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VALIDITY AND APPLICATION OF THE RELIGIOUS FREEDOM RESTORATION ACT IN THE TENTH CIRCUIT AFTER *CITY OF BOERNE V. FLORES*

INTRODUCTION

During this survey period, September 2000 to August 2001, the Tenth Circuit grappled to define a standard for evaluating alleged violations of the First Amendment's protection of the free exercise of religion. The Tenth Circuit exhibited little difficulty in concluding that the Supreme Court's 1997 landmark case, *City of Boerne v. Flores*[1] invalidated the highly controversial Religious Freedom Restoration Act ("RFRA" or the "Act")[2] only as it applied to state actions.[3] In this regard, the court aligned itself with the Eighth and Ninth Circuits in holding that claims alleging federal government violations of the Free Exercise Clause should be held to the highest constitutional standard when brought under RFRA.

The Tenth Circuit was less certain, however, of exactly how to apply the RFRA standard. On August 8, 2001, three different Tenth Circuit panels released opinions involving challenges to the same federal regulation but arriving at very different conclusions.[4] Cognizant of the inconsistencies among the results in these cases, the court vacated all three decisions and ordered an *en banc* re-hearing to bring about consistency within the circuit.[5] The *en banc* hearing was held on January 15, 2002.

The regulation at issue in all three cases was an exception[6] to two federal laws that prohibit the possession and transportation of eagles and eagle parts, the Bald and Golden Eagle Protection Act[7] ("BGEPA") and the Migratory Bird Treaty Act[8] ("MBTA"). The exception allows members of federally recognized Indian tribes to possess eagle feathers for Indian religious purposes after obtaining a permit from the U.S. Fish and

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1. 521 U.S. 507 (1997).
2. 42 U.S.C §§ 2000bb-1 to -4 (2001).
3. *See* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001).
4. Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. 17702 LEXIS (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.
5. United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam).
6. *See generally* Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.
7. 16 U.S.C. § 668 (2001).
8. 16 U.S.C. § 703 (2001).

Wildlife Service.[9] In each of these cases, the federal government had seized eagle feathers from individuals, who did not qualify for permits because they were not enrolled in federally recognized tribes.[10] All three individuals claimed eagle feathers were necessary for their religious practices and challenged the permitting regulation as unconstitutionally burdening their First Amendment free exercise rights.[11] In one case, the court invalidated the regulation.[12] In the other two cases, the court upheld it.[13]

Several factors contributed to the mixed results. One factor, which is the central focus of this article, was whether courts must apply RFRA's strict scrutiny standard to all free exercise claims or whether they should apply the less rigorous *Employment Division v. Smith*[14] standard, if none of the parties invoke RFRA.

These cases also raised important questions concerning the government's unique relationship with federally recognized Indian tribes,[15] specifically, whether case law involving Indian trust and treaty rights mandates application of rational basis review to laws and regulations designed to benefit tribes and tribal members.[16] Some members of the court

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9. *See* 50 C.F.R. § 22.22 (2002).

10. *See Saenz*, 2001 U.S. App. LEXIS 17698, at *2-3; *Hardman*, 2001 U.S. App. LEXIS 17702, at *2-3; *Wilgus*, 2001 U.S. App. LEXIS, at *2-4.

11. *See Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698 at *3-4; *Hardman*, No. 99-4210, 2001 U.S. App. LEXIS 17702 at *2-3; *Wilgus*, No. 00-4015, 2001 U.S. App. LEXIS at *2-4.

12. *See Saenz*, No. 00-2166, 2001 U.S. App. LEXIS 17698, at *38.

13. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *71; *Wilgus*, , 2001 U.S. App. LEXIS, at *34.

14. Employment Div. v. Smith, 494 U.S. 872 (1990).

15. On rehearing, several tribes submitted amicus curiae briefs. Brief of Amici Curiae Ute Indian Tribe of the Uintah and Ouray Reservation, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Hopi Tribe, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Jicarilla Apache Nation, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210); Brief of Amici Curiae Christian Legal Society, United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (No. 99-4210).

16. Indeed, a compelling argument can be made that these cases should be decided in the context of Indian law, which is a "distinct field, with its own doctrines and traditions," independent of broader legal, social and political concerns. *See* FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 220-28 (Rennard Strickland et al. eds., 1982) (describing the development of the Federal Indian Trust Doctrine and its application as a limit on Congressional authority over Indians). *Cf.* John Celichowski, *A Rough and Narrow Path: Preserving Native American Religious Liberty in the* Smith *Era*, 25 AM. INDIAN L. REV. 1 (2001) (surveying Indian First Amendment/Free Exercise claims before and after Employment Div. v. Smith, 494 U.S. 872 (1990)); Antonia M. De Meo, *Access to Eagles and Eagle Parts: Environmental Protection v. Native American Free Exercise of Religion*, 22 HASTINGS CONST. L.Q. 771, 808 (1995) (asserting Indian religious claims should be analyzed under the Federal Indian Trust Doctrine because the Free Exercise Clause and the American Indian Religious Freedom Act "fail to offer Native Americans effective religious protection"); Matthew Perkins, *The Federal Indian Trust Doctrine and the Bald and Golden Eagle Protection Act: Could Application of the Doctrine Alter the Outcome in U.S. v. Hugs?*, 30 ENVTL. L. 701, 701 (2000) (arguing "a valid trust doctrine argument remains to be made for Native American religious freedom" against federal limitations on Indian use of eagle feathers and parts for religious purposes). *See generally* David H. Getches, *Beyond Indian Law: The Rehnquist Court's Pursuit of*

questioned whether the government had a compelling interest in conserving eagles and called for more fact finding on the issue.[17] Although each of these issues merits in-depth discussion and analysis, they are discussed here only to the extent that they influenced or were implicated in the various panels' decisions on first hearing.

Part I of this article traces the jurisprudential history of what at least one commentator has dubbed the "holy war" that has been raging since the early 1960s over the appropriate standard for evaluating free exercise claims.[18] At the center of the debate is RFRA, which has drawn fire for both its substantive content and the manner of its birth.[19] At stake is the delicate balance between the First Amendment's protection of the individual's religious freedom under the Free Exercise Clause and its protection of the national interest in maintaining separation of church and state under the Establishment Clause.[20] Also at issue is the scope of Congress's legislative powers when they collide with the judiciary's long-established authority to interpret the Constitution.[21] By placing RFRA in the context of U.S. Supreme Court decisions that preceded and followed the statute's enactment, it becomes apparent why some have vilified RFRA as an "unconstitutional grab for power" by Congress,[22] while others remain

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States' Rights, Color-Blind Justice and Mainstream Values, 86 MINN. L. REV. 267, 340-61 (2001) (criticizing the Supreme Court's use of Indian cases as a "crucible" to further a broader agenda under which state interests prevail, rights of racial minorities fail and mainstream values are protected, while undermining the "political relationship between the United States and self-governing tribes").

17. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *71

18. Robert Hoff, *Losing Our Religion: The Constitutionality of the Religious Freedom Restoration Act Pursuant to Section 5 of the Fourteenth Amendment*, 64 BROOK. L. REV. 377, 377 (1998).

19. *See generally* Christopher L. Eisgruber & Lawrence G. Sager, *Why the Religious Freedom Restoration Act is Unconstitutional*, 69 N.Y.U. L. REV. 437 (1994). In an early critique of RFRA, Eisgruber and Lawrence argue the Act is substantively unconstitutional because it "privileges" rather than "protects" religious practices and impermissibly favors religion over equally important secular concerns. *Id.* at 447-61. They claim RFRA's "constitutional vices" are directly associated with the Act's "origin as an attempt by Congress to undo the Supreme Court's constitutional judgment." *Id.* at 444. They also expressed concern that Congress had exceeded its powers under section 5 of the Fourteenth Amendment, foreshadowing a similar conclusion the Supreme Court would reach later in *City of Boerne*. *Id.* at 460-69; *see City of Boerne*, 521 U.S. 507, 516-36 (1997) ("Broad as the power of Congress is under the Enforcement Clause of the Fourteenth Amendment, RFRA contradicts vital principles necessary to maintain separation of powers and the federal balance.").

20. *Compare* Marci A. Hamilton, *The Religious Freedom Restoration Act is Unconstitutional, Period*, 1 U. PA. J. CONST. L. 1, 2-8 (1998) (arguing RFRA violates the Establishment Clause), *with* Erwin Chemerinsky, *The Religious Freedom Restoration Act is a Constitutional Expansion of Rights*, 39 WM. & MARY L. REV. 601, 632-34 (1998) (arguing the protection RFRA affords free exercise is not incompatible with the Establishment Clause).

21. *See* Chemerinsky, *supra* note 20, at 604, 606 (arguing that the Constitution sets the "floor" for protected personal liberties which Congress may expand under its section 5 powers under the Fourteenth Amendment). For the opposing view, *see* Hamilton, *supra* note 20 (arguing RFRA violates Article V); Edward J.W. Blatnik, *No RFRAF Allowed: The Status of the Religious Freedom Restoration Act's Federal Application in the Wake of City of Boerne v. Flores*, 98 COLUM. L. REV. 1410 (1998) (arguing RFRA violates Article V).

22. Hamilton, *supra* note 20, at 5.

steadfast in their belief that RFRA was a legitimate expansion of rights[23] that correctly imposed "the highest standard of constitutional protection from one of the most important freedoms guaranteed by the Constitution."[24]

Part II describes four Tenth Circuit decisions rendered during the survey period which involved religious freedom claims, the first of which established the continued viability of RFRA as applied to federal government actions and the three other cases that illustrate the differing perspectives within the court as to the constitutionality of the eagle feather permitting regulation. Finally, Part III summarizes the questions the Tenth Circuit identified for discussion in its order for rehearing *en banc*.

I. BACKGROUND

A. *In the Beginning, There Was* Sherbert v. Verner[25] *and* Wisconsin v. Yoder[26]

The Brennan Court's 1963 decision in *Sherbert* was the first shot in the war of constitutional standards, because it "marked the first time that the Supreme Court applied the compelling interest test to a Free Exercise Clause challenge to a generally applicable law."[27] In *Sherbert*, a Seventh-day Adventist claimed South Carolina violated her First Amendment right to free exercise of her religion by denying her request for unemployment benefits.[28] The woman's employer had fired her for refusing to work on Saturday, which was the Sabbath Day of her faith.[29] Because the claimant would not accept Saturday work, she was unable to find another job and filed an unemployment benefits claim.[30] The state denied her request for benefits based on a statutory provision that disqualified any claimant who "failed, without good cause . . . to accept available suitable work."[31] The South Carolina Supreme Court upheld the state's decision, reasoning that the statutory disqualification placed no restriction upon the claimant's religious freedom nor did it "prevent her in the exercise of

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23. *See* Chemerinsky, *supra* note 20, at 629-34.
24. Hoff, *supra* note 18, at 380.
25. 374 U.S. 398 (1963).
26. 406 U.S. 205 (1972).
27. *See* Hoff, *supra* note 18, at 380. The Court has made the Free Exercise Clause of the First Amendment applicable to states by incorporation into the Fourteenth Amendment. *See* Cantwell v. Connecticut, 310 U.S. 296, 303 (1940) (citing Employment Div. v. Smith, 494 U.S. 872, 86-87 (1990)).
28. *See Sherbert*, 374 U.S. at 399-401.
29. *Id.* at 399.
30. *Id.* at 399-400.
31. *Id.* at 401 (quoting S.C. Code § 68-114(3)(a)(ii)).

her right and freedom to observe her religious beliefs in accordance with the dictates of her conscience."[32]

The U.S. Supreme Court, however, reversed the state court's decision and ruled for the claimant.[33] The Court held that to withstand the claimant's constitutional challenge, South Carolina's decision to deny unemployment benefits:

> must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of [her] religion may be justified by a 'compelling state interest' in the regulation of a subject within the State's constitutional power to regulate.[34]

Though the Court found the consequences of denying the claimant unemployment benefits to religious practices and principles "only an indirect result" of legislation that was "within the state's general competence to enact," it held that where the "purpose or effect of a law" impedes a religion or discriminates between religions, such a law "is constitutionally invalid."[35] Here, the government forced the plaintiff to choose between "following the precepts of her religion and forfeiting benefits . . . and abandoning one of the precepts of her religion in order to accept work," which the Court held was "the same kind of burden upon the free exercise of religion as would a fine imposed against [her] for her Saturday worship."[36]

The Court then found South Carolina failed to show "some compelling state interest" that would justify the "substantial infringement" of the plaintiff's First Amendment right.[37] In so doing, the Supreme Court also noted "no showing merely of a rational relationship to some colorable state interest would suffice," and "only the gravest abuses, endangering a paramount [state] interest" would permit a limitation on an individual's free exercise of religion.[38]

In 1972, the Supreme Court decided *Wisconsin v. Yoder*,[39] which further clarified the "compelling interest" standard by stating a "regulation neutral on its face may, in its application, nonetheless offend the constitutional requirement for governmental neutrality if it unduly burdens the free exercise of religion."[40] The issue in *Yoder* was whether the

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32. *Id.* at 401 (citing Sherbert v. Verner, 125 S.E.2d 737, 746 (S.C. 1962) *overruled by* Sherbert v. Verner, 374 U.S. 398 (1963) (internal quotations omitted)).

33. *Id.* at 402.

34. *Sherbert*, 374 U.S. at 403 (citing NAACP v. Button, 371 U.S. 415, 438 (1963)).

35. *Id.* at 403-04 (citing Braunfeld v. Brown, 366 U.S. 599, 607 (1961)).

36. *Id.* at 404.

37. *Id.* at 406.

38. *Id.* (citing Thomas v. Collins, 323 U.S. 516, 530 (1945)).

39. Wisconsin v. Yoder, 406 U.S. 205, 220 (1972).

40. *Yoder*, 406 U.S. at 220.

State of Wisconsin, under its compulsory school-attendance statute, could impose criminal penalties on Amish parents who refused to send their children to school past the eighth grade.[41] The Court said no, notwithstanding Wisconsin's argument that the requirement for school attendance to age 16 applied "uniformly to all citizens of the State and [did] not, on its face, discriminate against religions or a particular religion" and was "motivated by legitimate secular concerns."[42]

B. *Court Redraws the Borders in* Employment Division v. Smith[43]

Almost three decades after *Sherbert*, the fortress of compelling interest surrounding free exercise came tumbling down in 1990 with the Court's decision in *Smith*. The question in *Smith* was whether the Free Exercise Clause permitted the State of Oregon to deny unemployment benefits to Native Americans who were dismissed from their jobs for using peyote during religious ceremonies.[44] The Court said yes.[45]

Writing for the majority, Justice Scalia went to great lengths to distinguish the circumstances in *Smith* from *Sherbert* and its progeny.[46] Here, the Court distinguished between religious beliefs and "performance of (or abstention from) physical acts," particularly acts that violate criminal laws.[47] The Court also attempted to distance *Smith* from previous decisions by noting it had applied the *Sherbert* balancing test to invalidate generally applicable laws only when they involved the Free Exercise Clause "in conjunction with other constitutional protections, such as freedom of speech and of the press."[48] *Yoder*, for example, was rationalized as presenting a "hybrid situation" in which "the interests of parenthood [were] combined with a free exercise claim."[49] The Supreme

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41. *See id.* at 207.

42. *Id.* at 220.

43. 494 U.S. 872 (1990) (O'Connor, J., concurring in the judgment; Blackmun, J., with whom Brennan, J., and Marshall, J., join, dissenting).

44. *See Smith*, 494 U.S. at 874.

45. *See id.* at 890.

46. *See* Getches, *supra* note 16, at 341-42 (analyzing *Smith* as an example in which the Court used an Indian case as a "crucible" for promoting states' rights in ruling "states should not be burdened with proving a compelling interest to enforce its laws every time someone claims to have violated the law in the name of religion"). Getches suggests the unusual facts of this case, which were "unlikely to be replicated in mainstream religious cases," provided the Court with a "vehicle for changing First Amendment law and giving governments more latitude to regulate religious practices that are contrary to mainstream norms." *Id.* Thus, even if the Court is not pursuing a specifically anti-Indian agenda, its application of traditional First Amendment principles rather than established Indian law doctrine effectively erodes and diminishes Indian rights. *See id* at 342.

