. Supp. 1085, 1089 (E.D. Tenn. 1987) (citations omitted), *aff'd,* 857 F.2d 1475 (6th Cir. 1988).

123. *See, e.g.,* Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (balancing police station safety versus arrestees' rights).

124. U.S. CONST. amends. V, XIV.

125. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985) (state statute plainly created property right in the jobs of civil service employees); Johnson v. United States, 628 F.2d 187, 194 (D.C. Cir. 1980) (employee could not be dismissed but for cause, and thereby clearly enjoyed a property interest protected by due process); Jones v. McKenzie, 628 F. Supp. 1500, 1504 (D.D.C. 1986) (cause requirement for termination, protecting against arbitrary and capricious employer actions, confers property interest which cannot be denied without due process), *rev'd,* 833 F.2d 335 (D.C. Cir. 1987).

126. 643 F. Supp. 1507 (D.N.J. 1986).

127. *Id.* at 1520-21.

the court argued that the unreliability of urinalysis testing[128] presented further concern, and offended traditional notions of fundamental fairness and due process.[129]

The *Capua* decision highlights the manner in which complainants utilize the due process clause to challenge drug-testing programs. In order to avail themselves of the protection of the due process clause, complainants often attack the lack of any procedural safeguards or the unreliability of the applied tests.[130]

2. *The Equal Protection Challenge*

The constitutionality of drug-testing programs is also challenged as violative of equal protection. Generally, in reviewing an equal protection challenge, courts presume that legislation or a regulation is valid and sustain it if the classification drawn by the statute is rationally related to a legitimate state interest.[131] It is therefore the burden of the plaintiff to demonstrate the requirements imposed by law or regulation "so lack rationality that they constitute a constitutionally impermissible denial of equal protection."[132] The equal protection challenges to drug-testing programs are often similar to the challenge found in *Poole v. Stephens.*[133]

In *Poole,* correction officer recruits were subject to random drug-testing, while the correction officers themselves were only subject to testing on reasonable individualized suspicion.[134] Plaintiff recruit complained this proc-

---

128. *Id.* at 1521.

129. This Comment does not comprehensively examine the available urinalysis tests and their reliability. However, this should not serve to diminish the importance placed in the reliability of these tests, and the weight this is afforded in constitutional analysis. *See* Miller, *supra* note 3; Comment, *supra* note 2 (accuracy depends on the administering operator's expertise and the proper identification of each urine specimen at various levels of custody, and further, the validity of urinalysis testing is severely limited because it cannot determine the level of intoxication); Note, *Drug Testing in the Workplace: The Need for Quality Assurance Legislation,* 48 OHIO ST. L.J. 877 (1987) (regardless of which method, or combination of methods, is used, incorrect results are always a possibility because the methodology of the immunoassay is based on immune reactions and a certain degree of cross-reactivity occurs among various drug metabolites).

130. One study has indicated that false positive results from the EMIT test can be as high as ten percent. Morgan, *Problems of Mass Urine Screenings for Misused Drugs,* 16 J. PSYCHOACTIVE DRUGS 305, 312 (Oct.-Dec. 1984).

For a case in which an employee advanced both substantive and procedural due process violations in connection with drug testing, see Copeland v. Philadelphia Police Dep't, 840 F.2d 1139 (3d Cir. 1988).

131. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439-40 (1985).

132. Rogin v. Bensalem Township, 616 F.2d 680, 688 (3d Cir. 1980), *cert. denied,* 450 U.S. 1029 (1981) (quoting New Orleans v. Dukes, 427 U.S. 297 (1976)).

133. 688 F. Supp. 149 (D.N.J. 1988). *See also* Chaney v. Southern Ry., 847 F.2d 718 (11th Cir. 1988) (in an equal protection challenge, case was remanded for a determination if the EMIT test had an adverse effect on blacks).

134. 688 F. Supp. at 156-57.

ess denied him equal protection of law. The court, in rejecting plaintiff's complaint, noted that the recruits and officers were engaged in different activities in different settings, and emphasized the intense training recruits endured.[135] The court stated it was reasonable and rational to weed out drug abusers before entrusting them with running the prisons. Furthermore, the court reasoned it was rational for prison officials to conclude that those individuals who passed random testing at the recruit level needed only to be tested upon reasonable individualized suspicion.[136]

The court in *Poole* also considered an equal protection challenge raised by the correction officers. The officers complained that because civilians in regular contact with inmates were not subject to reasonable suspicion testing, the drug-testing policy was tainted by "underinclusion" and thereby violative of equal protection.[137] Again, the court rejected this argument, reasoning that the state was allowed to rationally take one step at a time.[138] In support, the court inferred from the evidence that the Department would expand the program in the future.[139]

II. THE SUPREME COURT OPINIONS

The serious and potentially devastating effects of drug abuse have quickly ushered the constitutionality issue of drug-testing programs to this land's highest Court. The two Supreme Court opinions discussed in this Comment, *National Treasury Employees Union v. Von Raab*[140] and *Skinner v. Railway Labor Executives Association,*[141] provided the vehicle for discussion of this issue.

---

135. *Id.*

136. *Id.*

137. *Id.* at 157.

138. *Id. See, e.g.,* Williamson v. Lee Optical, Inc., 348 U.S. 483, 489 (1955); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986).

139. Opponents of drug-testing programs have also argued that drug-testing programs were violative of their fifth amendment right against self-incrimination and their penumbral rights of privacy. However, both of these arguments have found little support.

In Egloff v. New Jersey Nat'l Guard, 684 F. Supp. 1275, 1282 (D.N.J. 1988), the court, applying the rationale of the *Schmerber* Court, held chemical analysis of bodily fluids did not involve "testimonial compulsion," and therefore extinguished any fifth amendment incrimination argument.

Similarly, the court in Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560 (C.D. Cal. 1987), rejected a penumbral rights of privacy argument. Plaintiff Union advanced the argument that the drug-testing program violated the constitutional right to privacy established in *Roe v. Wade* and *Griswold v. Connecticut.* However, the court, citing the rationale of Bowers v. Hardwick, 478 U.S. 186 (1986), held there was no broad right to privacy, and reasoned that here the interests did not rise to the level of an independent fundamental right. *Amalgamated,* 663 F. Supp. at 1571-72.

140. 816 F.2d 170 (5th Cir. 1987).

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

A. National Treasury Employees Union v. Von Raab

In *Von Raab,* the United States Customs Service issued a directive which implemented a urinalysis drug-screening program.[142] This program required testing of individuals who were either initially applying for, or seeking transfer to, three types of jobs: positions that either directly involved the interdiction of illicit drugs, required the carrying of a firearm, or involved access to classified information.[143] *Von Raab* considered only the constitutionality of the program as it applied to current employees seeking a transfer.

Under the program, the Service notified a potential transferring employee that his appointment was contingent upon successful completion of a drug-screening test.[144] A urinalysis test was then scheduled for the potential transferor, with the option of withdrawal left to the individual. At the test site, an employee is requested to enter a restroom stall and produce a urine sample.[145] An observer remains in the restroom to listen for the sounds of urination, but does not visually observe the act of urination. Subsequently, a tamper-proof seal is affixed to the bottle, and, after strict chain-of-custody procedures, the sample is mailed to the laboratory. The laboratory initially screens the sample by the enzyme-multiplied-immunoassay technique ("EMIT"),[146] and if the result is positive, then applies the gas chromatography/mass spectrometer ("GC/MS") test.[147] Finally, if the GC/MS result is positive, the employee may designate a laboratory to test the original sample independently.