47. *See Smith*, 494 U.S. at 877-78.

48. *See id.* at 881.

49. *See id.* at 882 n.1. *But see* Hoff, *supra* note 18, at 382-386 (agreeing with the conclusion Congress would reach in its finding that compelling interest was "a workable test for striking sensible balances between religious liberty and competing prior governmental interests"). Hoff points to many of the same cases the Court cited in *Smith* as evidence of the *Sherbert* test's effectiveness in rendering some laws invalid and others valid. *Id. See also Smith*, 494 U.S. at 902

Court went on to attack *Sherbert* directly by arguing its applicability had been limited to "denial of unemployment compensation" cases, offhandedly dismissing cases that evidenced the contrary as only "purport[ing] to apply" the *Sherbert* test.[50] The Court further narrowed applicability of *Sherbert* even in the unemployment benefits context to those situations in which "the State has in place a system of individual exemptions, [which] it may not refuse to extend . . . to cases of 'religious hardship' without compelling reason."[51]

In finally rejecting the compelling interest test, the Supreme Court asserted that to do otherwise would "subvert its rigor in the other fields where it is applied."[52] The Supreme Court also raised the specter of "anarchy" under the compelling interest test's presumption of invalidity extended to every regulation of conduct that may be challenged given the broad diversity of religious beliefs that could be burdened.[53]

The significance of the majority opinion was not lost on other members of the Supreme Court. Justice O'Connor, who applied the *Sherbert* compelling interest test to arrive at the same result as the majority, vigorously disagreed with Justice Scalia's analysis of precedent and the majority's decision to reduce the standard of scrutiny.[54] The three dissenting justices concurred with Justice O'Connor's reasoning when she wrote:

> The Court today gives no convincing reason to depart from settled First Amendment jurisprudence. There is nothing talismanic about neutral laws of general applicability or general criminal prohibitions, for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion.[55]

Smith's effects in Free Exercise Clause cases "were immediately felt."[56] A firestorm of controversy ensued, provoking vehement criticism by "impassioned commentators"[57] and "high-profile hearings [on Capitol Hill] on *Smith's* 'evisceration' of free exercise rights."[58]

(O'Connor, J., dissenting) (arguing post-*Sherbert* precedent has demonstrated "the courts have been quite capable of applying our free exercise jurisprudence to strike sensible balances between religious liberty and competing state interests").

50. *See Smith*, 494 U.S. at 883.

51. *See id.* at 884.

52. *Id.* at 888.

53. *See id.*

54. *Id.* at 901.

55. *Id.*

56. *See* Hoff, *supra* note 18, at 388-91 (arguing the new standard of scrutiny "virtually eliminated any protection previously provided by the Free Exercise Clause").

57. *Id.* at 378. *See also* Getches, *supra* note 16, at 341 n.323 (citing, e.g., John Delaney, *Police Power Absolutism and Nullifying the Free Exercise Clause: A Critique of* Oregon v. Smith, 25 IND. L. REV. 71, 72 (1991) (arguing that "minority religious claims will be held hostage to majoritarian politics")); Roald Mykkeltvedt, Employment Div. v. Smith: *Creating Anxiety by*

C. *Congress Enters the Fray with RFRA*[59]

Congress's response to *Smith* was unambiguous. In passing the Religious Freedom Restoration Act of 1993, Congress clearly set its sight on the Supreme Court's decision in *Smith* as "virtually eliminat[ing] the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion . . . ,"[60] because neutral laws could burden religious exercise "as surely as laws intended to interfere with religious exercise."[61] Furthermore, Congress stated RFRA's purpose was to:

> restore the compelling interest test as set forth in *Sherbert v. Verner* . . . and *Wisconsin v. Yoder* . . . and to guarantee its application in all cases where free exercise of religion is substantially burdened; and to provide a claim or defense to persons whose religious exercise is substantially burdened by government.[62]

RFRA received almost unanimous Congressional support with all members of the House of Representatives and all but three members of the Senate voting for the Act.[63]

Specifically, RFRA prohibits government from substantially burdening the exercise of religion "even if the burden results from a rule of general applicability. . . ."[64] The Act also allows individuals whose religious freedom has been burdened in violation of RFRA to "assert that violation as a claim or defense in a judicial proceeding and obtain relief against a government."[65] The government may substantially burden free exercise only when the government demonstrates that such a burden furthers "a compelling governmental interest; and is the least restrictive means of furthering that compelling governmental interest."[66] RFRA is retroactive and far-reaching in scope, applying to all federal and state statutory and judge-made law.[67] In addition, RFRA expansively defines

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Relieving Tension, 58 TENN. L. REV. 603, 631 (1991) (concluding "the degree to which various sects will be free to exercise their religions will be determined by their political power and not by the application of legal principles by a disinterested judiciary").

58. Blatnik, *supra* note 21, at 1411 (citing Kent Greenawalt, *Why Now Is Not the Time for Constitutional Amendment: The Limited Reach of* City of Boerne v. Flores, 39 WM. & MARY L. REV. 689, 689 (1998)).

59. Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.* (2001).

60. 42 U.S.C. § 2000bb(a)(4).

61. *Id.* at § 2000bb(a)(2).

62. *Id.* at § 2000bb(b).

63. Hoff, *supra* note 18, at 392 n.97.

64. 42 U.S.C. § 2000bb-1(a).

65. *Id.* at § 2000bb-1(c).

66. *Id.* at § 2000bb-1(b).

67. *See id.* at § 2000bb-3(a) (stating "[t]his Act applies to all Federal and State law, and the implementation of that law, whether statutory or otherwise, and whether adopted before or after the enactment of this Act enacted Nov. 16, 1993"). This language was in the 1993 Act, but reference to "and State law" has been deleted by amendment. *Id.*

"religious exercise" to encompass "any exercise of religion, whether or not compelled by, or central to, a system of religious belief" including "[t]he use, building, or conversion of real property for the purpose of religious exercise. . . ."[68]

Subsequently, parties raised RFRA claims in contexts from AIDS and abortion to zoning.[69] For example, courts applied RFRA to invalidate a school district policy that prohibited students from bringing ceremonial knives to school;[70] portions of the federal Bankruptcy Code that allowed the government to recover funds that a debtor had tithed to a church;[71] and a grooming regulation that required Rastafarian correctional officers to cut off their dreadlocks.[72] RFRA claims, however, failed to invalidate the Food and Drug Administration's refusal to mandate labeling of genetically modified foods;[73] a zoning regulation that limited locations in which churches could operate food banks and homeless shelters;[74] and drug possession and trafficking charges against a "Church of Marijuana" member.[75]

D. *The Court Strikes Back with* City of Boerne[76]

The Supreme Court's reaction to RFRA was "[as] decisive as Congress's reaction to *Smith* . . . ."[77] In *City of Boerne*, Justice Kennedy led the majority in striking down RFRA – at least as the Act applies to state and local governments – holding the Act "intruded into an area reserved by the Constitution to the States."[78] At issue was a local ordinance and historic preservation plan under which the City of Boerne denied a Catholic church's application for a permit to enlarge its building.[79]

An argument more prominent than one based on federalism came from the majority's assertion that Congress had invaded the judiciary's turf, thereby violating separation of powers principles.[80] Indeed, the Supreme Court's opening round relied on the *M'Culloch v. Maryland's*

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68. *Id.* at § 2000cc-5(7). *See* § 2000bb-2(4) of RFRA (providing the term "'exercise of religion' means religious exercise, as defined in section 2000cc-5 of this title").

69. *See generally* Mary L. Topliff, *Validity, Construction, and Application of Religious Freedom Restoration Act*, 135 A.L.R. FED. 121 (1996) (listing almost 200 topics in which RFRA protections have been sought).

70. *See* Cheema v. Thompson, 67 F.3d 883, 894 (9th Cir. 1995).

71. *See* United States v. Crystal Evangelical Free Church (*In re* Young), 82 F.3d 1407, 1420 (8th Cir. 1996).

72. *See* Francis v. Keane, 888 F. Supp. 568, 580 (S.D.N.Y. 1995).

73. *See* Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 181 (D.D.C. 2000).

74. *See* Daytona Rescue Mission v. City of Daytona Beach, 885 F. Supp. 1554, 1561 (M.D. Fla. 1995).

75. *See* United States v. Meyers, 906 F. Supp. 1494, 1509 (D. Wyo. 1995).

76. City of Boerne v. Flores, 521 U.S. 507 (1997).

77. Hoff, *supra* note 18, at 380.

78. *City of Boerne*, 521 U.S. at 527.

79. *Id.* at 511-12.

80. *See id.* at 516.

pronouncement that the "Federal Government is one of enumerated powers,"[81] immediately followed by *Marbury v. Madison's* declaration that the legislature's defined and limited powers may not be mistaken, or forgotten.[82] These premises form the basis for "judicial authority to determine the constitutionality of laws[] in cases and controversies."[83] While acknowledging Congress's authority to enact legislation enforcing the constitutional right to the free exercise of religion pursuant to section 5 of the Fourteenth Amendment, the Supreme Court noted, "[a]s broad as the congressional enforcement power is, it is not unlimited."[84]

Here, the Court found Congress exceeded its limits by enacting legislation that lacked "congruence between the means used and the ends . . . " because RFRA's legislative record lacked evidence of "modern instances of generally applicable laws passed because of religious bigotry."[85] Furthermore, the Court considered RFRA "so out of proportion to [the] supposed remedial or preventative objec[tive] . . . that it . . . appear[ed] instead, to attempt a substantive change in constitutional protections."[86] The Court specifically objected to RFRA's "[s]weeping coverage [that] ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter."[87] In a rebuke of Congress, Justice Kennedy asserted the judiciary's authority to define the parameters of constitutional rights:

> Our national experience teaches that the Constitution is best preserved when each part of the Government respects both the Constitution and the proper actions and determinations of the other branches. When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis,* and contrary expectations must be disappointed. RFRA was designed to control cases and controversies, such as the one before us; but as the provisions of the federal statute here invoked are beyond congressional authority, it is this Court's precedent, not RFRA, which must control.[88]

Despite Justice Kennedy's clearly expressed hostility toward Congress's enactment of RFRA, the extent to which the Court invalidated the

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81. *Id.* at 516 (citing M'Culloch v. Maryland, 4 Wheat. 316, 405 (1819)).
82. *Id.* (citing Marbury v. Madison, 1 Cranch 137, 176 (1803)).
83. *Id.*
84. *City of Boerne,* 521 U.S. at 518 (citing Oregon v. Mitchell, 400 U.S. 112, 128 (1970)).
85. *Id.* at 530.
86. *Id.* at 532.
87. *Id.*
88. *Id.* at 535-36.

Act remains cloudy in that the opinion repeatedly refers to RFRA's impact on *state* laws.[89] In one such instance, the Court also makes clear that it reduces the standard of review two notches below "compelling interest" to minimal scrutiny: "Even [assuming that a interpretation of RFRA would] in effect . . . mandate some lesser test, say, one equivalent to intermediate scrutiny, the statute nevertheless would require searching judicial scrutiny of *state* law with the attendant likelihood of invalidation."[90]

E. *Post-*City of Boerne *Fallout*

RFRA opponents elevated the significance of *City of Boerne's* separation of powers argument to posit the Supreme Court effectively invalidated RFRA in its entirety as applied to both state and federal law.[91] Therefore, some courts and commentators viewed RFRA as dead.[92] But those who read *City of Boerne* more narrowly – like the Tenth Circuit[93] – concluded that RFRA still applies to federal government actions.[94]

89. *See, e.g., id.* at 533-34 ("The stringent test RFRA demands of *state* laws reflects a lack of proportionality or congruence between the means adopted and the legitimate end to be achieved." Requiring a "*state* [to] demonstrate a compelling interest and show that [it has adopted] the least restrictive means of [achieving that]" interest is the most demanding test known to constitutional law. (emphasis added)).

90. *City of Boerne,* 521 U.S. at 534 (emphasis added).

91. *See* Hamilton, *supra* note 20, at 1 ("[T]he message of *Boerne* is that RFRA is unconstitutional under any scenario, whether it is applied to state or federal law."). *Cf.* Blatnik, *supra* note 21, at 1412-13 (asserting that the Court left "unanswered" RFRA's constitutionality in its application to federal law, but arguing the Act is unconstitutional in its entirety for reasons other than those set forth in *City of Boerne*).

92. *See, e.g.,* Blatnik, *supra* note 21, at 1412 n.11 (citing cases in the Sixth Circuit, Seventh Circuit, several district courts and bankruptcy courts which have rejected RFRA claims based on the assumption that such claims are moot as a result of *City of Boerne*); Chemerinsky, *supra* note 20, at 634 (implying RFRA's demise by suggesting Congress could "reenact the law" by showing that neutral laws of general applicability do seriously burden religious freedom); Hoff, *supra* note 18, at 380 (stating the Court "struck down the statute" with no distinction between its applicability to state versus federal law).

93. *See* Kikumura v. Hurley, 242 F.3d 950, 958 (10th Cir. 2001) (Holloway, J., concurring and dissenting; Ebel, J., concurring) ("This court agrees . . . with both the Eighth and Ninth Circuits in their conclusion that [*City of Boerne*] does not determine the constitutionality of RFRA as applied to the federal government.") (citing Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-33 (9th Cir. 1999); Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-59 (8th Cir. 1998)).

94. *See also,* Blatnik, *supra* note 21, at 1413 n.12 (citing cases in the Fifth Circuit, Sixth Circuit and several district courts asserting *City of Boerne* did not reach the issue of federal laws).

II. TENTH CIRCUIT DECISIONS

A. *Kikumura v. Hurley*[95]

1. Facts

Yu Kikumura was a federal prisoner, who had emigrated from Japan.[96] Upon entering prison, he listed Buddhism as his religious affiliation to support his request for a special diet.[97] Kikumura later became acquainted with a Methodist minister, who had served as a missionary in Japan and was familiar with Kikumura's spiritual culture.[98] Kikumura accepted the minister's offer to make pastoral visits.[99] However, prison officials denied the minister's requests to visit Kikumura based on a prison regulation that required (1) requests for pastoral visits be initiated by the inmate; and (2) the member of the clergy be of the same faith as that professed by the inmate.[100] Kikumura's administrative appeal was denied.[101] Kikumura then filed a claim in the United States District Court for the District of Colorado, asserting prison officials had violated his religious beliefs under the First Amendment, as well as his right to equal protection under the Fifth Amendment Due Process Clause.[102] In addition to damages and permanent injunctive relief, Kikumura sought a preliminary injunction and a temporary restraining order to compel prison officials to grant the request.[103] The district court denied both the preliminary injunction and the temporary restraining order.[104] Kikumura appealed.[105] Because denial of a temporary restraining order was not reviewable, only the preliminary injunction was subject to appeal.[106]

2. Tenth Circuit Opinion

In the Tenth Circuit, a preliminary injunction must be granted if the movant demonstrates:

> (1) a substantial likelihood of success on the merits of the case; (2) irreparable injury to the movant if the preliminary injunction is denied; (3) the threatened injury to the movant outweighs the injury to the

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95. 242 F.3d 950 (10th Cir. 2001).
96. *Kikumura*, 242 F.3d. at 953.
97. *Id.* at 954.
98. *Id.* at 961.
99. *Id.* at 953.
100. *Id.* at 954.
101. *Id.*
102. *Kikumura*, 242 F.3d at 954.
103. *Id.*
104. *Id.* at 955.
105. *Id.*
106. *Id.* at 955 n.2.

> other party under the preliminary injunction; and (4) the injunction is not adverse to the public interest.[107]

However, when a preliminary injunction would disturb the status quo, the movant must satisfy a heightened burden of showing that the four factors "weigh heavily and compellingly in his favor."[108] In reviewing Kikumura's request for a preliminary injunction, the court applied the heightened burden requirement.[109]

a. RFRA Claim

The court's major conclusion is its most controversial in light of the national debate over RFRA's applicability to federal government actions in the post-*City of Boerne* era. Specifically, this Tenth Circuit panel was unanimous in finding the district court erred when it concluded the Supreme Court in *City of Boerne* had declared RFRA unconstitutional in its entirety and, therefore, Kikumura's RFRA claim had no likelihood of success.[110] Rather, the Tenth Circuit, aligning itself with the Eighth and Ninth Circuits,[111] held *City of Boerne* invalidated RFRA only as it applied to state, but not federal government action.[112] Therefore, the court ordered the district court to allow Kikumura the opportunity to provide evidentiary support for his RFRA claim on remand.[113]

In reaching its conclusion, the panel implicitly overruled an earlier unpublished Tenth Circuit case, which was among those the defendants had used to support their argument that *City of Boerne* had rendered RFRA unconstitutional in its application to the federal government.[114] The Tenth Circuit here asserted the "only issue" before the Supreme Court in *City of Boerne* was "Congress's remedial powers to enforce the Fourteenth Amendment against *state and local* authorities."[115] "Because Congress's ability to make laws applicable to the federal government" does not depend on its Fourteenth Amendment, section 5 enforcement power, the court reasoned, "the [*City of Boerne*] decision does not de-

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107. *Id.* at 955. *See also* Country Kids 'N City Slicks, Inc. v. Sheen, 77 F.3d 1280, 1283 (10th Cir. 1996).

108. *Kikumura*, 242 F.3d at 955.

109. *Id.*

110. *Id.* at 958.

111. *Compare* Sutton v. Providence St. Joseph Med. Ctr., 192 F.3d 826, 831-33 (9th Cir. 1999), *and* Christians v. Crystal Evangelical Free Church (*In re* Young), 141 F.3d 854, 858-59 (8th Cir. 1998) (interpreting *City of Boerne* as invalidating RFRA only as applied to state actions), *with* Flagner v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001), Alliance for Bio-Integrity v. Shalala, 116 F. Supp. 2d 166, 180 (D.D.C. 2000), Combs v. Corrections Corp. of America, 977 F. Supp. 799, 801 (D.W.D. La. 1997), *and In re* Gates Cmty. Chapel of Rochester, Inc., 212 B.R. 220, 225-26 (Bankr. W.D.N.Y. 1997) (interpreting *City of Boerne* as invalidating RFRA as applied to both state and federal actions).

112. *Kikumura*, 242 F.3d at 958.

113. *Id.* at 961.

114. *Id.* at 958.

115. *Id.* (emphasis added).

termine the constitutionality of RFRA as applied to the federal government."[116] The court concluded, "[t]hus, the separation of powers concerns expressed in *City of Boerne* do not render RFRA unconstitutional as applied to the federal government."[117]

The Tenth Circuit acknowledged that the Supreme Court in *City of Boerne* did "mention" separation of powers concerns.[118] However, it found in the context of the entire [*City of Boerne*] opinion that the Supreme Court raised these concerns only to the extent that RFRA could not be considered remedial or preventative under the limits the Fourteenth Amendment imposes on Congress's enforcement power vis-à-vis the states.[119] By contrast, Congress's power to apply RFRA to the federal government comes from Article I, which allows Congress to establish standards for suits against the federal government that are more protective than the Constitution requires.[120]

After determining that the unconstitutional portions of RFRA that applied to state government could be severed and did not alter RFRA's structure or applicability to the federal government, the court found federal officials, such as the prison officials here, within the class of defendants subject to RFRA requirements.[121]

The panel, however, lacked unanimity in the application of RFRA.[122] At issue was the provision that "[g]overnment shall not substantially burden a person's exercise of religion . . ." without compelling justification.[123] The majority held this requirement is a question of law for which a plaintiff establishes a prima facie RFRA claim by proving, with evidentiary support, a substantial burden on a sincere exercise of religion.[124]

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116. *Id.*
117. *Id.* at 959.
118. *Kikumura*, 242 F.3d at 959.
119. *Id.*
120. *Id.*
121. *Id.* at 960.
122. In a concurring opinion, Judge Ebel expressed disagreement with the majority only with respect to whether Kikumura's allegations, even if supported by evidence, would establish a "substantial burden" absent a more far-ranging inquiry into matters such as whether the defendants would grant Kikumura pastoral visits by other Christian ministers whose counseling would be substantially similar to that by the minister Kikumura requested. *See id.* at 966. Judge Ebel explained that, "[b]ecause this is an intrinsically fact-based question, and there has been no opportunity for the parties to develop these facts, I believe it is inappropriate for us to rule on the issue as a matter of law at this time. . . . Since we are remanding anyway for a balancing analysis, I would also remand to the district court for it to determine whether there is a substantial burden in the first instance, without prejudging the issue." *Id.* at 966-67.
123. *Kikumura*, 242 F.3d at 961-62.
124. *Id.* at 960-61 (citing 42 U.S.C. § 2000bb-1(a); Werner v. McCotter, 49 F.3d 1476, 1479 n.1 (10th Cir. 1995) (noting that a plaintiff's religious belief must be sincerely held)). *But see supra* note 122.

The court found, and the defendants did not challenge, that Kikumura was sincere in his beliefs.[125] The court also found Kikumura's request for pastoral visits were "protected activities"[126] within the expansive definition of "exercise of religion" Congress adopted in passing the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA").[127] When the district court considered Kikumura's claim, RFRA defined "exercise of religion" as "the exercise of religion under the First Amendment to the Constitution."[128] However, Congress had since amended RFRA to incorporate the RLUIPA definition of "religious exercise" as defined in 42 U.S.C. § 2000cc5,[129] which provides that religious exercise includes "any exercise, whether or not compelled by, or central to, a system of religious belief." Thus, the Tenth Circuit noted Kikumura's expressed desire to study Christianity and practice Christian prayer under the tutelage of a clergyman with missionary experience in Japan satisfied the new RFRA definition of protected "exercise of religion" even though such pastoral visits were not required by Kikumura's religious beliefs.[130]

The court, however, found insufficient evidence on record to support Kikumura's claim that denial of the pastoral visits constituted a "substantial burden" on his exercise of religion as required for showing a substantial likelihood of success on his RFRA claim.[131] The majority (with Judge Ebel dissenting on this point only) did conclude, if Kikumura could provide evidentiary support sufficient to prove the allegations related to his "substantial burden" argument, "he will have satisfied his prima facie burden."[132] The burden will then shift to the defendants to prove "application of the burden" to Kikumura is the "least restrictive means" of furthering a "compelling governmental interest."[133]

b. First Amendment Free Exercise Claim

In reviving Kikumura's RFRA claim, the Tenth Circuit effectively breathed new life into RFRA as applied to the federal government within the Tenth Circuit. The majority (with Judge Holloway dissenting), however, refused to revive Kikumura's First Amendment claim by agreeing with the district court that he had not demonstrated a substantial likeli-

125. *Kikumura*, 242 F.3d at 961.

126. *Id.* at 960-61.

127. *See id.* at 960; Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc) (hereinafter, "RLUIPA").

128. Religious Freedom Restoration Act 42 U.S.C. § 2000bb-2(4) (1999).

129. *Kikumura*, 242 F.3d at 960; 42 U.S.C. § 2000b-2(4).

130. *Kikumura*, 242 F.3d at 960-61.

131. *Id.* at 961.

132. *Id. But see supra* note 122.

133. *Kikumura*, 242 F.3d at 961-62; 42 U.S.C. § 2000bb-(1)(b) ("Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person – (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling interest.")

hood of success on the merits of his First Amendment claim.[134] The court based its decision partly on the deference given prison officials when evaluating prisoners' constitutional claims[135] and, more significantly, based on the Supreme Court precedent under *Turner v. Safley*.[136]

Under *Turner*, a prison regulation may not be "arbitrary or irrational" as evidenced by a valid, rational connection between a legitimate, government interest and the regulation.[137] The court must also consider whether readily available, alternative means exist for the inmate to exercise the asserted constitutional right, as well as the extent to which accommodating the inmate's right might affect guards, other inmates and prison resource allocation.[138] Here the court found the prison regulation that allowed pastoral visits only when the prisoner initiates the request was sufficiently related to the prison's goals of allowing pastoral visits while limiting the overall number of visits and preventing abuses of the system.[139] Thus, as a matter of law, the regulation was not "arbitrary or irrational,"[140] particularly given the deference courts must give prison regulations that attempt to balance prisoner rights with legitimate penological concerns.[141] Kikumura had to demonstrate that no "obvious, easy alternatives" to pastoral visitation existed.[142] The court ruled that he failed this test, suggesting that correspondence would be a possible alternative to pastoral visitation.[143] Accordingly, the majority held the district court did not commit a legal error or abuse its discretion in concluding Kikumura failed to show a substantial likelihood of success on his First Amendment claim.[144]

c. Dissent

In dissent, Judge Holloway disagreed with the majority's analysis of Kikumura's First Amendment claim.[145] Specifically, Judge Holloway argued limitations on the number and frequency of pastoral visits would be an obvious alternative to the "unjustified" use of an inmate's religious identification to "restrict to that *one* faith those from whom pastoral vis-

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134. *Kikumura*, 242 F.3d at 956. *But see infra* Part c (summarizing Judge Holloway's dissent).

135. *Kikumura*, 242 F.3d at 956 (citing O'Lone v. Estate of Shabazz, 482 U.S. 342, 353 (1987) (holding that courts cannot substitute their judgment on matters of institutional administration for prison officials' determinations, even when First Amendment claims are made)).

136. *Id.* at 956 (citing Turner v. Safley, 482 U.S. 78, 89 (1987) (holding that "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests")).

137. *Turner*, 482 U.S. at 89, 90.

138. *Id.* at 90-91.

139. *Kikumura*, 242 F.3d at 957.

140. *Id.*

141. *Id.*

142. *Id.* at 957-58 (citing *Turner*, 482 U.S at 90).

143. *Id.* (citing *Turner*, 482 U.S. at 90).

144. *Id.* at 958.

145. *Kikumura*, 242 F.3d at 964.

its or counseling is permitted" and to ban "*all* other pastoral visitors."[146] For that reason, Judge Holloway found the prison's regulation too broad and not reasonably related to any legitimate penological interest.[147] Accordingly, he disagreed with the majority's conclusion that Kikumura had not demonstrated a substantial likelihood of success on his First Amendment claim.[148] However, he agreed with the majority that, on remand, the district court should provide Kikumura the opportunity to prove his allegation that the requested clergyman was well suited to provide him religious assistance.[149] In agreeing with the majority that Kikumura should be allowed to provide evidentiary support for his RFRA claim, Judge Holloway stated the defendants also should be allowed to present any showing they may have on security issues they claim were involved.[150]

B. *The "Indian Tribal Use" Exception Cases*

On August 8, 2001, just five months after *Kikumura*, the Tenth Circuit simultaneously issued three opinions in cases involving individuals charged with violating federal laws prohibiting the possession of eagle feathers — *Saenz v. Department of the Interior, United States v. Hardman and United States v. Wilgus*.[151] In all three cases, the court found the individuals were practitioners of Native American religions that purportedly required the use of items with eagle feathers.[152]

The federal laws at issue were the Bald and Golden Eagle Protection Act ("BEGPA")[153] and the Migratory Bird Treaty Act ("MBTA").[154] Both acts prohibit, *inter alia*, the possession and transportation of eagles and eagle parts unless permitted to do so under the so-called "Indian tribal use" provisions of the federal "Eagle Permits" regulation.[155] The exception requires applicants to provide the U.S. Fish and Wildlife Service (the "FWS") with "certification of enrollment in an Indian tribe that is

146. *Id.*

147. *Id.*

148. *Id.* at 965.

149. *Id.*

150. *Id.* at 966.

151. *See* Saenz v. Dep't of the Interior, No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Hardman, No. 99-4210, 2001 U.S. App. 17702 LEXIS (10th Cir. Aug. 8, 2001), *vacated by Hardman*, 260 F.3d 1199; United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001) *vacated by Hardman*, 260 F.3d 1199.

152. *Saenz*, 2001 U.S. App. LEXIS 17698, at *12; *Hardman*, 2001 U.S. App. 17702, at *2; *Wilgus*, 2001 U.S. App. LEXIS 17700, at *4.

153. 16 U.S.C. § 668 (2001).

154. 16 U.S.C. § 703 (2001).

155. *Id.*; 16 U.S.C § 668; 50 C.F.R. § 22.22 (2002).

federally recognized"[156] and that the applicant be "an Indian who is authorized to participate in bona fide tribal religious ceremonies."[157]

1. *Saenz v. Department of the Interior*[158]

a. Facts

The Chiricahua tribe of Apache Indians was recognized as a tribe by the federal government until 1886, when the Chiricahua reservation was dissolved in the wake of warfare between the Apache and the United States.[159] Joseluis Saenz was a descendent of the Chiricahua, whose religious practices required the use of eagle feathers.[160] In 1996, pursuant to the BGEPA,[161] New Mexico state officials seized and sent to the FWS eagle feathers from Saenz's home because he did not have a permit authorizing him to possess them.[162] The BGEPA authorized the Secretary of the Interior (the "Secretary") to permit the taking, possession and transportation of eagles and eagle parts under specified circumstances, including "for the religious practices of Indian tribes."[163] After failing to get the items back through administrative proceedings, Saenz sought their return by filing a motion in district court for return of his property.[164] Saenz argued he had a right to possess eagle feathers under BGEPA, asserting claims under RFRA, the Free Exercise Clause, and the Equal Protection Clause.[165] The district court granted Saenz's motion based "solely on the BGEPA and RFRA" without reaching the constitutional issues.[166] The government appealed.

b. Tenth Circuit Opinion

On appeal, the government stipulated Saenz was a Chiricahua Indian and sincere practitioner of the Chiricahua Apache Indian religion.[167] Even though the government also agreed that the BGEPA substantially burdened Saenz's religious beliefs, it argued "restricting eagle permits to members of federally-recognized Indian tribes is the least restrictive means of furthering the government's compelling interests . . . in eagle

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156. The definition of "tribe" and significance of federal recognition is a highly complex and sensitive issue beyond the scope of this article. *See generally* COHEN, *supra*, note 16 at 3-27 (discussing "tribe" and "Indian" as an ethnological classifications and as a legal-political designations, and the significance of these distinctions in different legal contexts).

157. 50 C.F.R. § 22.22.

158. No. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 8, 2001).

159. *Id.* at *2.

160. *Id.*

161. 16 U.S.C. § 668 (2001).

162. *Saenz*, 2001 U.S. App. LEXIS 17698, at *2-3.

163. *Id.* at *4 (quoting 16 U.S.C. § 668a).

164. *Id.* at *3.

165. *Id.*

166. *Id.* at *9.

167. *Id* at *13.

conservation and fulfilling its treaty obligations to Indian tribes under RFRA."[168] The Tenth Circuit, like the court below, analyzed Saenz's request for return of the eagle feathers under RFRA without specifically addressing his constitutional claims under the Free Exercise and Equal Protection clauses.[169] However, in an opinion written by Judge Kelly, the Tenth Circuit ruled in Saenz's favor and declared the regulation unconstitutional.[170]

The court first rejected the government's assertion that Saenz lacked standing to challenge the permit process because "he failed to actually apply for a permit."[171] The court reasoned that the regulation restricts permits to members of federally-recognized Indian tribes and contains no provision for discretionary waivers.[172] Therefore, it would have been "futile" for Saenz to apply for a permit notwithstanding "credible proof that he is Indian and uses eagle feathers as an essential part of the exercise of an Indian religion."[173] "The law recognizes . . . that a plaintiff need not make costly futile gestures simply to establish standing, particularly when the First Amendment is implicated."[174]

Using the test set forth in *Kikumura*, the court found Saenz had established a prima facie free exercise claim under RFRA by showing the government had "(1) substantially burdened (2) a sincerely-held (3) religious belief."[175] The burden then shifted to the government to "demonstrate that the challenged regulation furthers a compelling state interest in the least restrictive manner," as required by 42 U.S.C. § 2000bb-1(b)(1).[176]

With respect to the government's asserted interest in fulfilling trust and treaty obligations, the Tenth Circuit agreed with the district court below that trust and treaty obligations generally encompass "a duty to tribal government and a need to acknowledge tribal sovereignty."[177] However, it then argued, the central issue in this case was "the rights of an individual, not as against tribal governments, but as against the United

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168. *Saenz*, 2001 U.S. App. LEXIS 17698, at *12-13.

169. *Id.* at *13.

170. J. McKay and J. Murphy also sat on this panel.

171. *Id.* at *14. *But see* United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (holding defendant Indians' failure to apply for a permit precluded their challenge to the *manner* in which the BGEPA was applied, but preserving their facial challenge of the statute and the "Indian tribal use" exception under RFRA). *Hugs* is discussed more fully *infra* Part II.C.