The district court enjoined all drug testing, holding the program violated the fourth amendment's protection against unreasonable searches and seizures.[148] Next, the circuit court considered the constitutionality of the program. Initially, the court addressed whether the urinalysis testing constituted a search. The court reasoned that the private nature of passing urine, and the possible disclosure of information apart from the presence of illicit drugs, dictated that the testing constituted a search.[149] Having made this determination, the tribunal next considered whether the search was reasonable. Noting that the program did not require individualized suspicion, the court found it necessary to weigh the factors suggesting constitutional violation against all of those indicating validity.[150]

---

142. *Von Raab,* 816 F.2d at 173.

143. *Id.*

144. *Id.*

145. *Id.* at 174.

146. *See supra* note 129. The EMIT test utilizes the production of drug antibodies in interaction with enzymatic detectors to identify the metabolites of drugs in urine. Morgan, *supra* note 130, at 308.

147. *Von Raab,* 816 F.2d at 174. GC/MS involves a separation of drug metabolite components and detection. *See* Caplan, *Drug Testing in Urine: Understanding the Factors and the Process,* 1984 A.B.A., DRUG TESTING IN THE WORKPLACE 6.

148. *Von Raab,* 649 F. Supp. 380, 386 (E.D. La. 1986).

149. 816 F.2d at 175-76.

150. *Id.* at 177.

The court first indicated the scope and manner of the testing were sufficiently limited. Specifically, the court reasoned the intrusiveness of the search was minimal, as there was no visual observation of the employee and the employee was notified in advance of the testing.[151] Furthermore, the court noted the tests were either positive or negative, and therefore left no room for official discretion.[152] Next, the court reasoned the national interest in preventing drug smuggling provided justification for the testing. The court emphasized it was essential that the individuals responsible for preventing drug smuggling be drug-free themselves.[153] Otherwise, the court reasoned, the customs agent might be susceptible to bribery, or even tempted to divert seized contraband for his or her own use.[154] Additionally, the court noted that a rest room was the most private facility practicable, and also recognized the voluntary nature of submitting to the test.[155]

The court also considered the employment relationship between the government and the Customs Service agents in determining if the program was reasonable. The court reasoned that the relationship allowed government employees to be subject to searches or other restraints of liberty that would otherwise be impermissible, so long as the restraints were aimed at assuring integrity and competence.[156] In the instant case, the court held that the consent requirement imposed here was reasonable in light of the nature and responsibilities of the job.[157] Finally, the court noted that alternative sources of information did not eliminate the need for urine testing, and that the test was a "sufficiently productive mechanism" for fulfilling its objectives.[158] Accordingly, the court found the search implicated by the drug-testing program was reasonable.

The court also summarily dismissed a contention that the testing violated the fifth amendment right against self-incrimination.[159] Specifically, the court reasoned urine samples revealed only "physical characteristics," and were not testimonial in nature.[160] Finally, the court stated the testing was not so unreliable as to violate due process.[161]

The Supreme Court granted certiorari[162] to determine whether the Customs Service's program violated the fourth amendment protection against unreasonable searches and seizures.

---

151. *Id.*
152. *Id.*
153. *Id.* at 178.
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 179.
158. *Id.* at 180 (quoting Delaware v. Prouse, 440 U.S. 648, 659 (1979)).
159. *Id.* at 181.
160. *Id.*
161. *Id.* *See supra* note 129 (articles discussing test reliability).
162. 108 S. Ct. 1072 (1988).

1. The Majority's Analysis [163]

The Court first addressed the issue of whether the program's urinalysis testing constituted a search.[164] Citing the companion opinion of *Skinner v. Railway Labor Executives Association,*[165] the Court summarily held that the testing constituted a search.[166] Next, the Court considered whether the testing program satisfied the reasonableness requirement of the fourth amendment.

The Court first acknowledged the general rule favoring either the issuance of a warrant based upon probable cause[167] or some measure of individualized suspicion. However, these requirements, the Court reasoned, were not indispensable components of a reasonable search.[168] Instead, the Court stated that where a "Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[169] In reviewing the Customs Service's testing, the Court noted the program was not designed to serve the ordinary needs of law enforcement,[170] and further noted that the substantial governmental interests of deterring drug use and preventing promotion of drug users presented a special governmental need. Accordingly, the Court invoked the "special needs" exception to the fourth amendment and held that departure from the ordinary warrant, probable cause, and individualized suspicion requirements was justified.[171]

---

163. The Customs Service drug-testing program applies to three classes of employees: 1) those directly involved in drug interdiction or enforcement of related laws; 2) those required to carry firearms; and, 3) those required to handle "classified material." National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989). The Court's opinion does not assess the reasonableness of the program toward this third class of employees, as, on the present record, the Court was unable to determine if the category was limited to those who had access to sensitive information. *Id.* at 1396-97. Accordingly, this issue was remanded to the court of appeals. *Id.* at 1397.

164. *Id.* at 1390.

165. 109 S. Ct. 1402 (1989).

166. 109 S. Ct. at 1390.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Id.* at 1390-91. Justice Kennedy noted that test results could not be used in a criminal prosecution without the employee's consent. *Id.*

171. 109 S. Ct. at 1393. In dispensing with the need for a warrant, the Court reasoned that common sense militated against requiring a warrant for every work-related intrusion, as it would prohibit an office from functioning properly. *Id.* at 1391. *See* O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (plurality opinion) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983)); *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (to require teacher to obtain warrant before searching student would unduly interfere with disciplinary procedures of schools).

The Court also reasoned that a warrant requirement would divert valuable agency resources from the primary mission of interdicting drug smuggling. Furthermore, Justice Kennedy noted the warrant would provide minimal additional protection, as the applying employees were automatically subject to the test, and thereby escaped discretion of an official in the field. 109 S. Ct. at 1391.

Having dismissed the need for a warrant or probable cause, the Court employed a balancing test to determine the program's reasonableness. The Court balanced the valid public interests against the interference with the individual liberties of the customs agents. In applying this balancing test, the Court noted the public interest in eradicating the drug problem, and emphasized that the most formidable defense to this problem was the Customs Service.[172] Due to this prominent position, the Court recognized the government's compelling interest in assuring that the Service's personnel were physically fit and possessed unimpeachable integrity and judgment.[173] Without these characteristics, the majority feared employees would be unsympathetic to their mission of interdicting narcotics, and might even aid the importation of drugs.[174] The Court also feared the potential dangers of drug users who carried firearms, and ruled the public should not have to bear these risks.[175]

Against these public interests, the Court weighed the interference with individual liberties that urinalysis testing imposed. The Court conceded that invasion of privacy with urinalysis testing could be significant in certain circumstances, but also recognized that certain forms of public employment diminished privacy expectations.[176] The Court included the Customs Service positions among these forms of employment with a lessened expectation of privacy, reasoning that individuals responsible for drug interdiction, and those that carried firearms, "reasonably should expect effective inquiry into their fitness and probity."[177] In light of this, the majority held the government's interests outweighed the employees' privacy interests.