172. *Saenz*, 2001 U.S. App. LEXIS 17698, at *15.

173. *Id.*

174. Lac Vieux Desert Band of Lake Superior Chippewa Indians v. Mich. Gaming Control Bd., 172 F.3d 397, 406 (6th Cir. 1999).

175. *Saenz*, 2001 U.S. App. LEXIS 17698, at *15 (citing Kikumura v. Hurley, 242 F.3d 950, 960 (10th Cir. 2001).

176. *Id.* at *16.

177. *Id.* at *21-22.

States."[178] The court also looked to legislative history as an indication that Congress intended to balance the "conservation purposes of the statute" against the "special cultural and religious interests of Indians."[179] Thus, the government failed to prove a compelling interest in fulfilling trust and treaty obligations with respect to the BGEPA.[180]

Significantly, the Tenth Circuit questioned the district court's finding that the government had a compelling interest in eagle conservation.[181] However, the court declined to decide on this issue as "unnecessary" to its disposition of this case, because of its conclusion the government was not furthering its interest – even if it were compelling – by the "least restrictive means," pursuant to 42 U.S.C. § 2000bb-1(b)(2).[182]

The government argued restricting permits to members of federally-recognized Indian tribes satisfied the "least restrictive means" test for four reasons.[183]

The first reason was "allowing all persons of Indian heritage to possess eagle feathers, without regard to membership in a recognized tribe, would undermine the United States's obligations to recognized tribes."[184] Because the court had already ruled the government failed to prove its treaty interests in the context of this case were compelling, this reason could not be used to justify the permit system.[185]

The government's second argument was that its interest in protecting eagles would be harmed because "significantly increasing the number of persons authorized by law to possess eagle parts and feathers . . .

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178. *Id.* Additionally, the Tenth Circuit specifically declined to follow the Eleventh Circuit, which had held that the government had a compelling interest in fulfilling its treaty obligations based on an analysis that the BGEPA was "meant to be a substitute for tribes' abrogated hunting treaty rights." *Id.* at *19 (citing Gibson v. Babbitt, 223 F.3d 1256, 1258 (11th Cir. 2000)). Although the Supreme Court has held the BGEPA abrogated Native American hunting rights, the purpose of the "Indian tribes" exception was for "religious" not "hunting" purposes in consideration of the Indians' "special cultural and religious interests." *See* United States v. Dion, 476 U.S. 734, 743-45 (1986).

179. *Saenz*, 2001 U.S. App. LEXIS 17698, at *20-21.

180. *Id.* at *22.

181. *Id.* at *22-23. Though the court acknowledged case law "seems to support this proposition," it contended the government's "alleged" interest in eagle conservation "existed without evidentiary analysis," noting the golden eagle was not endangered and the FWS had proposed the bald eagle be removed from the endangered species list. *Id.* at *22-23, *23 n.8 (citing *Gibson v. Babbitt*, 72 F. Supp. 2d. 1356, 1360 (S.D. Fla. 1999), *aff'd*, 223 F.3d 1256 (11th Cir. 2000); United States v. Hugs, 109 F.3d 1375, 1378 (9th Cir. 1997); United States v. Lundquist, 932 F. Supp. 1237, 1241 (D. Ore. 1996); United States v. Thirty Eight (38) Golden Eagles or Eagle Parts, 649 F. Supp. 269, 276-77 (D. Nev. 1986), *aff'd*, 829 F.2d 41 (9th Cir. 1987)). *See also* Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32, 35 (1st Cir. 1992) (finding the government has a "legitimate governmental interest" in "protecting a dwindling and precious eagle population").

182. *Saenz*, 2001 U.S. App. LEXIS 17698, at *23.

183. *Id.* at *25, *31.

184. *Id.* at *25.

185. *Id.* at *26.

would likely lead to increased numbers of illegal kills and increased reliance on a black market for eagle parts."[186] The court shot down this argument for lack of proof that illegal killings would increase or that a black market for eagle parts even existed.[187] Arguably, the court stated, "opening up the permit process to all Native Americans . . . would decrease the number of illegal eagle kills and black market transactions . . . [because] a Native American who is not a member of a federally-recognized tribe has no method . . . of obtaining eagles for religious ceremonies other than through the black market."[188]

The government also asserted equal protection concerns.[189] Specifically, opening up the permit process to all Native Americans would rely on an "impermissible racial classification."[190] The government based its argument on the Supreme Court's landmark decision in *Morton v. Mancari*[191] that found membership in a federally-recognized tribe was "political in nature rather than racial in nature."[192] The *Saenz* court distinguished the context for the *Morton* ruling as "solely concerned with tribal sovereignty" from Saenz's case as "dealing with an individual's free exercise rights."[193] The court went on to note that even the government admitted "there may be occasions when it is defensible for the government to rely on ancestry in determining a person's status as an Indian."[194] In concluding "this is one of those occasions," the court pointed to certain federal educational and employment programs as examples that allow for a broader definition of "Indian" that includes Native Americans who are not members of federally-recognized tribes.[195] The court also noted "federal policy toward recognition of Indian tribes has been by no means consistent with 'real' ethnological principles."[196] Congress has frequently consolidated distinct tribes for recognition purposes, divided tribes into more than one separately recognized group, terminated some tribes' federal recognition (e.g., the Chiricahua Indians) and

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186. *Id.* at *25.

187. *Id.* at *29.

188. *Saenz*, 2001 U.S. App. LEXIS 17698, at *31. By contrast, the Eleventh Circuit, in upholding the validity of the "Indian tribal use" exception, emphasized that opening up the permit process would increase the burden on the religious practices of members of federally recognized tribes. *See* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000); discussion *infra* Part III, C.

189. *Saenz*, 2001 U.S. App. LEXIS 17698, at *31.

190. *Id.* at *32.

191. 417 U.S. 535 (1974).

192. *Id.* (citing *Morton*, 417 U.S. at 553 n.24 (holding that a BIA employment preference applies to applicants who are members of federally recognized tribes, not as a discrete racial group, but as members of quasi-sovereign tribal entities)). *See also* COHEN, *supra* note 16, at 3-27.

193. *Saenz*, 2001 U.S. App. LEXIS 17698, at *32-33.

194. *Id.* at *33.

195. *Id.* at *33-34.

196. *Id.* at *35-36 (quoting Christopher A. Ford, *Executive Prerogatives in Federal Indian Jurisprudence: The Constitutional Law of Tribal Recognition*, 73 DENV. U. L. REV. 141, 156 (1995)).

restored federal recognition for others.[197] On the one hand, the government made federal recognition impossible for the Chiricahua tribe, while on the other hand, it "wants to use that same lack of recognition to infringe upon Mr. Saenz's religious freedom. We refuse to base Mr. Saenz's free exercise rights on such tenuous ground."[198]

The court was especially unsympathetic to the government's final argument that expanding the permit program to encompass all Indians would make it "administratively unfeasible."[199] The court noted, the BGEPA permit system exception had operated for at least eleven years after the Secretary first issued the "Indian tribal use" exception and possibly for as many as eighteen before the government imposed the "federally-recognized" requirement.[200] The court, again, pointed to other federal programs for Native Americans that do not require participants belong to federally recognized tribes as additional evidence that the government is able to allocate limited resources among a broader pool of applicants.[201]

The court's bottom line was membership in a federally-recognized tribe "bears no relationship whatsoever to whether or not an individual practitioner is of Indian heritage by birth, sincerely holds and practices traditional Indian religious beliefs, is dependent on eagle feathers for the expression of those beliefs, and is substantially burdened when prohibited from possessing eagle parts."[202]

2. *United States v. Hardman*[203]

a. Facts

Raymond Hardman had practiced a Native American religion for many years.[204] He lived in Neola, Utah, within the boundaries of the Uintah and Ouray Ute Reservation.[205] Although his ex-wife and children were enrolled members of the federally recognized S'Kallum Tribe, Hardman himself was not of Native American descent.[206] In 1993, in the course of a religious ritual, a Hopi tribal religious leader gave Hardman a bundle of prayer feathers, including golden eagle feathers, to keep in his truck which he had used to transport the body of his son's godfather to religious services in Arizona.[207] After Hardman returned to his home, he

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197. *Id.* at *35-36.
198. *Id.* at *37.
199. *Saenz*, 2001 U.S. App. LEXIS 17698, at *37-38.
200. *Id.* at *5 n.2, *38.
201. *Id.* at *38.
202. *Id.* at *38-39.
203. No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001).
204. *Hardman*, 2001 U.S. App. LEXIS 17702, at *2.
205. *Id.*
206. *Id.*
207. *Id.*

"contacted the Utah Division of Wildlife Resources in order to obtain a permit to possess the feathers," but was told he could not apply because he was not a member of a federally recognized tribe.[208]

In 1996, Hardman's estranged wife told Ute tribal officials Hardman possessed golden eagle feathers without a permit.[209] Subsequently, Hardman surrendered the feathers, under protest, to a Ute tribal fish and game officer, who was cross-commissioned as a federal law enforcement agent.[210] On March 10, 1997, Hardman was issued a violation notice for possessing golden eagle feathers without a permit pursuant to the Migratory Bird Treaty Act ("MBTA").[211] Almost two years later, a magistrate judge convicted Hardman of violating the MBTA and imposed a small fine.[212] A district court affirmed Hardman's conviction, and he appealed to the Tenth Circuit.[213]

b. Tenth Circuit Opinion

As in *Saenz*,[214] the government argued Hardman had no standing because he never actually applied for a permit.[215] However, the Tenth Circuit held Hardman's "good faith effort to do so" was sufficient to establish standing.[216]

Once again, as in *Saenz*, the tougher question was what standard to apply to the regulatory requirement that permits could only be issued to members of federally recognized tribes.[217] Hardman raised Free Exercise Clause and Establishment Clause challenges to the permit criteria in the MBTA and its implementing regulation which states: "(1) that the person be an actual practitioner of a bona fide Native American religion requiring the use of migratory bird feathers, and (2) that the person be a member of a certain political classification, i.e., a member of a federally recognized tribe."[218] Hardman argued both qualifications should be subject to and would fail strict scrutiny.[219]

i. Free Exercise Claim: Revisiting RFRA and *Smith*

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208. *Id.*
209. *Id.* at *2-3.
210. *Hardman*, 2001 U.S. App. LEXIS 17702, at *3.
211. *Id.*; 16 U.S.C. § 703 (2001).
212. *Hardman*, 2001 U.S. App. LEXIS 17702, at *3.
213. *Id.*
214. 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001).
215. *Hardman*, 2001 U.S. App. LEXIS 17702, at *4.
216. *Id.*
217. *Id.* at *6-7; *see also* Saenz v. Dep't of Interior, no. 00-2166, 2001 U.S. App. LEXIS 17698 (10th Cir. Aug. 18, 2001).
218. *Id.* (citing 50 C.F.R. § 22.22 (2002)).
219. *Id.* at *7.

Judge Tacha, writing for the majority,[220] first addressed the question of whether to apply the RFRA standard of review even though Hardman had not raised RFRA.[221] The court acknowledged that Congress intended to overturn the Supreme Court's interpretation of the Free Exercise Clause as set forth in *Smith*, and also acknowledged that, under its own decision in *Kikumura*, RFRA created a "valid *statutory* 'standard for suits against the federal government.'"[222] The court then concluded "a RFRA claim for relief from federal burdening of religion is clearly distinct from a First Amendment claim for identical relief," labeling the latter a "*constitutional* free exercise claim" subject to the *Smith* standard.[223] Although the Tenth Circuit had previously applied the RFRA standard to a First Amendment claim, "even when it was not raised by the parties,"[224] it declined to do so here.[225]

In applying the *Smith* standard, the court posited two questions: (1) "does a generally applicable law containing an accommodation for a specific religious group . . . violate the *Smith* requirement of neutrality"; and (2) if "non-neutral, does the fact that the accommodation is for a Native American religion trump the generic rule, thereby requiring only the application of a rational basis test, rather than strict scrutiny?"[226]

With respect to the first question, the court responded in the affirmative.[227] Thus, the court found that, although the MBTA without the exemption is "clearly neutral"[228] with the secular purpose of protecting eagles, "its attendant regulations for practitioners of Native American religions" rendered it in violation of the *Smith* neutrality standard.[229] However, the court stated its holding was not "dispositive of the neutrality analysis in this case..." because Harding's religion did not prevent him from complying with the permitting regulations.[230] Rather, his non-membership in a federally recognized Indian tribe, a "political classification render[ed] him . . . in violation of the statute."[231] Because the court had "no difficulty" finding neutrality forbids "religious accommodations contingent on membership in a particular political subdivision," it held

220. Also on this panel were J. Henry, concurring, and J. McKay, dissenting. *Id.* at *2.

221. *Hardman*, 2001 U.S. App. LEXIS 17702, at *7.

222. *Id.* at *8-9 (emphasis added) (citing Employment Div. v. Smith, 494 U.S. 872 (1990) and Kikumura v. Hurley, 242 F.3d 950 (2001), and mentioning City of Boerne v. Flores, 521 U.S. 507 (1997)).

223. *Id.* at *9 (emphasis added).

224. *Id.* at *10 (citing Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995)).

225. *Id.* (refusing to "transform [Hardman's] constitutional claim into a statutory one").

226. *Id.* at *12.

227. *Hardman*, 2001 U.S. App. LEXIS 17702, at *12.

228. *Id.* at *13 n.3.

229. *Id.* at *35-36.

230. *Id.* at *36.

231. *Id.*

both qualifying requirements of the permitting process violated *Smith's* neutrality prong.[232]

With respect to the second question, the Tenth Circuit responded in the negative.[233] The court specifically rejected the rationale adopted by the First Circuit in upholding the same regulation pursuant to an Establishment Clause challenge.[234] In *Rupert v. Director, United States Fish & Wildlife Service*,[235] the First Circuit held that "where the government has treated Native Americans differently from others in a manner that arguably creates a religious classification," the First Amendment is not violated because of "Congress's historical obligation to respect Native American sovereignty and to protect Native American culture."[236] The Tenth Circuit found the First Circuit's analysis inapplicable to Hardman's free exercise claim, because the First Amendment's "two religion clauses protect different values, and because they require different things from the government."[237] *Rupert* concerned the government's inability to "maintain strict non-entanglement with religion when it was exercising its trust duties toward Native American tribes."[238] By contrast, in analyzing Hardman's situation, the Tenth Circuit found the Free Exercise Clause is concerned with "protecting individual religious freedom" so that the "Free Exercise Clause cannot be trumped by the guardian-ward relationship between the government and Native American tribes."[239] Thus, the court concluded First Amendment strict scrutiny applied and required the regulation be "justified by a compelling governmental interest and must be narrowly tailored to advance that interest."[240]

Contrary to the *Saenz* panel, this Tenth Circuit panel found that the United States had compelling interests sufficient to save the regulation.[241] The court distinguished the MBTA from the Bald and Golden Eagle Protection Act ("BGEPA")[242] in that the former implements treaty agreements between the United States and Mexico, which the court found created a compelling governmental interest in "enforcing its treaty obligations . . ."[243] Although this panel found the government's interest in protecting Native American culture and religion was inapplicable to the analysis that lead to its use of the strict scrutiny test, it noted that this interest – the same interest the *Saenz* panel found uncompelling – also

232. *Id.* at *37.
233. *Hardman*, 2001 U.S. App. LEXIS 17702, at *12.
234. *Id.* at *40-41.
235. 957 F.2d 32 (1st Cir. 1992).
236. *Hardman*, 2001 U.S. App. LEXIS 17702, at *40 (quoting *Rupert*, 957 F.2d at 34-35).
237. *Id.* at *48.
238. *Id.* at *49.
239. *Id.*
240. *Id.* at *49-50 (citing Church of Lukumi Babalu Aye, Inc., v. City of Hialeah, 508 U.S. 520, 531-32, 546 (1993)).
241. *Id.* at *55.
242. 16 U.S.C. § 668a (2001).
243. *Hardman*, 2001 U.S. App. LEXIS 17702, at *50-52.

was sufficiently compelling to justify the burden on Hardman's free exercise of his religion.[244]

ii. Establishment Clause Claim

Because the court had already determined the permitting process survived strict scrutiny in its free exercise analysis, it concluded it did not need to decide whether the regulation should be subject to the rational basis or strict scrutiny review in the Establishment Clause context.[245] However, in dicta, the court noted that, where a denominational preference exists, strict scrutiny applies,[246] but also acknowledged the "unique guardian-ward relationship between the federal government and Native American tribes precludes the degree of separation of church and state ordinarily required by the First Amendment."[247] The court also stated the government could not apply "conventional separatist understandings of the establishment clause" to that relationship.[248]

c. Dissent

Judge McKay, who also sat on the *Saenz* panel, dissented.[249] He disagreed with the majority's characterization of RFRA "as a statutory cause of action separate from a constitutional claim."[250] Rather, McKay wrote that RFRA is a "required statutory supplement to those constitutional claims."[251] In this regard, RFRA strict scrutiny applies to all free exercise challenges to federal government actions even if not raised by any of the parties.[252]

Judge McKay acknowledged that the First, Ninth and Eleventh Circuits had held that the Indian tribal use regulation survived strict scrutiny, but declined to follow their precedent.[253] Despite his belief that the federal government, as a matter of law, has a compelling interest in accommodating Native Americans' religious practices, Judge McKay wrote, "it is not at all obvious to me that this interest leads to the conclu-

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244. *Id.* at *54-55. Significantly, in light of the holding in *Saenz*, this panel stated it did not reach "more specific questions which may arise later under 50 C.F.R. § 22.22 such as whether a bona fide Native American who is not a member of a federally recognized tribe may constitutionally be excluded from the exemption." *Id.* at *55 n.21.