The Court also considered two further contentions which the petitioners asserted demonstrated the testing program's unreasonableness. The petitioners argued the program violated the fourth amendment because first, the testing was not expected to reveal any drug use,[178] and second, the scheme was not a "sufficiently productive mechanism," as detection could be avoided

---

172. 109 S. Ct. at 1392.

173. *Id.* at 1393. The Court recognized the need for these characteristics in Customs Service employees because of the employees' frequent exposure to the criminal element associated with drugs, and of exposure to the controlled substances themselves. The majority reasoned the employees would be tempted both by bribes from the drug traffickers, and their own propensity to steal the seized contraband. *Id.* at 1392.

In further emphasizing the inherent dangers and enticements of the employee's positions, the Court noticed certain findings of the Agency's Commissioner. Specifically, the Commissioner noted nine officers died in the line of duty since 1974, and several officers were removed from the Service for accepting bribes. *Id.*

174. *Id.* at 1393.

175. *Id.*

176. *Id.* at 1393-94. The Court gave as examples military and intelligence personnel. *Id.* at 1393.

177. *Id.* at 1394.

178. 109 S. Ct. at 1394. Petitioners argued the program was not implemented in response to a perceived drug problem, and further emphasized that to date, the testing had not revealed a significant number of drug users. *Id.*

with abstinence or adulteration.[179] The Court found both arguments unpersuasive. Concerning the lack of revealed drug use, the Court reasoned that there was little reason to believe that the Service was immune from this pervasive social problem, and that the minimal number of positive tests in the Service did not impugn the program's validity.[180] The Court also rejected the petitioner's concerns of abstinence and adulteration. Specifically, the Court noted that abstinence would be difficult and that many individuals would be ignorant of the "fade-away" effect[181] of drugs. The possibility of adulteration, the Court reasoned, was also slight, as the sample collector employed precautions to ensure the integrity of the sample.[182]

2. *The Dissent*

Justice Scalia, joined by Justice Stevens, dissented.[183] The dissent emphasized that there existed no documented drug use in the Service nor any instances of bribery, unsympathetic law enforcement, or the dangerous use of a firearm.[184] This lack of demonstrated evils, Justice Scalia reasoned, prevented any special need for a suspicionless search or seizure, and thereby distinguished the instant case from that line of cases upholding suspicionless searches and seizures.[185]

Justice Scalia also disagreed with the program's testing of those employees who carried firearms. The Justice argued this testing exposed an inordinate number of public employees to a needless indignity, and feared it would extend to any employee potentially dangerous under the influence of drugs.[186] Justice Scalia also feared the program's testing of employees with access to "sensitive information"[187] similarly attached a broad scope, and warned it approved testing for all federal employees with security clearance.

---

179. *Id.* at 1395.

180. *Id.* In advancing this reasoning, Justice Kennedy pointed to the similar paucity of guilty individuals of those required to submit to suspicionless housing code inspections, and of those motorists stopped at checkpoints. *Id.*

181. *Id.* at 1395.

182. *Id.* at 1396.

183. 109 S. Ct. at 1398 (Scalia, J., dissenting). Justice Marshall, joined by Justice Brennan, dissented on the basis that the majority's balancing test violated the fourth amendment's requirement of probable cause, as he explained more fully in his dissent in Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402 (1989) (Marshall, J., dissenting). Alternatively, he agreed with the argument made by Justice Scalia in his dissent, and that advanced by the dissenting judge below. *See* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 182-84 (5th Cir. 1987) (Hill, J., dissenting).

184. 109 S. Ct. at 1399 (Scalia, J., dissenting). *See also Von Raab,* 816 F.2d at 173 (1987) ("the Commissioner has described the [Customs] Service as 'largely drug free.'").

185. 109 S. Ct. at 1398.

186. *Id.* at 1400-01. As examples, Justice Scalia offered automobile drivers, operators of other potentially dangerous equipment, construction workers, and school crossing guards. *Id.* at 1401.

187. *Id.*

In sum, the *Von Raab* Court employed the "special needs" exception and thereby dispensed with the warrant and individualized suspicion requirements of the fourth amendment. In place of these requirements, the Court applied a balancing test to determine the reasonableness of the Service's testing program. The Court reasoned that the national interest in eradicating the drug problem outweighed the infringement of individual liberties and therefore held the program was not violative of constitutional protection.

B. Skinner v. Railway Labor Executive's Association[188]

The conflict which the Supreme Court addressed in *Skinner* was presented below in *Railway Labor Executives Association v. Burnley.*[189] In *Burnley,* the Labor Association challenged regulations[190] mandating blood and urine tests of employees after serious train accidents and other fatal incidents.[191] Following the accident or incident, the regulations required blood and urine samples to be taken from all crew members of the involved train. The district court upheld the constitutionality of the regulations, and mandatory post-accident testing began shortly thereafter.[192] On appeal, the Ninth Circuit, following precedent, first conceded a search occurred, reasoning that an individual possessed a reasonable expectation of privacy in his bodily fluids. Next, the court noted that the exigency of determining the existence of alcohol or drugs in urine rendered the warrant requirement impracticable.[193] Though dismissing the need for a warrant, the court refused to apply the administrative warrant exception to the testing program.[194] The court reasoned the exception was inapplicable because the program implicated searches of persons, whereas all previous administrative warrant cases involved searches of property.

Having refused to presume the reasonableness of the program under the guise of the administrative warrant exception, the court next focused on the applicable standard to determine this reasonableness. The court adopted a balancing test, reasoning that it was necessary to balance the railroad employees' expectations of privacy against the governmental interest in the safe and efficient operation of the railroads.[195] In weighing these factors, the court noted it was incumbent upon it to determine first, whether the search was justified at its inception, and second, whether the search was reasonably related in scope to the circumstances which justified the interference.[196] To be justified at its inception, the court held the toxicological testing of the

188. 109 S. Ct. 1402 (1989).
189. 839 F.2d 575 (9th Cir. 1988), *rev'd,* 109 S. Ct. 1402 (1989).
190. 49 C.F.R. § 219 (1988).
191. 839 F.2d at 577.
192. *Id.*
193. *Id.* at 583.
194. *Id.* at 584.
195. *Id.*
196. *Id.* at 587.

employees had to be based on a particularized suspicion. Involvement in an accident, the court reasoned, did not provide this suspicion.[197] Next, the court ruled the blood and urine tests were not reasonably related in scope as they could not measure either current drug intoxication or degree of impairment. This reality, the court reasoned, made it imperative that the drug testing be conducted on only individual suspicion.[198]

Again, the Supreme Court granted certiorari[199] to consider whether the drug-testing program violated the fourth amendment's restriction against unreasonable searches and seizures.

1. The Majority's Analysis[200]

Justice Kennedy first addressed petitioner's contention that the regulations did not require government action[201] and therefore did not implicate fourth amendment protection.[202] The Court noted that the regulations preempted state laws, rules, or regulations covering the same subject matter, and superseded collective bargaining and arbitration agreements. The regulations, the majority emphasized, also enabled the Federal Railroad Administration to receive biological samples and test results, and failed to offer the employees a power of denial.[203] In light of these provisions, the Court held the requisite government action was present, as the government had encouraged, endorsed, and participated in the testing program.[204]

The Court next considered whether the regulation's procedures constituted a search.[205] The Court summarily held that the "compelled intrusion" of both blood testing and breathalyzer tests infringed a reasonable expectation of privacy, and thereby constituted a search.[206] Though absent any surgical intrusion, as with blood testing, the Court also held that urinalysis testing involved a search. The Court reasoned that the testing could reveal a host of physiological facts[207] and emphasized the intru-

---

197. *Id.* at 587.

198. *Id.* at 588-89.

199. 108 S. Ct. 2033 (1988).

200. Justice Kennedy wrote the majority opinion, and was joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor and Scalia. Justice Stevens concurred in part and in the judgment. 109 S. Ct. at 1407.

201. *See supra* notes 22-26 and accompanying text (discussing governmental action requirement).

202. 109 S. Ct. 1402 (1989). Petitioners argued that Subpart D of the regulations did not compel any testing by private individuals, and therefore lacked the required governmental action. *Id.* at 1411. *See* 49 C.F.R. §§ 219.301 to .309 (1988).

203. 109 S. Ct. at 1411-12.

204. *Id.* at 1412.

205. *Id.*

206. *Id.*

207. *Id.* at 1413. Justice Kennedy specifically noted the ability to determine if an individual was an epileptic, pregnant or diabetic.

siveness of the collecting process, which often involved visual or aural monitoring.[208]

Having found both the government action and search requirements satisfied, the Court next inquired as to the reasonableness of the drug-testing program. Justice Kennedy first recognized the desire to have searches conducted pursuant to a judicial warrant issued upon probable cause. However, the Justice also noted that exceptions had been forged to this rule, including when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[209] The Court held the government's interest of ensuring safe rail transportation constituted one of these "special needs," and therefore dismissed the warrant and individual suspicion requirements. Instead, the Court balanced governmental and privacy interests to determine the program's reasonableness.

In dismissing the need for a search warrant, Justice Kennedy reasoned the regulations entrusted minimal discretion to those administering the program and also contained safeguards limiting the potential for abuse of this minimal discretion.[210] The Court also reasoned that the government's interest in dispensing with the warrant requirement was substantial. Specifically, the Court held that the delay caused by procuring a warrant might lead to the destruction of valuable evidence, namely the presence of drugs or alcohol.[211]

Next, the Court inquired as to the need for probable cause or individualized suspicion. Though normally required, the Court held individualized suspicion was not an irreducible requirement of a reasonable search, and could be dismissed if it would jeopardize significant governmental interests and intrude on only minimal privacy interests.[212] Concerning privacy interests, the Court first noted that the regulations minimized the intrusiveness of the collection

---

208. 109 S. Ct. at 1413. In discussing the private act of urination, the majority quoted the Fifth Circuit, stating:

> 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.

Id. (quoting National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).

209. 109 S. Ct. at 1414 (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985)) (Blackmun, J., concurring in judgment). As examples of these "special needs" exceptions, Justice Kennedy offered Griffin v. Wisconsin, 483 U.S. 968 (1987) (search of probationer's home); New York v. Burger, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); O'Connor v. Ortega, 480 U.S. 709, 721-25 (1987) (plurality opinion) (work-related searches of employees' desks and offices); New Jersey v. T.L.O., 469 U.S. 325, 337-42 (1985) (search of student's property by school officials); and Bell v. Wolfish, 441 U.S. 520, 559-60 (1979) (body cavity searches of prison inmates).

210. 109 S. Ct. at 1415-16. Justice Kennedy reasoned the narrow discretion allowed by the regulations provided virtually no facts for a neutral magistrate to review. *Id.*

211. *Id.* at 1416.

212. *Id.* at 1417.

process.[213] More importantly, however, the Court reasoned that the privacy expectations of the covered employees were diminished because of their participation in a highly regulated industry.[214] Accordingly, the Court found the employees' privacy interests minimal. Conversely, the Court held the governmental interests in testing without individualized suspicion were compelling.[215] The Court reasoned that the employees' position suggested disastrous consequences if they were to improperly perform their duties.[216] The regulations, the Court reasoned, provided an effective means of deterring drug use, and thereby served the compelling governmental interest.[217] The Court noted the testing also allowed the securing of invaluable information about the causes of accidents. Collection of this information, reasoned the Court, would be impeded by a requirement of individualized suspicion.[218] Hence, the Court dismissed any need for individualized suspicion.

Finally, the majority addressed the appellate court's argument that the urinalysis-testing regulations were unreasonable because of their failure to measure current intoxication or degree of impairment. The Court rejected this contention on several grounds. First, the Court reasoned that the evidence need not be conclusive, but instead only exhibit a tendency to make the existence of a consequential fact more or less probable.[219] Second, the Court emphasized the urine tests were a secondary source of information, designed to detect traces that were cleansed from the bloodstream.[220] Finally, the Court noted that the regulations were not only designed to detect impairment, but also to deter use.[221]

2. *The Dissent*

Justice Marshall, joined by Justice Brennan, dissented, arguing the "special needs" exception asserted by the majority was unprincipled and dangerous.[222] Justice Marshall asserted that the instant use of the "special needs" exception differed dangerously in two ways from previous use of the exception.[223]

---

213. *Id.* at 1418. The Court noted the regulations did not require direct observation during the collection process, and also reasoned the intrusion was minimal because of its similarity to a regular physical examination. *Id.*

214. *Id.* at 1418.

215. *Id.* at 1419.

216. *Id.*

217. *Id.* at 1419-20.

218. *Id.* at 1420. The majority noted the often chaotic atmosphere at the scene of a serious rail accident, and the inherent difficulties in obtaining evidence of a particularized suspicion in such surroundings.

219. *Id.* at 1421 (quoting FED. R. EVID. 401).

220. *Id.* at 1421.

221. *Id.*

222. 109 S. Ct. at 1426 (Marshall, J., dissenting).

223. *Id.* at 1425. As examples of previous use of the exception, Justice Marshall cited Griffin v. Wisconsin, 483 U.S. 968 (1987); O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion); and New Jersey v. T.L.O., 469 U.S. 325 (1985).

First, the Justice noted past uses of the exception were applied to searches of person's possessions, not to searches of persons.[224] Second, the previous exception cases, Justice Marshall noted, all contained an element of individualized suspicion, which was not required in the instant case.[225] These differences, Justice Marshall argued, signaled the unfortunate abandonment of any probable cause requirement for civil searches, and instead substituted a manipulable balancing inquiry.[226] Justice Marshall argued this malleable balancing approach gave undue weight to policy concerns, and left one's "right to be let alone" totally unprotected by the fourth amendment.[227]

In place of this "special needs" balancing approach, Justice Marshall promoted the traditional fourth amendment analytical framework. Justice Marshall urged the Court to inquire, serially, whether a search occurred,[228] whether the search was conducted pursuant to a valid warrant or under an exception to the warrant requirement,[229] whether the search was based on probable cause or a lesser suspicion,[230] and whether the search was conducted in a reasonable manner.[231] Following this formula, Justice Marshall agreed with the majority that a search occurred. However, the dissenting Justice disagreed with the majority's dispensing of the warrant requirement.[232]

Specifically, Justice Marshall noted that the program imposed three distinct searches, namely the two of collecting blood and urine samples, and the third search of chemically analyzing the samples.[233] The Justice agreed the first two searches could be conducted absent a warrant under the "exigent circumstances" doctrine.[234] However, Justice Marshall saw no such exigency preventing the securing of a warrant before the samples were analyzed,[235] and accordingly argued a warrant was required.