245. *Id.* at *58.

246. *Id.* at *56 (citing Larson v. Valente, 456 U.S. 228 (1982)).

247. *Id.* (quoting Peyote Way Church of God, Inc., v. Thornburgh, 922 F.2d 1210, 1217 (5th Cir. 1999)).

248. *Id.*

249. *Hardman*, 2001 U.S. App. LEXIS 17702, at *63.

250. *Id.* at *68.

251. *Id.*

252. *Id.*

253. *Id.* (citing Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997); Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992)).

sion that the government may draw distinctions between adherents to the same religion and practices."[254]

Judge McKay's dissent also echoed the *Saenz* panel in questioning whether sufficient evidence existed to support the government's claim of a compelling interest in protecting eagles.[255] He rejected the majority's finding that the government had a compelling interest in fulfilling its treaty obligations under the MBTA.[256] Though the treaty authorizes the government to enact regulations for distributing eagle parts, Judge McKay argued, such regulations "must comply with the Constitution."[257]

He concluded that the record was not adequately developed to determine whether the government's interest in protecting eagles was compelling, and if so, whether it was sufficiently compelling to "require discrimination among adherents to the same religion."[258] Judge McKay stated additional fact finding on this issue was needed to determine whether the regulatory scheme satisfied "either the narrowly tailored or the least restrictive means tests" for achieving any government interest "so compelling as to justify the denial of free exercise of religion."[259]

3. *United States v. Wilgus*[260]

a. Facts

Samuel Ray Wilgus, Jr., like Hardman, was a non-Indian who was a "bona fide adherent of a Native American religion.[261] Possession of eagle feathers was central to his beliefs and practices."[262] In June 1998, a Utah Highway Patrol officer stopped a pick-up truck in which Wilgus was a passenger and discovered a box containing 137 feathers from bald and golden eagles.[263] Wilgus admitted he possessed the feathers and others subsequently seized from his home by the Utah Division of Wildlife Resources.[264] Wilgus was charged with violating the BGEPA because he did not have a permit.[265] He entered a conditional guilty plea, which permitted him to challenge the district court's denial of his motion to dismiss the indictment in which he asserted violations of the First Amendment's religion clauses.[266]

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254. *Id.* at *68-69.
255. *Hardman*, 2001 U.S. App. LEXIS 17702, at *69.
256. *Id.* at *70.
257. *Id.*
258. *Id.* at *71.
259. *Id.*
260. No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001).
261. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *4.
262. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *3.
263. *Id.* at *2-3.
264. *Id.* at *3.
265. *Id.* at *4.
266. *Id.* at *5.

b. Tenth Circuit Opinion

Judge Ebel,[267] writing for the majority, raised the threshold issue of whether RFRA always applies in free exercise cases even when, as here, it is not raised on appeal.[268] After acknowledging the split among the circuits on this question, the court declined to apply RFRA – notwithstanding a finding that the regulation substantially burdened Wilgus's religious freedom – based on the rule that "an appellant must raise the issues upon which he seeks [the] court's review."[269] Where Judge McKay's dissent in *Hardman* found RFRA "by its own language . . . applies 'in all cases where free exercise of religion is substantially burdened,'"[270] the *Wilgus* majority argued that "[h]ad Congress desired . . . courts to apply RFRA in all free exercise cases . . . it would have written RFRA unambiguously to achieve that purpose."[271]

i. Free Exercise Claim

Like the *Hardman* majority, the majority in *Wilgus* applied the *Smith* standard, but reached a different conclusion.[272] In this instance, the court relied largely on *Church of the Lukumi Babalu, Aye, Inc. v. City of Hialeah*, for guidance to determine whether the BGEPA is neutral and generally applicable.[273] "Neutrality," the court noted, is a "subjective inquiry into the purpose or object of a law," while "general applicability" is an objective inquiry as to its scope.[274]

Because the BGEPA's purpose was protecting eagles, the court held it was neutral despite its exceptions for Indian religious and other purposes such as scientific exhibitions, which do "not change the [BGEPA's] purpose."[275] Even if the Indian tribal use exception was examined separately, the court found the law would not violate the neutrality principle because the object and purpose is to permit members of federally recognized tribes to use eagle feathers in their worship, not to prohibit non-Indians from doing so.[276] The court asserted that a fundamental difference exists between laws having the purpose to accommodate religious practices and those that prohibit or burden religion.[277] By analogy,

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267. Also on this panel were J. McWilliams, concurring, and J. Baldock, dissenting. *Id.* at *2.

268. *Wilgus*, 2001 U.S. App. LEXIS 17700, *6-7.

269. *Id.* at *9 (citing Hernandez v. Starbuck, 69 F.3d 1089, 1093 (10th Cir. 1995)).

270. United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 at *67 (10th Cir. Aug. 8, 2001) (quoting 42 U.S.C. 2000bb(b)(1)).

271. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *10-11.

272. *Id.* at *12-15.

273. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *12-15 (citing Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531, 533 (1993)).

274. *Id.* at *14.

275. *Id.* at *15-16 (citing 16 U.S.C. § 668a).

276. *Id.* at *16.

277. *Id.* at *16-17. When a generally applicable statute incidentally burdens religion, recent Supreme Court decisions suggest legislative attempts to relieve such government-imposed burdens

Judge Ebel explained that if he permits his daughter to drive his car, his purpose is not to prohibit his son from driving the car "even if that is the practical effect."[278] Though exceptions made for certain religious groups may support a conclusion that a "covert purpose of a legislative scheme is to discriminate . . . 'adverse impact will not always lead to a finding of impermissible targeting.'"[279]

Although the Supreme Court had defined a neutral law as one that neither burdened nor benefited religious conduct, here, the Tenth Circuit applied a narrower definition that looked only to whether the regulation at issue burdened religious practice.[280] The court employed a textual analysis comparing the word "prohibiting" in the Free Exercise Clause with the "more general word 'respecting'" in the Establishment Clause.[281] Thus, in applying the narrower view of neutrality, the court concluded that the BGEPA is neutral because the purpose of the law's exceptions is to "benefit members of federally recognized Indian tribes . . . and not to burden anyone."[282] The court buttressed its conclusion that the BGEPA was neutral by asserting the Indian tribal use exception was designed to benefit a political group rather than a racial or religious group, citing several examples in which federal law has recognized Indians' special status as a permissible political classification.[283]

The court also found the BGEPA satisfied the "objective half of the *Smith* analysis."[284] The court argued general applicability does not mean "universal applicability."[285] "Rather, 'general' should be given its customary meaning of 'widespread,' 'predominant' or 'prevalent,' admit[ting] the possibility of some minor exceptions or deviations."[286] Because the BGEPA's proscription against possessing eagle feathers is a

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on free exercise are "permissible accommodations" that do not offend the Establishment Clause. *See* Roberto L. Corrada, *Religious Accommodation and the National Labor Relations Act*, 17 BERKELEY J. EMP. & L. 185, 191 (1996).

278. *Id.* at *17.

279. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *18-19 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535). *Wilgus* notes that a city's general prohibition against ritual animal slaughter constituted "an impermissible attempt to target" a specific church's religious practices). *Id.* at *18 (quoting *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 535).

280. *Id.* at *19-22 (citing *Church of the Lukumi Babalu Aye, Inc.*, 508 U.S. at 532).

281. *Id.* at *22.

282. *Id.* at *24.

283. *Id.* at *25-28. (quoting Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) ("[T]he peculiar semi-sovereign and constitutionally recognized status of Indians justifies special treatment . . ."); Morton v. Mancari, 417 U.S. 535, 552 (1974) ("Literally every piece of legislation dealing with Indian tribes . . . single out for special treatment a constituency of tribal Indians."); United States v. Antelope, 430 U.S. 641, 645 (1977) ("[F]ederal legislation with respect to Indian tribes . . . is not based upon impermissible racial classifications . . .").

284. *Id.* at *28.

285. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *30.

286. *Id.*

prohibition imposed on "almost all of society," the court found it fits squarely within its definition of generally applicable.[287]

By applying the *Smith* standard to find the BGEPA both neutral and generally applicable rather than RFRA's more rigorous compelling interest test, the court avoided the necessity of evaluating the strength of the government's interests. The court also dismissed what it referred to as the "'*Sherbert* exception,'" arguing that its mandate to apply strict scrutiny to individual exemptions in the post-*Smith* era applies only to unemployment compensation cases.[288] Thus, the BGEPA "falls within the *Smith* safe harbor" and does not offend the Free Exercise Clause, "despite its incidental effect on Wilgus's religious practice."[289]

ii. Establishment Clause Claim

Wilgus also argued the BGEPA violated the Establishment Clause by creating "impermissible denominational and racial preferences" by permitting members of federally recognized Indian tribes to possess eagle feathers but denying him that privilege.[290] The court, again, looked to precedent recognizing the unique relationship between the federal government and Indian tribes. It determined that the government need only show that the special treatment the BGEPA bestows on Native Americans is "rationally related to the government's extraordinary duty to Indians."[291] Here, in contrast to *Saenz*, the court concluded that the "Indian tribal use" exception to the BGEPA was "rationally related to the government's unique obligation to preserve Indian tribes' heritage and culture."[292]

c. Dissent

In his dissenting opinion, Judge Baldock disagreed with the majority's application of *Smith*.[293] He argued that the majority unjustifiably ignored RFRA's "heightened legislative standard," against which Congress "undoubtedly intended courts to measure laws such as the BGEPA."[294] Like Judge McKay in his *Hardman* dissent, Judge Baldock found "RFRA's plain language and tone" unambiguous in its intent that RFRA applies "'in all cases where free exercise of religion is substan-

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287. *Id.* at *31.

288. *Id.* at *31 n.16 (quoting Employment Div. v. Smith, 494 U.S. 872, 884 (1990)).

289. *Id.* at *32.

290. *Id.* at *32.

291. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *33-34 (citing Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 673 n.20 (1979) (explaining the Court "has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians'").

292. *Id* at *34.

293. *Id.*

294. *Id.* at *35.

tially burdened.'"[295] Because the BGEPA's substantial burden on Wilgus's exercise of his religious beliefs was undisputed, RFRA should apply.[296]

With respect to the majority's argument that the court need not apply RFRA because Wilgus failed to raise it as an affirmative defense, Judge Baldock argued that the district court's error in concluding that the United States Supreme Court had held RFRA unconstitutional was among the "exceptional circumstances" in which an appellate court could and should raise the issue to correct the defect – particularly in a criminal case in which the defendant's substantial rights are affected.[297] In fact, Judge Baldock suggested that Wilgus might have thought he was precluded from asserting his RFRA claim on appeal based on the district court's erroneous conclusion that RFRA was unconstitutional.[298]

Judge Baldock stopped short of concluding the BGEPA failed to meet constitutional muster under RFRA. Rather, he argued more facts were needed to determine, for example, the effect of the recent reclassification of bald eagles from endangered to threatened and the number of non-Indians who practice Native American religions that require eagle feathers.[299]

Judge Baldock also stated that the majority's discussion of Wilgus's Establishment Clause claim was unnecessary and premature.[300] He reasoned that if the BGEPA survived RFRA's strict scrutiny, "it will pass any level of scrutiny applicable to Establishment Clause challenges."[301] Alternatively, if the BGEPA failed strict scrutiny, Wilgus's conviction would fall and his Establishment Clause challenge would be moot.[302]

C. *Analysis*

Two other circuits have ruled that the Indian tribal use exception withstands strict scrutiny review under RFRA, even when challenged by ethnologically Indian practitioners of religious ceremonies that require the use of eagle feathers.[303]

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295. *Id.* at *38 (citing 42 U.S.C. 2000bb(b)(1)); *see also Hardman*, 2001 U.S. App. LEXIS 17702, at *61.

296. *See id.* at *38.

297. *Wilgus*, 2001 U.S. App. LEXIS 17700, at *39-40.

298. *See id.* at *40 n.4.

299. *Id.* at *41.

300. *Id.* at *42 n.5.

301. *Id.*

302. *Id.* at *42 n.5.

303. *See* Gibson v. Babbitt, 223 F.3d 1256 (11th Cir. 2000) (per curiam); United States v. Hugs, 109 F.3d 1375 (9th Cir. 1997) (per curiam). In *Hugs*, the Ninth Circuit analyzed the challenged regulation under RFRA, even though *City of Boerne* was then pending before the Supreme Court. *Hugs*, 109 F.3d at 1378 n.1. The court reasoned that because it found the regulation survived strict scrutiny under RFRA, it would also survive a less stringent test if the court invalidated RFRA. *Id.*

In *United States v. Hugs*, the Ninth Circuit held the BGEPA and permit system "provide the least restrictive means of conserving eagles while permitting access to eagles and eagle parts for religious purposes."[304] In this case, two Native Americans were convicted of taking, attempting to take and purchasing eagles without a permit in violation of the BGEPA as a result of an undercover operation conducted by a state game warden on the Crow Reservation.[305] Though the defendants admitted they trapped, shot at and killed eagles, they claimed they did so to obtain eagle feathers and parts for religious use and that the BEGPA infringed on their free exercise of religion.[306] The court was not asked to evaluate the government's interest in protecting eagles, because the defendants stipulated the interest was compelling.[307] However, the court found the BGEPA's legislative history reflected "the importance of protecting eagles because of their religious significance to Native Americans."[308] It specifically rejected the United States District Court for the District of New Mexico's holding that the BGEPA was unconstitutional because the government had failed to establish a compelling interest in eagle conservation, since the golden eagle was not endangered and "the permit system was 'utterly offensive and ultimately ineffectual.'"[309] The court then determined the information required to obtain a permit was "the minimum necessary to assure that eagles and eagle parts will be used for religious purposes," and, therefore, satisfied RFRA's least restrictive means requirement.[310] In *Hugs*, the Ninth Circuit was asked to invalidate the permit system as facially unconstitutional without regard to the distinction between Indians who are members of federally recognized tribes and those who are not.[311]

In *Gibson v. Babbitt*, [312] however, this distinction was central to Eleventh Circuit's analysis. Here, a Native American challenged the eagle feather permitting system under the First Amendment and RFRA after the FWS denied his request for a permit because he was not enrolled in a federally recognized tribe.[313] In a per curiam decision, the *Gibson* court first analyzed the BGEPA under RFRA and found the govern-

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304. *Hugs*, 109 F.3d at 1378.

305. *Id.* at 1377.

306. *Id.*

307. *See id.*

308. *Id*; *see also* United States v. Dion, 476 U.S. 734, 740-44 (1986) (discussing the legislative history of the BGEPA and the exception for Indian religious use of eagle feathers and eagle parts).

309. *Hugs*, 109 F.3d at 1379 (citing United States v. Abeyta, 632 F. Supp. 1301, 1307 (D.N.M. 1986)).