Though offended by the lack of a warrant, Justice Marshall found the dispensing of any probable cause or individualized suspicion even more violative of fourth amendment principles. Justice Marshall noted precedent

---

224. 109 S. Ct. at 1425.

225. *Id.*

226. *Id.*

227. *Id.* at 1426.

228. *Id. See, e.g.*, Katz v. United States, 399 U.S. 347, 350-53 (1967) (the government conducts a search when it invades an interest that an individual justifiably seeks to keep private).

229. 109 S. Ct. at 1426; *see, e.g.*, Welsh v. Wisconsin, 466 U.S. 740, 749-50 (1984) (exceptions to the warrant requirement are few in number and narrowly drawn).

230. 109 S. Ct. at 1426; *see, e.g.*, Dunaway v. New York, 442 U.S. 200, 209-10 (1979) (the Court has allowed limited intrusion searches on the basis of reasonable suspicion).

231. 109 S. Ct. at 1426; *see, e.g.*, Winston v. Lee, 470 U.S. 753, 763-66 (1985) (surgical removal of a bullet is not a "reasonable" search).

232. 109 S. Ct. at 1426.

233. *Id.*

234. *Id. See* Schmerber v. California, 384 U.S. 757, 770 (1966) ("[T]he delay necessary to obtain a warrant . . . threaten[s] the 'destruction of evidence' ").

235. 109 S. Ct. at 1426. Justice Marshall reasoned that the samples would not spoil if properly collected and preserved, and expected that railroad officials could easily understand the warrant process. *Id.*

required probable cause for full-scale personal searches[236] and, in an instance of minimal intrusion, still required individualized suspicion.[237] The dissent discounted the majority's holding that the intrusions were minimal, and instead argued the intrusions constituted full-scale personal searches requiring probable cause.[238] In support, Justice Marshall argued the majority's use of the "highly-regulated industry" exception was misplaced. Specifically, the Justice noted the industry exception had previously applied only to employer property, and not the individual employees themselves.[239] To extend the exception such, Justice Marshall stated, was to set "a dangerous and ill-conceived precedent."[240]

Finally, Justice Marshall argued that even if he employed the majority's balancing test, he would still find the program invalid. Justice Marshall maintained the benefits of the program were far outweighed by the costs to personal liberties, and emphasized the majority erroneously sided with the governmental interests by incorrectly viewing the procedure's intrusions as minimal.[241] In support of the program's intrusiveness, Justice Marshall noted the ability of criminal prosecutors to obtain the samples,[242] the inability of urinalysis testing to measure current impairment, and the limited deterrence effect of the program.[243]

III. ANALYSIS

As noted earlier, fourth amendment analysis is quite complex and is not capable of precise definition or application. Unfortunately, the end result of this complexity often is misguided and incorrect fourth amendment analysis, and the unwarranted infringement of individual's privacy rights.

This unfortunate result is demonstrated by the Supreme Court's approval of the drug-testing programs in the *Von Raab* and *Skinner* opinions. In particular, though the "special needs" exception is the correct tool to apply in the drug-testing arena, the Supreme Court ill-advisedly stretched the boundaries of the exception[244] in these cases. This unwarranted extension, namely to searches lacking in individualized suspicion or realized harm, is

---

236. *Id.* at 1427.

237. *Id.*

238. *Id.* at 1429.

239. *Id.*

240. *Id.* at 1430.

241. 109 S. Ct. at 1430-31.

242. *See* 49 C.F.R. § 219.211(d) (1987) ("Each sample . . . may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian of the sample . . .").

243. 109 S. Ct. at 1430-32.

244. The "special needs" exception, as forwarded by Justice Blackmun in his concurring opinion in New Jersey v. T.L.O., provides that "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, . . . a court [is] entitled to substitute its balancing of interests for that of the Framers." 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment).

exercised in both the *Von Raab* and *Skinner* decisions, though at different stages. In *Von Raab,* the Court, ignoring any reasonable suspicion analysis, summarily dismissed the obvious deficiency of any drug problem or concomitant harm in the Customs Service.[245] Instead, the Court was blinded by the government's interest in eradicating the national drug problem.[246] A requirement of individualized suspicion or of a realized harm, as in previous "special needs" exception cases, would have prevented this erroneous balancing analysis. In the *Skinner* decision, in contrast, the Court initially exercises proper application of the "special needs" exception. This proper application stems from the existence of a realized harm, namely documented drug and alcohol abuse in the railroad industry. However, by extending the reach of the exception to the chemical analysis of the collected samples, the *Skinner* Court joins the *Von Raab* Court in misapplying the exception. More specifically, the *Skinner* Court fails to recognize that once the samples are collected, the warrant and probable cause requirements are no longer impracticable, and therefore the "special needs" exception is rendered inapplicable.

A. The Von Raab *Court's Misapplication of the "Special Needs" Exception*

An early Supreme Court opinion espoused the theory that "[a] close and literal construction [of constitutional provisions for the security of persons and property] deprives them of half their efficacy, and leads to gradual depreciation of the right . . . ."[247] In *Boyd v. United States,*[248] the early Court, in finding an unreasonable search and seizure, emphasized the courts' role as protectors of constitutional rights.[249] In *Von Raab,* the Court heeds the words of the *Boyd* Court, and exercises a broad and sweeping construction of the fourth amendment. However, this construction is employed not to safeguard constitutional rights, but instead to justify the agency's drug-testing program. The vehicle for this justification is the "special needs" exception.

By employing the "special needs" exception, a court overlooks any warrant or probable cause requirement, and instead, applies only a balancing test to determine a search's reasonableness.[250] Previous to the *Von Raab* decision, all "special needs" cases involved either an element of individualized suspicion or realized harm which was mitigated by the search, and usually

245. *See supra* note 166 and accompanying text.

246. *See infra* notes 248-54 and accompanying text.

247. Boyd v. United States, 116 U.S. 616, 635 (1886).

248. 116 U.S. 616 (1886).

249. *Id.*

250. *See* cases cited *supra* note 209. As Justice Marshall noted in his dissent in *Skinner,* application of this balancing analysis has led to a finding of reasonable searches in all the "special needs" cases. Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1424-25 (1989) (Marshall, J., dissenting).

both.[251] The *Von Raab* decision, though, lacks both an individualized suspicion and a realized harm, and therefore represents a misapplication of the "special needs" exception.

The Customs Service testing program[252] is implemented upon an employee's voluntary application to transfer to a covered position. After voluntary application, all employees are required to submit to urinalysis tests. This all-inclusive aspect renders unnecessary any requirement of probable cause or individualized suspicion,[253] and therefore places this program outside the scope of the "special needs" exception. Under a correct application of the "special needs" exception, intrusiveness is minimized, because individualized suspicion provides for a limited number of searches. Without such individualized suspicion, numerous innocent parties are unnecessarily subjected to infringements of their privacy.[254] Also, by foregoing any probable cause or suspicion analysis, the Court, swept away by the emotion of the drug problem,[255] is free to ignore the lack of drug use in the Service. A requirement

---

251. *See* Griffin v. Wisconsin, 483 U.S. 968 (1987) (suspicion that probationer possessed contraband; harm to society if probationers allowed at large); O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion) (suspicion that employee was misusing funds; harm that governmental operations would be disrupted by a probable cause requirement in order to search public employees' offices); New Jersey v. T.L.O., 469 U.S. 325 (1985) (individualized suspicion that student had possession of drugs; harm of disrupting school environment); *cf.* New York v. Burger, 482 U.S. 691 (1987) (realized harm of auto theft under the administrative search exception).

252. *See supra* notes 142-47 and accompanying text.

253. In fact, the Commissioner of the Customs Service stated he believed the Service was largely drug free, that employees' use of drugs was not the reason for instituting the program, and that he expected very few positive screenings. National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1400 (1989) (Scalia, J., dissenting).

254. Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986). The *Capua* court stated:

> The invidious effect of such mass, roundup urinalysis is that it casually sweeps up the innocent with the guilty and willingly sacrifices each individual's Fourth Amendment rights in the name of some larger public interest. . . . Such an unfounded presumption of guilt is contrary to the protection against arbitrary and intrusive government interference set forth in the Constitution.

Id. at 1517.

255. In his dissent, Justice Scalia pointed out that the only justification for the Customs testing program was to demonstrate that the government is serious in its "war on drugs." This symbolic use of urinalysis testing is insufficient to justify the invasion of personal privacy it entails. Justice Scalia accused the Court of upholding the testing on this basis, although offering other justifications in its opinion. *Von Raab*, 109 S. Ct. at 1401 (Scalia, J., dissenting).

The *Von Raab* decision is not the first instance of public emotion leading to the unnecessary abandonment of constitutional protection. History also offers the following: Dennis v. United States, 341 U.S. 494 (1951) (first amendment not violated by statute making illegal the advocacy of overthrowing the government); Korematsu v. United States, 323 U.S. 214 (1944) (no constitutional violation by relocation of Japanese citizens); Hirabayashi v. United States, 320 U.S. 91 (1943) (no violation of due process or equal protection to impose curfew on Japanese citizens); Schenck v. United States, 249 U.S. 47 (1919) (no first amendment violation under statute which prohibited mailing of circular urging draftees not to comply with conscription orders).

of individualized suspicion would force the Court to focus on the existence or absence of a real problem. The presence of a realized harm is necessary to prevent a misguided balancing analysis that results when policy concerns are examined exclusively.[256]

Just as important an oversight by the Court is its failure to realize that the Service's testing program mitigates no harm. Again, this absence places the program outside the parameters of the "special needs" exception. First, as noted above, there exists neither documented drug use among Service employees, nor any expectations that testing will reveal such drug use.[257] In contrast, the *New Jersey v. T.L.O.*[258] Court, in applying the "special needs" exception, specifically noted the growing disorder in American schools, including drug use and violent crime. This unrest provided a harm for the search to lessen.[259] Second, and most importantly, the majority's implication that the drug testing will mitigate a harm, namely national drug abuse, is erroneous. Clearly, the national drug problem lies deeper than drug abuse in the Customs Service.[260] The significant intrusion of suspicionless searches of the Customs employees is unwarranted by any minimal effect the searches may have on the national drug problem. Indeed, the probable reason for the program is its symbolic value; it may serve to demonstrate the government's commitment to eradicating the national drug problem.[261]

Again, the *T.L.O.* decision provides a contrast.[262] In *T.L.O.*, a school official searched a student's purse and recovered marijuana. The seizure of

---

256. There exists substantial precedent in the drug-testing context concerning the individualized suspicion requirement. For cases requiring individualized suspicion, see Division 241 Amalgamated Transit Union v. Suscy, 538 F.2d 1264 (7th Cir.), *cert. denied,* 429 U.S. 1029 (1976); Policemen's Benevolent Ass'n of New Jersey, Local 318 v. Township of Washington, 672 F. Supp. 779 (D.N.J. 1987), *rev'd,* 850 F.2d 133 (3d Cir. 1988); 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 (D.N.J. 1986). For cases not requiring individualized suspicion, see McDonnell v. Hunter, 809 F.2d 1302 (8th Cir. 1987); Shoemaker v. Handel, 795 F.2d 1136 (3d Cir.), *cert. denied,* 479 U.S. 986 (1986); Amalgamated Transit Union Div. 1279 v. Cambria County Transit Auth., 691 F. Supp. 898 (W.D. Pa. 1988); American Fed'n of Gov't Employees v. Dole, 670 F. Supp. 445 (D.D.C. 1987). For one definition of reasonable suspicion, *see supra* note 122.

257. *See supra* note 253.

258. 469 U.S. 325, 339 (1985).

259. *Id.* at 339-40.

260. It is conceded drug-free Customs Service employees may lead to more efficient and more substantial interdiction of drugs. However, reality dictates that even a fully operative Service will never succeed in capturing more than a small percentage of illegally smuggled drugs. Nadelmann, *The Case for Legalization,* 1988 CHICAGO LAWYER 13 (Oct.).

The extent of the drug problem, and the resulting minimal effect of the Service's interdiction efforts, is also illustrated in Sciolino, *Drug Production Rising Worldwide, State Dept. Says,* N.Y. Times, Mar. 2, 1989, at 1, col. 2. Specifically, the article highlights the increased global production of coca, marijuana, opium poppies and hashish, and the inability of the United States to control the world events which have led to this global increase in production.

261. *See* National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384, 1401 (1989) (Scalia, J., dissenting) (an unreasonable search cannot be justified on symbolic grounds).

262. 469 U.S. 325 (1985).

the marijuana and the subsequent disciplinary action of the student directly affected the school drug problem. Thus, though the *Von Raab* Court applied the correct fourth amendment exception for drug-testing programs, the "special needs" test, its failure to require either an individualized suspicion or a realized harm lead to the misapplication of the exception. In place of these requirements, the Court found that there was a special need simply because the drug problem is a national concern and the Customs department is involved in drug interdiction. However, this misapplication, and the concurrent skewed balancing analysis, is capable of remedy. The most effective remedy would be congressional action in the form of national drug-testing legislation. Legislation requiring either an individualized suspicion or a realized harm or both, in order for the government to undertake drug testing, (see Appendix) would prevent this misapplication.

B. The Skinner *Court's Proper Application of the "Special Needs" Exception*

The Court's opinion in *Skinner,*[263] unlike the *Von Raab* decision, demonstrates a proper application of the "special needs" exception to the fourth amendment in the initial procurement of the test samples.[264] The decision provides guidance for implementation of the exception in exigent situations requiring drug testing. This proper application stems from the existence of a realized harm, namely drug and alcohol abuse in the railroad industry,[265] and the ability to mitigate this harm. With this realized harm, the *Skinner* decision is consistent with the earlier "special needs" cases,[266] and distinguishes itself from the *Von Raab* decision. The railroad's drug-testing program, just as the seizure of marijuana in the *T.L.O.* decision,[267] will directly affect the realized harm, and thereby distinguishes itself from the *Von Raab* testing program.

---

263. 109 S. Ct. 1402 (1989).

264. The *Skinner* Court's application of the "special needs" exception to the initial search of collecting the samples is appropriate. However, it is arguable, as Justice Marshall duly noted in his dissent, that the extension of the exception to the chemical testing of the samples is inappropriate. For extensive analysis of this point, see *infra* notes 268-74 and accompanying text.