310. *Id.* at 1378.

311. *See id.* at 1379; *see also* De Meo, *supra* note 16, at 796-97; Perkins, *supra* note 16, at 703 (arguing the permitting system is unconstitutional because it is an unduly burdensome infringement on Indian religious practices).

312. 223 F.3d 1256, 1258 (11th Cir. 2000) (per curiam) (explaining that the issue on appeal narrows to permit applicants who are members of federally recognized Indian tribes).

313. *Gibson*, 223 F.3d at 1257.

ment had a compelling interest in "fulfilling its treaty obligations with federally recognized Indian tribes."[314] In so doing, the court declined to address the government's other asserted interests in protecting eagles and preserving Native American religions.[315] The court found the demand for eagle parts by members of federally recognized tribes exceeded the supply.[316] Therefore, extending permits to other Indians would increase the already prolonged delays "in providing eagle parts to members of federally recognized Indian tribes, thereby vitiating the government's efforts to fulfill its treaty obligations."[317] The court then concluded the permitting system was the least restrictive means to achieve the government's compelling interest in fulfilling its obligations to federally recognized tribes.[318] By the same test, the court also determined the regulation did not violate the First Amendment.[319]

Notwithstanding the factual differences among the Ninth, Tenth and Eleventh Circuits' challenges to the Indian tribal use exception to the BGEPA and the MBTA, these cases represent the collision of several important issues that surely will remain controversial regardless of how the Tenth Circuit rules on rehearing.

Even if one agrees with the commentators and jurisdictions that have construed *City of Boerne* as invalidating RFRA as applied to federal actions,[320] the critical issue is whether the regulation should be analyzed as "legislation that singles out Indians for particular and special treatment"[321] under *Morton* or as a Free Exercise challenge under *Smith.*[322] If viewed as favoring benefits for members of federally registered tribes, *Morton* suggests the Indian tribal use exception would be constitutional as long as the court finds "the preference is reasonable and rationally designed to further Indian self-government."[323]

Under *Smith*, however, the starting point is determining whether the requirement is neutral and generally applicable[324] – a point on which the Tenth Circuit was split in its initial decisions in *Hardman* and *Wilgus.*[325] If the court finds the Indian tribal use exception is not neutral and gener-

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314. *Id.* at 1258.

315. *Id.*

316. *Id.*

317. *Id.*

318. *Gibson*, 223 F.3d. at 1258.

319. *Id.* at 1258-59.

320. *See* Hamilton, *supra* note 20; Blatnik, *supra* note 21; Flagner v. Wilkinson, 241 F.3d 475, 481 (6th Cir. 2001), *cert. denied*, 122 S. Ct. 678 (2001).

321. Morton v. Mancari, 417 U.S. 535, 554-55 (1974).

322. *See* Dep't of Human Res. v. Smith, 494 U.S. 872, 874 (1990).

323. *Morton*, 417 U.S. at 555.

324. *See Smith*, 494 U.S. at 879-81.

325. *See* United States v. Hardman, No. 99-4210, 2001 U.S. App. LEXIS 17702 (10th Cir. Aug. 8, 2001), *vacated by* 260 F.3d 1199 (10th Cir. 2001) (per curiam); United States v. Wilgus, No. 00-4015, 2001 U.S. App. LEXIS 17700 (10th Cir. Aug. 8, 2001), *vacated by* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001) (per curiam).

ally applicable, as did the *Hardman* majority, it must subject the regulation to strict scrutiny.[326] The regulation might survive heightened scrutiny if viewed as a burden the non-Indian majority has imposed on itself to relieve the burden the BGEPA and MBTA would otherwise impose on a political minority's religious freedom. Alternatively, the regulation would be less likely to pass constitutional muster if found to favor one individual's religious practice over another.

If the regulation is subject to strict scrutiny under *Smith* or RFRA, the question becomes whether the court will find any of the government's asserted interests sufficiently compelling to satisfy the first prong of the test. From a civil liberties perspective, these cases may turn on whether the government's interest is characterized as protecting the unique status of federally recognized Indian tribes as a political classification, protecting individual's religious practice without regard to denomination, protecting a religious minority or, as in the *Hardman* case, fulfilling the United States' treaty obligations to Mexico under the MBTA.[327]

If the court extends permit eligibility to all Indians, it must also overcome an equal protection argument that would create a constitutionally suspect class based on race. If the court extends permit eligibility to all individuals who engage in Indian religious practices, it could encounter Establishment Clause problems.[328] Furthermore, any expansion of the permitting system might also provide additional fodder for those who argue eagle conservation is less than compelling.[329]

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326. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *36.

327. *See Hardman*, 2001 U.S. App. LEXIS 17702, at *54-55. In this regard, future claims may turn on whether the government is seeking to enforce the MBTA, which implicates international treaty obligations, or the BGEPA, which does not. *See also* United States v. Hardman, 260 F.3d 1199, 1200 (10th Cir. 2001) ("Are there any relevant differences between the MBTA and the BGEPA such that we should analyze their effect on religious exercise separately?").

328. *But see* Corrada, *supra* note 277, at 252-81. Corrada asserts that under the "burden lifting" model advanced by Justice Scalia, most accommodations of religion would be constitutionally valid. *Id.* at 265. The ultimate test of a legislative accommodation under this model, which Corrada views as being consistent with *Smith*, would be whether the exemption "alleviate[s] a government-imposed burden on religion." *Id.* Thus, an argument can be made that the Establishment Clause is not a constitutional obstacle to extending eligibility for permits to all practitioners of Indian religions (or even any religion that might require the use of eagle parts) to the extent that the BGEPA and MBTA are viewed as laws by which the government has burdened such practitioners' religion and the permitting system is characterized as an accommodation to lift that burden. At the same time, Corrada describes other accommodation models that are less tolerant of religious accommodations. *Id.* In particular, strict application of the three-pronged test first articulated in Lemon v. Kurtzman "would serve to invalidate virtually any statutory religious exemption from generally applicable laws." *Id.* at 253, 272 (citing Lemon v. Kurtzman, 403 U.S. 602 (1971) declaring a government accommodation of religious freedom violates the Establishment Clause unless it (1) serves a "secular legislative purpose;" (2) has a "principal or primary effect . . . that neither advances nor inhibits religion;" and (3) does not foster an "excessive government entanglement" with religion.).

329. Environmental organizations were notably absent from the list of amici who submitted briefs when the Tenth Circuit considered this issue on January 15, 2002. *See supra* note 15.

III. CONCLUSION

In *Kikumura*, the court unequivocally established that RFRA lives in the Tenth Circuit for federal claims, a fact acknowledged in the three subsequent cases.[330] However, RFRA's vitality remained questionable. Implicit in *Kikumura* is the notion that RFRA could sustain a plaintiff's asserted free exercise claim as a statutory matter, even if the challenged federal law or regulation satisfied rational basis review under the *Smith* First Amendment test.[331]

Kikumura, however, did not reach the issue of whether RFRA was strong enough to carry a religious freedom claim when it was not specifically asserted or when it bumps up against an Establishment Clause claim.[332] These questions and others did surface in the three Indian tribal use exception cases in which opinions were issued, vacated and ordered for rehearing en banc as directed by *United States v. Hardman*.[333]

Clearly cognizant of the conflicts among the jurists over fundamental questions of law, the court set forth more than twenty questions for rehearing.[334] The first is whether RFRA or the less onerous First Amendment standard set forth in *Smith* applies to Free Exercise Clause cases.[335] Specifically, should claims arising from burdens on religious freedom be subject to RFRA's statutory strict scrutiny analysis, as urged by Judges McKay and Baldock, in lieu of the courts' traditional First Amendment analysis, even when parties have not raised RFRA below or on appeal?[336] Additionally, what difference, if any, exists between RFRA's least restrictive means requirement and the First Amendment analysis' narrow tailoring requirement for laws that are not neutral and/or generally applicable? A related issue is the precedent of *Werner*, in which the Tenth Circuit applied the RFRA despite its absence in the pleadings, after *City of Boerne*.[337]

The remaining enumerated issues specifically focused on the applicable standard for a Free Exercise Clause analysis of the MBTA and BGEPA, but may provide clues as to how the Tenth Circuit might analyze other cases implicating the Free Exercise and Establishment Clauses.[338] Do the BGEPA and MBTA fall within *Smith's* "safe harbor"

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330. *See generally* Kikumura v. Hurley, 242 F.3d 950 (10th Cir. 2001).

331. *See id.*

332. *See id.*

333. 260 F.3d 1199 (10th Cir. 2001) (per curiam).

334. *Hardman*, 260 F.3d at 1200-02.

335. *Id.* at 1200.

336. *Id.*

337. *See id.*; Werner v. McCotter, 49 F.3d 1476 (10th Cir. 1995).

338. *See Hardman*, 260 F.3d at 1200. This article approaches the serendipitous occurrence of three factually similar, though not identical, situations as a potential opportunity for the court to illuminate and advance the understanding of the interplay between the Establishment and Free Exercise clauses in a way that might have utility beyond its application to the Indian tribal use exception to the BGEPA and MBTA. *See* United States v. Hardman, 260 F.3d 1199 (10th Cir. 2001).

as laws that are neutral and generally applicable?[339] If so, should the court extend to free exercise cases the rational relationship standard other circuits have applied in the Establishment Clause context when analyzing laws based on the unique relationship between the federal government and Indian tribes?[340] If the Acts are not neutral, not generally applicable nor establish "a system of individualized exemptions," will they survive strict scrutiny?[341] What level and type of scrutiny should the court give to Establishment Clause challenges – rational basis, strict scrutiny, the *Lemon v. Kurtzman* test, or one of its modern variants?[342]

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At the same time, the difficulties the Tenth Circuit encountered which led to inconsistent results from the first hearings could indicate such expectations are unrealistic. *See generally* William P. Marshall, *Towards a Nonunifying Theory of Unconstitutional Conditions: The Example of the Religion Clauses*, 26 SAN DIEGO L. REV. 243 (1989) (supporting his thesis that "the search for a comprehensive theory of unconstitutional conditions is ultimately futile" by noting the "baselines" against which the constitutionality of religious benefits and deprivations may be measured "may not even remain constant within one constitutional protection").

339. *Id.*

340. *Id.*; *see* Rupert v. United States Fish & Wildlife Serv., 957 F.2d 32 (1st Cir. 1992); Peyote Way Church of God, Inc. v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (applying the rational basis test to Establishment Clause cases).

341. *Hardman*, 260 F.3d at 1200; *see also* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 531-32 (1993) (requiring application of First Amendment strict scrutiny to non-neutral laws that are not generally applicable); Sherbert v. Verner, 374 U.S. 398, 403 (1963) (requiring the government to demonstrate a compelling interest to support laws that create systems of individualized exemptions); *cf.* Employment Div. v. Smith, 494 U.S. 872, 883-85 (1990) (holding the *Sherbert* test inapplicable to free exercise challenges of governmental actions that substantially burden a religious practice).

342. *Hardman*, 260 F.3d at 1200-01; *see* Morton v. Mancari, 417 U.S. 535 (1974); *see also* Rupert v. United States Fish and Wildlife Serv., 957 F.2d 32 (1st Cir. 1992); Peyote Way Church of God v. Thornburgh, 922 F.2d 1210 (5th Cir. 1991) (applying rational basis scrutiny to Establishment Clause cases); *cf.* Lemon v. Kurtzman, 403 U.S. 602, 615 (1971) (analyzing "whether the government entanglement with religion is excessive"); Corrada, *supra* note 277.

THE FOURTH AMENDMENT WARRANT REQUIREMENT: CONSTITUTIONAL PROTECTION OR LEGAL FICTION? NOTED EXCEPTIONS RECOGNIZED BY THE TENTH CIRCUIT

INTRODUCTION

Under the Fourth Amendment,[1] a search occurs when the government seeks to intrude into an area in which a person has manifested a subjective expectation of privacy that is recognized by society as being reasonable.[2] In authorizing the government to conduct a search, the Supreme Court has noted a strong preference for the issuance of warrants.[3] "Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions."[4] Yet, if one were to look across the landscape of Fourth Amendment law, this statement from the country's highest court would seem to be fatally flawed.[5] For as Justice Scalia observed in *California v. Acevedo*,[6] the Fourth Amendment warrant requirement has become "so riddled with exceptions that it [i]s basically unrecognizable."[7] However, as stretched and maligned as the Fourth Amendment may be,[8] it is the one protection that we, as citizens, have against governmental intrusion into what we "seek[] to preserve as private."[9]

This survey addresses cases decided by the United States Court of Appeals for the Tenth Circuit from September 2000 to August 2001,

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1. The Fourth Amendment provides:

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

U.S. CONST. amend. IV.

2. Katz v. United States, 389 U.S. 347, 361 (1967)(Harlan, J., concurring).

3. 2 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 4.1, at 396 (3d ed. 1996).

4. *Katz*, 389 U.S. at 357.

5. *See* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 512 (1991)("Over about the last twenty years, the warrant has evolved from being an absolute prerequisite of police intrusions upon persons and their possessions and to the use of the fruits of any search or arrest, to a procedural requirement sometimes acknowledged and rarely enforced." (internal citations omitted)).

6. 500 U.S. 565 (1991).

7. *Acevedo*, 500 U.S. at 582 (Scalia, J., concurring).

8. *See id.* (noting that one commentator had catalogued some twenty exceptions to the warrant requirement, including: "searches incident to arrest . . . automobile searches . . . border searches . . . administrative searches of regulated businesses . . . exigent circumstances . . . search[es] incident to nonarrest when there is probable cause . . . boat boarding for document checks . . . welfare searches . . . inventory searches . . . airport searches . . . school search[es] . . . ." (quoting Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1473-74 (1985))).

9. *Katz*, 389 U.S. at 351.

which deal with exceptions the Tenth Circuit has recognized in allowing searches to take place without a search warrant based on probable cause. Part I analyzes the validity of consensual searches when they are preceded by a Fourth Amendment violation. Part II discusses the ability of law enforcement officials to execute searches of homes based on arrest warrants. Part III addresses administrative searches related to a regulated industry, specifically, motor carriers. Finally, Part IV focuses on the ability of secondary schools to conduct suspicionless searches of students.

I. CONSENSUAL SEARCHES PRECEDED BY FOURTH AMENDMENT VIOLATIONS

A. *Background*

One of the most well-established and utilized exceptions to the warrant and probable cause requirements of the Fourth Amendment is a search based on the individual's consent.[10] There are several reasons for this occurrence, including: administrative convenience of the police,[11] the ability of the police to search when there is no probable cause,[12] and the perception of the individual to be searched that consenting will allow him to clear his name and get about his business.[13] In some cases, consent to search is even sufficient to overcome a preceding illegal search or seizure conducted by the police.[14] While "evidence derived from the exploitation of an illegal search or seizure must be suppressed" as "fruit of the poisonous tree,"[15] if the government can establish that "the evidence to which instant objection is made has been come at . . . by means sufficiently distinguishable to be purged of the primary taint,"[16] it can "refute the inference that the evidence was a product of the constitutional violation."[17]

In a case that presents a valid search or seizure by the police, and thus no initial Fourth Amendment violation, courts will review the "totality of the circumstances" to determine whether the subsequent consent was voluntary, and not "the product of duress or coercion."[18] However,

10. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973).

11. 3 LAFAVE, *supra* note 3, § 8.1, at 596.

12. *Id.* at 597.

13. *See id.*

14. *See* United States v. McGill, 125 F.3d 642, 644 (8th Cir. 1997)(concluding consensual search of vehicle proceeding illegal search was valid); United States v. Ramos, 42 F.3d 1160, 1164 (8th Cir. 1994) (concluding consensual search of vehicle following illegal stop was valid); United States v. Mendoza-Salgado, 964 F.2d 993, 1013 (10th Cir. 1992)(concluding consensual search of home following warrantless entry was valid).

15. United States v. Miller, 146 F.3d 274, 279 (5th Cir. 1998).

16. United States v. Lowe, 999 F.2d 448, 451 (10th Cir. 1993)(quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)).

17. *Miller*, 146 F.3d at 279.

18. Schneckloth v. Bustamonte, 412 U.S. 218, 227 (1973).

when the initial search or seizure violates the Constitution, the burden on the government is heightened,[19] and the government must demonstrate that the consent was "sufficiently an act of free will to purge the primary taint of the unlawful invasion."[20] The Tenth Circuit has held that the factors enunciated by the Supreme Court in *Brown v. Illinois*,[21] are especially important in determining if consent preceding a Fourth Amendment violation is "sufficiently voluntary to purge the primary taint" of the illegal search or seizure.[22] "Among the factors which warrant consideration are '[t]he temporal proximity of the [Fourth Amendment violation] and the [consent], the presence of intervening circumstances, and, particularly, the purpose and flagrancy of the official misconduct.'"[23] In *United States v. Caro*,[24] the Tenth Circuit reviewed the admissibility of evidence discovered during a consensual search of a vehicle based on a stop that was unconstitutional in its scope.[25]

B. *United States v. Caro*

1. Facts

Utah Highway Patrol Trooper Denis Avery pulled over Caro after he noticed that the windows of the car Caro was driving appeared to be darker than the law of Utah permitted.[26] After Trooper Avery asked Caro for his license and registration, he noticed that the license was from Iowa and in Caro's name, while the registration was from Nebraska and in another person's name.[27] Caro appeared shaky and nervous, and told Trooper Avery that the car belonged to his friend, but was unable to recall his friend's last name.[28] A subsequent check revealed that the license was valid and that the car was not stolen; however, the car color was different than the color listed on the registration.[29] Caro's nervous behavior, his inability to remember the car owner's name, and the color discrepancy led Trooper Avery to suspect that the car was stolen.[30]

Trooper Avery next sought to compare the Vehicle Identification Number ("VIN") listed on the registration to the VIN plate visible through the windshield on the car's dashboard.[31] After Trooper Avery determined that the two matched, he asked Caro if he would exit the ve-

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19. *Miller*, 146 F.3d at 279.
20. *Wong Sun*, 371 U.S. at 486.
21. 422 U.S. 590 (1975).
22. United States v. Mendoza-Salgado, 964 F.2d 993, 1011 (10th Cir. 1992).
23. *Mendoza-Salgado*, 964 F.2d at 1011 (quoting *Brown*, 422 U.S. at 603-04).
24. 248 F.3d 1240 (10th Cir. 2001).
25. *Caro*, 248 F.3d at 1248.
26. *Id.* at 1242.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. *Caro*, 248 F.3d at 1243.

hicle so that he could also compare the VIN on the driver's door.[32] Caro complied, but Trooper Avery was unable to find a VIN on the driver's door.[33] However, while searching for the VIN plate on the door, Trooper Avery noticed air fresheners hanging in the car, as well as a bottle of air freshener.[34] This discovery made Trooper Avery suspicious that drugs might be in the car, which led him to ask Caro if any drugs were present.[35] After Caro responded in the negative, Trooper Avery asked for Caro's consent to search the car, which was subsequently given.[36]

Trooper Avery did not return Caro's license and registration until Caro opened both the trunk and hood of the car.[37] After an inspection of the trunk, Trooper Avery looked under the hood of the car.[38] Trooper Avery noticed that the battery appeared oversized, and upon further inspection, found two packages containing methamphetamine.[39]

The district court denied Caro's motion to suppress the drug evidence.[40] The court stated, "from the totality of the evidence presented . . . the investigative detention which occurred after the stop was supported by an objectively reasonable suspicion of illegal activity."[41] Furthermore, the court held that Caro had voluntarily consented to the search of the car.[42]

2. Tenth Circuit Decision

The first issue the Tenth Circuit addressed was whether "Trooper Avery exceeded the lawful scope of detention."[43] The court noted that based on the suspicious circumstances presented, including the discrepancy in the car's registered color and Caro's inability to identify the owner's name, Trooper Avery had reasonable suspicion which justified further questioning after the initial stop for the traffic violation.[44] However, the court stated:

> [W]here the dashboard VIN plate is readable from outside the passenger compartment, that VIN matches the VIN listed on the registration, and there are no signs the plate has been tampered with, there is insufficient cause for an officer to extend the scope of a detention

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32. *Id.* at 1242-43.
33. *Id.* at 1243.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Caro*, 248 F.3d at 1243.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.* (quoting district court memorandum decision and order).
42. *Id.*
43. *Caro*, 248 F.3d at 1244.
44. *Id.* at 1246.

> by entering a vehicle's passenger compartment for the purpose of further examining any VIN.[45]

Thus, the court held that "Trooper Avery's actions exceeded the permissible scope of the detention and violated Mr. Caro's Fourth Amendment rights."[46]

The next issue the Tenth Circuit considered was "whether the search [for an additional VIN] was nevertheless justified by Mr. Caro's consent."[47] The court stated that, "a search that is preceded by a Fourth Amendment violation may still be valid if the defendant's consent to that search 'was voluntary in fact under the totality of the circumstances.'"[48] The government must be able to show that there was "a sufficient attenuation or 'break in the causal connection between the illegal detention and the consent.'"[49] The court relied on factors pronounced by the Supreme Court in *Brown* as guidance in determining whether Caro's consent to search was capable of purging the taint of the impermissible stop.[50] Specifically, the court considered: 1) the lapse of time between Caro's illegal seizure and his consent; 2) whether there were any intervening circumstances; and 3) whether Trooper Avery's conduct was deliberate or flagrant.[51]

The Tenth Circuit held that based on the totality of the circumstances, Caro's consent to the search for an additional VIN was "insufficient to purge the taint of his unlawful detention."[52] First, there was no attenuation because when Trooper Avery asked for Caro's consent, he still possessed Caro's license and registration, as well as a warning citation for illegal tint.[53] Furthermore, Trooper Avery failed to instruct Caro that he could leave the scene or refuse consent.[54] Second, the *Brown* factors demonstrated that Caro's consent was not voluntary.[55] No time elapsed between Caro's illegal seizure and consent, no intervening circumstances were present, and Trooper Avery's conduct was deliberate, since he knew when he asked for consent that the dashboard VIN matched the VIN on the registration.[56] Accordingly, the court ruled that

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45. *Id.*
46. *Id.* at 1247.
47. *Id.*
48. *Id.* (quoting United States v. Fernandez, 18 F.3d 874, 881 (10th Cir. 1994)).
49. *Caro*, 248 F.3d at 1247 (quoting United States v. Gregory, 79 F.3d 973, 979 (10th Cir. 1996)).
50. *Id.*
51. *Id.*
52. *Id.* at 1248.
53. *Id.* at 1247.
54. *Id.*
55. *Caro*, 248 F.3d at 1247.
56. *Id.* at 1247-48.

any evidence derived from Trooper Avery's search for an additional VIN must be suppressed as "fruit of the poisonous tree."[57]

The final issue the Tenth Circuit addressed was whether the general search of Caro's vehicle, based on the discovery of the air fresheners during the search for an additional VIN, was justified by consent.[58] The court stated that the air fresheners discovered by Trooper Avery could not "provide a valid foundation for enlarged suspicion, as they were 'come at by the exploitation of [the] illegality.'"[59] In addition, the court believed that the same *Brown* factors that tainted the initial search for the VIN were "still present and unmitigated" when Caro consented to the general search.[60] Thus, Caro's consent did not remove the taint of the illegal stop.[61]

C. *Other Circuits*

The Eight Circuit achieved a different outcome in *United States v. McGill*.[62] In *McGill*, Officer Parker was summoned to the scene of an accident in which McGill was involved.[63] As part of the investigation, Officer Parker required the VIN numbers of the vehicles involved in the accident.[64] In order to view the VIN number of McGill's truck, Officer Parker stuck his head through the driver's side window, even though the VIN number was visible through the windshield.[65] In doing so, Officer Parker was confronted with the smell of marijuana from inside McGill's truck.[66] Upon relaying his discovery to McGill, Officer Parker asked for consent to search the truck, which was subsequently given.[67] A search of the truck uncovered "marijuana cigarettes in the ashtray and baggies of marijuana behind a loose dashboard panel plate."[68] Officer Parker arrested McGill, and a subsequent search of the truck at the police station revealed the presence of a firearm, from which the federal charges implicated in this case arose.[69]

At the trial level, McGill filed a motion to suppress the firearm, arguing that the Fourth Amendment was violated when Officer Parker stuck his head into McGill's truck to read the VIN, and that the gun was

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57. *Id.* at 1248.
58. *See id.*
59. *Id.* (quoting United States v. Shareef, 100 F.3d 1491, 1508 (10th Cir. 1996)).
60. *Id.*
61. *Caro*, 248 F.3d at 1248.
62. 125 F.3d 642, 644 (8th Cir. 1997).
63. *McGill*, 125 F.3d at 643.
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.*
69. *McGill*, 125 F.3d at 643.

the fruit of an illegal search.[70] The district court denied McGill's motion to suppress, finding that the "marijuana was inevitably discoverable."[71] The court stated that Officer Parker would have eventually either smelled the marijuana emanating from the truck or have checked the VIN number on the inside of the driver's door.[72]

On appeal, the Eight Circuit affirmed.[73] Without addressing the legality of the initial search,[74] the court noted that, "McGill's voluntary consent was sufficiently an act of free will, even if Parker's motive in requesting consent was supplied by an unlawful prior search."[75] In making its determination, the court relied on the factors outlined in *Brown.*[76] The court recognized that Officer Parker's request for consent took place immediately following the purported unlawful search, absent any intervening circumstances.[77] However, the court noted that McGill was aware of his right to refuse consent.[78] Furthermore, the court emphasized that the most important factor, "the nature of Officer Parker's Fourth Amendment violation," demonstrated that Officer Parker was acting appropriately in response to an automobile accident that was caused by McGill.[79] Accordingly, the circumstances demonstrated that McGill's consent was sufficient to purge the taint of the assumed illegal search by Officer Parker.[80]

D. *Analysis*

Consensual searches are the most commonly used weapon within the arsenal of law enforcement.[81] Police conducting these searches do not have to make the same outside efforts that are required by the warrant system,[82] and people are often willing to allow the police to conduct a search in order to avoid the hassle of a prolonged seizure.[83] However, the rule that the Tenth Circuit enunciated in *Caro* permits evidence that would normally be suppressed as fruit of the poisonous tree to be cleansed of its unconstitutional taint, if the consent was voluntary in fact

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70. *See id.* at 644.
71. *Id.*
72. *Id.*
73. *Id.* at 645.
74. *Id.* at 644.
75. *McGill*, 125 F.3d at 645 (internal quotations omitted).
76. *See id.* at 644.
77. *Id.*
78. *Id.*
79. *Id.* at 644 ("Ascertaining the vehicle's VIN number and determining whether McGill's driving had been impaired by drugs or alcohol were highly relevant to th[e] investigation.").
80. *Id.* at 645.
81. *See* LAFAVE, *supra* note 3, § 8.1, at 596; *see also* MARC L. MILLER & RONALD F. WRIGHT, CRIMINAL PROCEDURES 212 (1998)("In most jurisdictions, the police conduct far more consensual searches than those justified by probable cause or a search warrant.").
82. LAFAVE, *supra* note 3, § 8.1, at 596.
83. *See id.* at 597.

and not the product of an illegal search or seizure.[84] This rule goes one step further because consent can not only overcome the warrant and probable cause requirements of the Fourth Amendment, but can also brush aside the fruit of the poisonous tree doctrine that is imbedded in our jurisprudence.

II. SEARCHES OF HOMES PURSUANT TO AN ARREST WARRANT

A. *Background*

In *Payton v. New York*,[85] the Supreme Court adopted the stance that while a "man's house is his castle,"[86] it is "constitutionally reasonable to require him to open his doors to the officers of the law."[87] This decision allowed law enforcement officers to gain constitutional admittance to people's homes based on an arrest warrant founded on probable cause and a reasonable belief the person was home.[88] However, on the trail of this case was *Steagald v. United States*,[89] which the Supreme Court decided a year later. *Steagald* sought to protect the Fourth Amendment rights of innocent individuals from governmental intrusion by limiting the ability of law enforcement officers to search houses based on an arrest warrant for a third party guest.[90] However, as *United States v. Gay*[91] demonstrates, the Tenth Circuit has interwoven the rationales of the two tests[92] and one must now question who is a third party guest, and when is a resident susceptible to police intrusion.

B. *United States v. Gay*

1. Facts

Gay was arrested for "possession of cocaine base with intent to distribute, in violation of 21 U.S.C. § 841(a)(1)."[93] While out on bail, Gay fled, and the United States Marshal Service tried for two years to serve a Drug Enforcement Agency (DEA) arrest warrant on Gay.[94]

Subsequently, Deputy McNeil of the United States Marshal Service received information from an informant regarding the whereabouts of Gay, who was supposedly living with his uncle at the time.[95] Officers

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84. *See* United States v. Caro, 248 F.3d 1240, 1247 (10th Cir. 2001).
85. 445 U.S. 573 (1980).
86. *Payton*, 445 U.S. at 596.
87. *Id.* at 602-03.
88. *Id.* at 603.
89. 451 U.S. 204 (1981).
90. *See Steagald*, 451 U.S. at 205-06.
91. 240 F.3d 1222 (10th Cir. 2001), *cert. denied*, 121 S. Ct. 2571 (2001).
92. *See Gay*, 240 F.3d at 1226.
93. *Id.* at 1224.
94. *Id.*
95. *Id.*

obtained and executed a search warrant for the uncle's residence, but Gay was not present.[96] However, an informant at the residence stated that Gay did not live at his uncle's residence.[97] Instead, the informant knew from "personal experience and numerous visits" that Gay lived at a different location two miles away.[98] The informant escorted the law enforcement officers to the location of Gay's duplex, which he pointed out, and told them Gay was presently inside.[99]

After arriving at the new residence, Deputy McNeil, accompanied by other officers, knocked on the door and announced "police."[100] After hearing a "thud" and waiting a few seconds, the police forcibly entered the residence and found Gay.[101] At Gay's feet was a gun and in plain view was crack cocaine.[102] Gay was arrested and admitted to owning the gun and drugs.[103] The district court denied Gay's motion to suppress and Gay subsequently pled guilty to drug and firearm charges.[104]

2. Tenth Circuit Decision

Gay argued that in order for the officers to have lawfully arrested him at the second residence, a search warrant was required.[105] The Tenth Circuit disagreed.[106] The court noted that under *Steagald*, when the home to be searched involves a third party, a search warrant is required "absent exigent circumstances or consent."[107] However, when there is "a reasonable belief the arrestee (1) live[s] in the residence; and (2) is within the residence at the time of entry," a *Payton* analysis is required and an arrest warrant founded on probable cause is sufficient.[108] In light of the circumstances presented, the court believed the *Payton* test was applicable.[109]

First, the Tenth Circuit considered whether it was reasonable for the officers to believe Gay lived at the second residence when the search was conducted.[110] The court noted that the officers' belief that the suspect lived in the residence was based on an objective standard, and "need not prove true in fact."[111] Furthermore, the suspect need not actually live in the residence, "so long as he 'possesses common authority over, or some

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96. *Id.* at 1224-25.
97. *Id.* at 1225.
98. *Gay*, 240 F.3d at 1225.
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Gay*, 240 F.3d at 1225.
105. *Id.* at 1226.
106. *Id.*
107. *Id.* (citing Steagald v. United States, 451 U.S. 204, 205-06 (1981)).
108. *Id.* (citing Valdez v. McPheters, 172 F.3d 1220, 1224-25 (10th Cir. 1999)).
109. *Id.*
110. *See Gay*, 240 F.3d at 1226-27.
111. *Id.* at 1226 (quoting *Valdez*, 172 F.3d at 1225).

other significant relationship to, the residence entered by police.'"[112] This is because "people do not live in individual, separate, hermetically-sealed residences[, but] live with other people[;] they move from one residence to another."[113] Based on the detailed information provided by the informant, the court held that the belief that Gay lived at the second residence was objectively reasonable.[114]

Second, the Tenth Circuit considered whether it was reasonable for the officers to believe Gay was inside the residence at the time of the search.[115] The court noted that the officers need not actually see the suspect because criminals often attempt to evade detection.[116] Based upon the knowledge of the informant and the fact that he "explicitly told the officers Mr. Gay was currently in his home," as well as the "thud" which was heard after knocking on the door,[117] the court held it was reasonable to believe Gay was present at the second residence when the search took place.[118]