265. *Skinner,* 109 U.S. at 1407-08. The Federal Railroad Administration ("FRA") provided numerous statistics reflecting the drug and alcohol problem. Specifically, the FRA noted that from 1972 to 1983 the nation's railroads suffered twenty-one significant accidents of which drug and alcohol abuse was a contributing factor. These accidents resulted in twenty-five fatalities, sixty-one non-fatal injuries, and an estimated $19 million in property damage. Furthermore, there were seventeen additional fatalities which occurred around rail rolling stock and were blamed on alcohol and drug abuse. *Id.*; 48 Fed. Reg. 30,726 (1983).

Finally to further emphasize the alcohol abuse problem, a 1979 FRA study stated that one of eight employees drank at least once while on duty, and alarmingly, that twenty-three percent of the operating personnel were problem drinkers. 109 S. Ct. at 1407 n.1; 48 Fed. Reg. 30,724 (1983).

266. *See supra* note 251.

267. *See supra* note 244 and accompanying text.

Through the correct application of the "special needs" exception, the *Skinner* decision demonstrates the exception's purpose. The exception is intended to apply where certain "needs" make the warrant and probable cause requirements impracticable. In *Skinner,* these "needs" are the necessity to collect samples before the evidence is cleansed from individuals' systems and the difficulty in establishing any type of individualized suspicion at the chaotic scene of a railroad accident. These "needs," however, are absent in the *Von Raab* situation, because in that case there was no documented drug use, and therefore no feared loss of evidence of drug use. Furthermore, there was no event in which it would be difficult to establish individualized suspicion.

In sum, the requirement of a realized harm capable of mitigation, or a requirement of individualized suspicion, will ensure the existence of a substantial government interest and thereby prevent a skewed balancing analysis, as present in *Von Raab.* Again, these requirements can be imposed by legislation (see Appendix).

C. *The* Skinner *Court's Unwarranted Extension of the "Special Needs" Exception*

Though the *Skinner* Court correctly applies the "special needs" exception to the collection of the samples, it joins the *Von Raab* Court in misapplying the exception by extending it to the testing of these samples. Justice Marshall, in his dissent in *Skinner* argued the railroad's drug-testing program imposed three distinct searches: the first two of collecting blood and urine samples and the third of chemically analyzing the samples.[268] Under this premise,[269] the *Skinner* Court, though applying the "special needs" exception properly to the first two,[270] extended the exception too far to the third. This is because the "special needs" exception is to be employed when the warrant and probable cause requirements are impracticable.[271] In the case of first collecting the samples, the requirements are impracticable, as there is the danger of losing valuable evidence and the difficulty of establishing probable cause.[272]

However, this impracticability of obtaining a warrant or establishing probable cause disappears once the samples are collected. At this point, there

---

268. 109 S. Ct. at 1426 (Marshall, J., dissenting).

269. To view the chemical analysis of the samples as a separate search is supported by the distinct information which the testing can provide. Specifically, the testing not only reveals the presence or absence of drugs, but it may also reveal whether an individual is an epileptic, is pregnant, or is on medication. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175-76 (5th Cir. 1987), *aff'd,* 109 S. Ct. at 1384 (1989).

270. *See supra* notes 263-67 and accompanying text.

271. *See supra* notes 85-87 and accompanying text.

272. The *Skinner* majority noted the difficulty of establishing probable cause or an individualized suspicion at the scene of a serious rail accident. In particular, the Court noted the often chaotic scene, and the inherent difficulty in determining which crew members were involved in the incident. 109 S. Ct. at 1420.

no longer exists the exigency of potentially losing valuable evidence,[273] and it is realistic to expect competency from railroad officials in obtaining a warrant.[274] At this stage, the obtaining of a warrant is further facilitated by the officials' ability to conduct an investigation of the incident. The officials could obtain necessary facts in order to establish probable cause. Therefore, to satisfy the constitutional requirement of a reasonable search, a warrant must be obtained before the samples are analyzed.

The two subject Supreme Court decisions, in differing manners, are negligent in applying the "special needs" exception, but nevertheless provide guidance for establishing a constitutionally sufficient program. An analysis of the two opinions suggests application of the exception should be accompanied by an individualized suspicion of drug use or a realized harm capable of mitigation. Furthermore, it is also necessary to limit the scope of the exception to the initial collection process, and impose a warrant requirement thereafter. The model legislation forwarded in the Appendix is intended to impose such requirements.

IV. IMPACT

The Supreme Court's approval of drug testing in the government and transportation employer contexts carries both a desirable message and potentially harmful possibilities.

An immediate impact, one characterized with both benefits and detriments, will be the re-evaluation of existing drug-testing programs and the institution of new programs.[275] The benefits of this include the renewed recognition of the employment-related drug and alcohol problem[276] and the concurrent need for a solution. Furthermore, the Court's promotion of measures to battle the national drug problem is commendable. However, the Court's instant opinions, and their failure to require either individualized suspicion or a realized harm for urinalysis testing, invite implementation of unconstitutional programs. In particular, the *Von Raab* decision may establish a precedent of allowing the government to conduct searches pursuant to the "special needs" exception based primarily on general policy concerns, such as the drug issue. If the government can establish that there is a "special need" based upon policy alone, a reviewing court following *Von Raab* may uphold a search of numerous individuals, regardless of any suspicion of wrongdo-

---

273. 109 S. Ct. at 1426 (Marshall, J., dissenting). Justice Marshall noted that if properly collected and preserved, the blood and urine samples would not spoil.

274. *Id.*

275. This trend was immediately demonstrated by HUD's announcement that it would institute a drug-testing program no later than one month from the day of the decisions. Chicago Sun Times, Mar. 25, 1989, at 12, col. 2. Furthermore, the Bush Administration's intentions were reflected in a statement by Attorney General Dick Thornburgh, who suggested that all drug-testing plans would be re-evaluated in light of the Supreme Court decisions. *Id.*

276. *See supra* notes 2-8 and accompanying text.

ing.[277] In this manner, the focus of the fourth amendment may shift to the circumstances surrounding the search, as opposed to the actual search itself. A finding of "reasonableness" could thus be based on policy concerns, as opposed to the level of intrusion the government imposes on the individual. This broadening of the "special needs" exception would severely limit the protection the fourth amendment provides to individuals.[278]

The decisions will also fail to end the challenges to drug-testing programs. First, those opposing drug-testing programs will present the Court's opinions as being very narrow in scope. Opponents will argue the *Von Raab* decision applies only to government agencies directly involved with the interdiction of drugs, and that the *Skinner* decision affects only programs in the transportation context. Likewise, opponents may contend that the Court has created a "drug exception" to the warrant and probable cause requirements of the fourth amendment; the decisions would then only apply to other drug-related cases.[279] Second, opponents will challenge the programs as violative of due process and equal protection,[280] grounds ignored by the Supreme Court.[281] These continued challenges to drug-testing programs will unfortunately produce both a divergence in the circuits and uncertainty as to the requirements for a constitutionally infirm program.

These short-range effects of unconstitutional programs and uncertainty as to the prerequisites for constitutional programs necessitate national legislation regulating drug testing.[282] This legislation would promote legal uniformity and, hopefully, with its attached certainty, encourage the institution of further programs designed to alleviate illegal drug use without violating individual rights. In particular, the provisions discussed immediately below are designed to ensure the constitutionality of any drug-testing program.

First, Section 2-2 of the proposed legislation, and its requirement of either an individualized suspicion or mitigation of a realized harm, significantly decreases the possibility that a program would violate the fourth amendment's reasonable search and seizure requirement. The individualized sus-

---

277. *See* Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1426 (1989) (Marshall, J., dissenting) (the Court has advanced a malleable test, subject to manipulation based on policy concerns).

278. *Id.* at 1425.

279. *But see* Skinner v. Railway Labor Executives Ass'n, 109 S. Ct. 1402, 1426 (1989) (Marshall, J., dissenting) (just as there is no "communist exception," there is no "drug exception" to the Constitution).

280. *See supra* notes 124-39 and accompanying text.

281. The due process challenges likely to be forwarded will focus either on a program's lack of procedural safeguards, or the unreliability of the tests themselves. *See supra* notes 125-30 and accompanying text. The equal protection challenges, on the other hand, may well focus on the "over-inclusiveness" of programs which require neither an individualized suspicion nor a realized harm. *See supra* notes 137-39 and accompanying text.

282. *See* McGovern, *supra* note 10, at 39 (advocating drug-testing legislation covering both public and private employees); Comment, *supra* note 2, at 1011 (1986) (advocating legislation to protect the rights of private employees).

picion requirement will preclude random testing which casually sweeps up the innocent employees with the guilty, while the realized harm requirement will ensure that significant government interests are being served with the testing. Section 2-3 of the legislation also addresses the reasonable search or seizure requirement. This section, which requires that a warrant be secured for chemical analysis of the collected samples, recognizes that the exigency attached to the initial collection of the samples is no longer present upon testing. This recognition will prevent fourth amendment challenges to the chemical testing. Finally, sections 3-1 (a) and (b) of the Model Bill are intended to preclude any due process challenges to the testing program. Though an issue unaddressed by the subject opinions, the reliability of many programs, and of the tests utilized by them, have led to due process challenges.[283]

The impact of the legislation proposed by this Comment may best be realized by examining its effect on the Customs Service's program. Quite simply, the legislation would render the Service's program illegal. This illegality would stem from three sources: the absence of both an individualized suspicion and a realized harm, and the program's failure to require a warrant after the initial collection process is completed. This finding of illegality is a desirable result of the legislation, as it indicates programs void of individualized suspicion or a realized harm will be found unconstitutional.

The Model Bill presented in the Appendix is an adaptation of the current Federal Railroad Administration's regulations.[284]

V. CONCLUSION

In *Skinner* and *Von Raab,* the Supreme Court was faced with the difficult task of facilitating this nation's war on drugs while also protecting citizens' individual liberties. To confront this task, the Court prudently chose the "special needs" exception to the fourth amendment to evaluate the subject programs. Unfortunately, the Court incorrectly applied the exception by approving programs which lacked both an individualized suspicion or a realized harm—elements present in all previous applications of the exception. Hence, this approval will neither end the challenges to drug-testing programs nor preclude the institution of unconstitutional programs. To remedy this shortcoming, it will be necessary to promulgate national legislation similar to the Model Bill forwarded in this Appendix.

Jeffrey S. Pavlovich

---

283. For a case in which the parties claimed that drug testing violated due process, see Capua v. City of Plainfield, 643 F. Supp. 1507, 1513 (D.N.J. 1986).

284. 49 C.F.R. § 219.5 (1988). The FRA promulgated the regulations pursuant to the Federal Railroad Safety Act of 1970, 45 U.S.C. §§ 431-444 (1982).

APPENDIX

MODEL BILL: PUBLIC EMPLOYEE DRUG TESTING PLAN

Section I

1-1. *Purpose and Scope*

(a) The purpose of the drug testing plan is to effectively minimize alcohol and drug abuse in the work place and the inherent dangers accompanying this abuse.

(b) The legislation covers all public employees in the United States. However, this bill does not preclude an individual state from promulgating drug-testing legislation which imposes more stringent and exacting requirements.

1-2. *Implied Consent*

Any individual accepting public employment consents to urinalysis drug-testing upon the employer satisfying the prerequisites imposed by this statute.

1-3. *Definitions*[285]

As used in this bill-

(a) "Alcohol" means ethyl alcohol (ethanol). References to use or possession of alcohol include use or possession of any beverage, mixture or preparation containing ethyl alcohol.

(b) "Controlled substance" has the meaning assigned by 21 U.S.C. § 802 and includes all substances listed on schedules I through V as they may be revised from time to time (21 CFR Parts 1301-1316).

(c) "Drug" means any substance (other than alcohol) that has known mind or function altering effects on a human subject, specifically including any psychoactive substance and including, but not limited to, controlled substances.

(d) "Possess" means to have on one's person or in one's personal effects or under one's control. However, the concept of possession as used in this bill does not include control by virtue of presence in the employee's personal residence.

1-4. *Waiver*[286]

An employee subject to the requirements of this Bill may petition for a waiver of compliance. If this waiver is in the public interest and is consistent

285. *See* 49 C.F.R. § 219.5 (1988).
286. *Id.* § 219.7.

with employee safety, the waiver may be granted subject to any necessary conditions.

Section II

2-1. *Prohibitions*[287]

(a) No employee may report for work or remain on duty while:
(1) Under the influence of or impaired by alcohol;
(2) Having .04 percent or more alcohol in the blood; or
(3) Under the influence of or impaired by any controlled substance.
(i) Controlled substances include marijuana, narcotics, stimulants, depressants, and hallucinogens.
(b) The statute's prohibitions do not extend to off-duty use of alcohol or drugs if this use leads to no on-job impairment.

2-2. *Testing Prerequisites*

Before an employer may implement drug-testing, he must demonstrate one of two criteria:
(1) an individualized suspicion that the employee to be tested was either under the influence or impaired by alcohol or a controlled substance while on duty; or
(2) there existed a realized harm which could be directly mitigated by the testing of the individual employee.

2-3. *Limitations*

The approval of drug-testing by this statute on a finding of individualized suspicion or of a realized harm capable of mitigation extends only to the initial collection of the samples. Once collection is complete, a warrant is required for chemical testing of the samples.

Section III

3-1. *Test Procedures and Safeguards*[288]

(a) All employee testing is to be conducted by an independent contractor at an independent medical facility. Chain-of-custody rules to ensure proper identification of samples are to be written and provided to the medical facilities.
(b) Initially, the EMIT test is to be administered. If a positive reading results, the GC/MS test is then administered. If this second test is positive, the employee must be afforded the option of having the sample tested at an independent testing facility.

---

287. *See* 49 C.F.R. § 219.101 (1988).
288. *See* 49 C.F.R. § 219.305 (1988).

(c) All test results, whether positive or negative, are to be strictly confidential. The results may not be revealed to other agencies, or to law enforcement officials, without the consent of the employee.

Section IV

4-1. *Disciplinary Procedures*

(a) An employee providing a positive sample for the first time shall be suspended without pay for one month and subject to mandatory testing upon return and once every six months thereafter for two years. Employment is continued as long as no further positive samples are provided.

(b) An employee providing a second positive sample shall be suspended for nine months and offered entrance into a drug rehabilitation center. Upon completion of the nine months and rehabilitation, the employee may return, conditioned upon passing an initial test and a test every six months for three years.

(c) An employee providing a third positive sample can be terminated from employment with no further obligations on the employer's part.