Accordingly, after considering the "totality of the circumstances," the court held that the officers' beliefs were reasonable and that the search of the second residence was authorized by the arrest warrant.[119]

C. *Other Circuits*

In *Watts v. County of Sacramento*,[120] plaintiff Christopher Pryor and his girlfriend Binti Watts brought a civil action claim pursuant to 42 U.S.C. § 1983 after police officers mistakenly entered their home trying to execute an arrest warrant.[121] The police had received an anonymous tip informing them that Chris Burgess, a wanted murder suspect, had been seen in front of the plaintiffs' house.[122] Acting on the tip, the police assembled on Watts' house to execute an arrest warrant already issued for Burgess on charges of murder and assault.[123] After Pryor opened the door, the police recognized that he fit the general description, as well as answered to the name Chris.[124] Pryor was handcuffed and Watts and her children were placed under guard, until the police discovered that they had seized the wrong person.[125] The district court granted defendants'

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112. *Id.* (quoting *Valdez*, 172 F.3d at 1225).
113. *Id.* at 1226-27(quoting *Valdez*, 172 F.3d at 1225).
114. *Id.* at 1227.
115. *See id.* at 1227-28.
116. *Gay*, 240 F.3d at 1227 (citing *Valdez*, 172 F.3d at 1226).
117. *Id.*
118. *Id.* at 1228.
119. *Id.*
120. 256 F.3d 886 (9th Cir. 2001).
121. *Watts*, 256 F.3d at 887.
122. *Id.* at 888.
123. *Id.*
124. *Id.*
125. *Id.*

motion for summary judgment on the Fourth Amendment unlawful entry claim.[126]

On appeal, however, the Ninth Circuit reversed and remanded.[127] The court stated that in order for a search based on an arrest warrant to be valid against "a co-resident of the third party, ... [the] officer must have a reasonable belief that the suspect named in the arrest warrant resides in the third party's home and that he is actually present at the time of entry into the home."[128] Based on the facts of the case, the court held that the police officers could not have established a reasonable belief that Pryor lived at the residence.[129]

D. *Analysis*

The Tenth Circuit has transformed the rationale behind *Payton* and *Steagald* with its adoption of an objective, reasonableness standard to coincide with the *Payton* test.[130] *Payton* and *Steagald* set up a simple line, if it's your house and the police have a valid arrest warrant, the government's interests in safety and crime reduction take priority over the arrestee's privacy rights.[131] However, when the subject of the arrest warrant is at the home of a third party, then the innocent third party's interests triumph over the government's.[132] By employing the standard that was used in *Gay*, whereby the court looks to see if the police possessed a "reasonable belief [that] the arrestee lived in the residence,"[133] the protection that was once afforded the innocent third party is jeopardized. While this is not a new take for the Tenth Circuit,[134] it seems to bear resemblance to a general warrant,[135] allowing law enforcement officials to search wherever a person may decide to frequent based solely on an arrest warrant. Accordingly, while the Tenth Circuit has stated that the "warrantless entry of the home is the 'chief evil against which . . . the

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126. *Id.* at 888-89.

127. *Watts*, 256 F.3d at 891.

128. *Id.* at 889-890 (citing United States v. Risse, 83 F.3d 212 (8th Cir. 1996); Perez v. Simmons, 900 F.2d 213 (9th Cir. 1990)).

129. *Id.* at 890.

130. *See* United States v. Gay, 240 F.3d 1222, 1226 (10th Cir. 2001).

131. *See* Payton v. New York, 445 U.S. 573, 602-03 (1980).

132. *See* Steagald v. United States, 451 U.S. 204, 205-06 (1981).

133. *Gay*, 240 F.3d at 1226 (10th Cir. 2001).

134. *See, e.g.*, Valdez v. McPheters, 172 F.3d 1220, 1225-26 (10th Cir. 1999). The court stated:

> [E]ntry into a residence pursuant to an arrest warrant is permitted when "the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, . . . warrant a reasonable belief that the location to be searched is the suspect's dwelling, and that the suspect is within the residence at the time of entry."

Valdez, 172 F.3d at 1225-26 (quoting United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. 1995)).

135. "[A] general warrant . . . authorize[s] the agent to search private premises, without specifying the place to search or the things to seize." MILLER & WRIGHT, *supra* note 81, at 136.

Fourth Amendment is directed,'"[136] its actions demonstrate that the court does not hold this belief inviolate if the government is allowed to gain admittance based on a minimal showing under the reasonable belief standard.

III. SEARCHES OF CLOSELY REGULATED INDUSTRY

A. *Background*

In *New York v. Burger*,[137] the Supreme Court enunciated that business owners who take part in a "closely regulated" industry have an attenuated expectation of privacy, such that warrantless searches are justifiable.[138] The Court recognized that if the government has a substantial interest in regulating an industry, the inspections further the goal of the regulation, and a statute gives notice of the inspections and limits discretion, the Fourth Amendment would not be discredited.[139] In *United States v. Vasquez-Castillo*,[140] the Tenth Circuit utilized the *Burger* test to decide whether warrantless searches of commercial carriers in New Mexico were constitutionally permissible.[141]

B. *United States v. Vasquez-Castillo*

1. Facts

Pursuant to New Mexico law,[142] "all commercial carriers entering or leaving New Mexico . . ." are required to stop at ports of entry for inspection "to determine whether the vehicles, drivers, and cargo are in compliance with state laws regarding public safety, health, and welfare."[143] If commercial carriers have a "Commercial Vehicle Safety Alliance" (CVSA) inspection sticker, they typically only undergo a brief inspection; however, if the commercial carrier does not have an inspection sticker, then the inspection will be more thorough.[144] While passing through the port of entry, Vasquez-Castillo's truck was directed to undergo the most thorough inspection, based upon several factors, including the lack of an inspection decal, non-current logbook, and irregularities regarding the bill of lading.[145]

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136. United States v. Lowe, 999 F.2d 448, 451 (10th Cir. 1993)(quoting United States v. United States Dist. Court, 407 U.S. 297, 313 (1972)).
137. 482 U.S. 691 (1987).
138. *Burger*, 482 U.S. at 691.
139. *Id.* at 702-03.
140. 258 F.3d 1207 (10th Cir. 2001).
141. *See Vasquez-Castillo*, 258 F.3d at 1210-12.
142. *See* N.M. STAT. ANN. § 65-5-1 (2001).
143. *Vasquez-Castillo*, 258 F.3d at 1209.
144. *Id.*
145. *Id.*

After the outside of the truck and trailer were inspected, the Inspector, Pacheco, decided to inspect the "blocking and bracing," to make sure the cargo was secured and did not shift while in transit.[146] Upon entering the trailer, Inspector Pacheco perceived the amount of cargo Vasquez-Castillo was carrying to be unusually small in relation to the truck size.[147] As he moved further into the trailer, Inspector Pacheco smelled raw marijuana.[148] Inspector Pacheco also noticed a space "between the inner wall and outer hull of the trailer," footprints on the trailer wall, and an "air vent in the trailer that appeared to lead to nowhere."[149] After asking Vasquez-Castillo for consent to search behind the wall, and having Vasquez-Castillo sign a consent form, Inspector Pacheco opened the wall and found "over 800 pounds of marijuana concealed in the compartment."[150] Vasquez-Castillo was subsequently arrested and his motion to suppress the evidence was denied by the district court.[151]

2. Tenth Circuit Decision

The Tenth Circuit applied the three-prong test annunciated in *Burger* to determine "whether a warrantless inspection of a closely regulated industry violates the Fourth Amendment."[152] Specifically, the test required the following:

> First, there must be a substantial government interest that informs the regulatory scheme pursuant to which the inspection is made. Second, the warrantless inspections must be necessary to further the regulatory scheme . . . . Finally, the statute's inspection program, in terms of the certainty and regularity of its application, must provide a constitutionally adequate substitute for a warrant.[153]

The court determined the first prong was satisfied because New Mexico has a substantial interest in promoting safety on its highways.[154] The court also determined that the warrantless inspection was necessary to further the regulatory scheme because commercial carriers traveling on the highway move quickly in and out of the State's jurisdiction.[155] Therefore, the second prong was also met.

The third prong, requiring the inspection program to be an "adequate substitute for a warrant," provided the court with the most in-depth analysis.[156] The court noted that in order to satisfy the third prong, the

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146. *Id.* at 1209 n.2.
147. *Id.* at 1209.
148. *Id.*
149. *Vasquez-Castillo*, 258 F.3d at 1209-10.
150. *Id.* at 1210.
151. *Id.*
152. *Id.*
153. *Id.* (quoting New York v. Burger, 482 U.S. 691, 702-03 (1987)).
154. *Id.* at 1211.
155. *Vasquez-Castillo*, 258 F.3d at 1211.
156. *Id.*

New Mexico regulation must inform commercial carriers that their trucks are susceptible to inspections for specific purposes, must inform them who may undertake the inspections, and must limit the inspectors' discretion "in time, place, and scope."[157] The court determined the regulation satisfied this third prong, and that Vasquez-Castillo "could not help but be aware that his property was subject to periodic inspections undertaken for specific purposes, including inspection of the blocking and bracing."[158]

Because the New Mexico regulatory statute satisfied all three prongs, the court held that Inspector Pacheco was authorized to be within the trailer prior to his detection of the marijuana smell.[159]

The court next considered whether Inspector Pacheco had probable cause to search between the walls of the trailer.[160] Based on the "totality of the circumstances," including the smell of marijuana, the internal irregularities in the trailer, and the irregularities found by Inspector Pacheco concerning the bill of lading and log book, the court held that Inspector Pacheco had probable cause to search between the walls and that the search did not violate Vasquez-Castillo's Fourth Amendment constitutional rights.[161] In doing so, the court relied on the automobile exception to the warrant requirement, which allows for the search of an automobile based on probable cause alone, without consent or exigent circumstances.[162]

C. *Other Circuits*

In *United States v. Fort*,[163] the Fifth Circuit, in a case of first impression, adopted the stance that commercial trucking is a closely regulated industry and falls within the warrant exception annunciated by the Court in *Burger*.[164] In *Fort*, the defendant's commercial truck was randomly stopped and inspected, and a cargo of 561.2 pounds of marijuana was discovered.[165] The court concluded that the stop and search were permitted because the regulatory program satisfied the three *Burger* requirements.[166] Specifically, the court noted that: 1) Texas had an interest in protecting travelers on its roads and reducing the costs incurred by taxpayers from injuries caused by commercial vehicles;[167] 2) "warrantless

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157. *Id.*
158. *Id.* at 1212 (quoting United States v. Burch, 153 F.3d 1140, 1142 (10th Cir. 2001)).
159. *Id.*
160. *Id.* at 1212-13.
161. *Vasquez-Castillo*, 258 F.3d at 1213.
162. *See id.* at 1212.
163. 248 F.3d 475 (5th Cir. 2001).
164. *Fort*, 248 F.3d at 480.
165. *Id.* at 477-78.
166. *Id.* at 480-82.
167. *Id.* at 480.

stops and inspections are necessary" to promote highway safety and because "commercial trucks pass quickly through states and . . . jurisdictions of the enforcement agencies;"[168] and 3) the Texas statute provided commercial carriers with notice that their vehicles were susceptible to search and seizure, and limited the discretion of the officers conducting the inspections.[169]

D. *Analysis*

In *Vasquez-Castillo,* the Tenth Circuit sought to apply the closely regulated industry exception outlined by the Supreme Court in *Burger* to motor carriers.[170] Unlike most exceptions the Tenth Circuit has recognized, this exception, while balancing the interests of the individual and the government, also contains a check to act as a warrant substitute.[171] Specifically, the State or agency must set up a regulation to serve as notice to those who might be affected by its actions, while at the same time limiting the scope of its own discretionary actions.[172] As such, while other exceptions might involve a reasonableness inquiry based solely on the perceptions of individuals, the *Burger* test is more codified and structured.

IV. SUSPICIONLESS SEARCHES IN SCHOOLS

A. *Background*

In *Vernonia School District 47J v. Acton,*[173] the Supreme Court held that suspicionless searches of school children may be reasonable under the Fourth Amendment if the government's interests in a school policy outweigh the students' privacy interests which are compromised by the policy.[174] The Supreme Court noted that a "search unsupported by probable cause can be constitutional . . . 'when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.'"[175] According to the Supreme Court, the public school forum qualified for the "special needs" exception to the warrant requirement because the warrant requirement would interfere with the ability of schools to maintain order and discipline.[176] In a case of first impression, the Tenth Circuit, in *Earls ex rel Earls v. Board of Edu-*

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168. *Id.* at 481.
169. *Id.* at 482.
170. *See* United States v. Vasquez-Castillo, 258 F.3d 1207, 1210-12 (10th Cir. 2001).
171. *See Vasquez-Castillo,* 258 F.3d at 1211.
172. *Id.*
173. 515 U.S. 646 (1995).
174. *Vernonia Sch. Dist. 47J,* 515 U.S. at 646.
175. *Id.* at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).
176. *Id.*

cation,[177] sought to apply the reasoning of the *Vernonia* Court to a drug-testing program administered by an Oklahoma high school.[178]

B. *Earls ex rel Earls v. Board of Education*

1. Facts

Students of Tecumseh High School in Oklahoma brought a civil action pursuant to 42 U.S.C. § 1983 against the Board of Education and the School District.[179] The students sought to challenge "the constitutionality of the random suspicionless urinalysis drug testing policy which the District implemented for all students participating in competitive extracurricular activities."[180] The testing policy adopted by the School District required every student who wished to participate in extracurricular activities to "sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion."[181] The testing itself was done based on a strict procedure and the information was kept confidential.[182] The testing results were only disclosed to specific school personnel who "ha[d] a need to know," and never to "any law enforcement authorities."[183] If a student did not wish to be drug tested, he/she could not participate in the school's extracurricular activities.[184] At the trial level, the district court held that the drug testing policy did not violate the Fourth Amendment.[185]

2. Tenth Circuit Decision

In considering whether the suspicionless drug testing policy adopted by the School District violated the Fourth Amendment, the Tenth Circuit was required to determine if the policy fell within the "special needs" doctrine.[186] "[U]nder the special needs doctrine, the [c]ourt identifies a special need which makes impracticable adherence to the warrant and probable cause requirements, then balances the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes."[187] The court noted that the warrant and probable cause requirements of the Fourth Amendment would interfere

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177. 242 F.3d 1264 (10th Cir. 2001).
178. *See Earls ex rel Earls*, 242 F.3d at 1264, 1270-78.
179. *Id.* at 1266.
180. *Id.*
181. *Id.* at 1267.
182. *Id.* at 1267-68.
183. *Id.* at 1268.
184. *Earls ex rel Earls*, 242 F.3d at 1268.
185. *Id.* at 1266.
186. *Id.* at 1269.
187. *Id.*

with the disciplinary needs of the School District and their ability to maintain order.[188]

The court next sought to determine the reasonableness of the search based on a balancing test of the interests of the parties involved.[189] The first factor the court considered was the "nature of the privacy interest upon which the search . . . intrudes."[190] The court initially noted that a student's expectation of privacy should not be diminished just because they voluntarily choose to participate in an activity; however, the court went on to reason that because students are required to follow rules in order to participate in extracurricular activities, either from a coach or teacher, their personal freedom is constrained to some degree.[191] Thus, participants in extracurricular activities expect less privacy than those students who choose not to participate.[192]

The second factor considered was "the character of the intrusion that is complained of."[193] The court determined the invasion of privacy to the student was minimal based on the manner in which the testing took place, the information obtained, and how the information was used.[194]

The final factor the Tenth Circuit considered was "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[195] The court noted that the safety concerns raised by the School District were lacking because the policy "too often simply tests the wrong students."[196] For instance, the court stated that students who participate in choir are tested out of concern for injury, but students who participate in shop or school labs, where an injury is more perceivable, are not required to submit to the testing.[197] Furthermore, the court recognized that there did not even appear to be a "measurable drug problem" in the School District, which diminished the efficacy of the drug testing greatly.[198] The court stated, that "[s]pecial needs must rest on demonstrated realities."[199] For if a school district did not have to demonstrate a perceivable problem before acting, their ability to invade upon the rights of the students would be limitless.[200]

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188. *Id.* at 1270.

189. *Id.*

190. *Earls ex rel Earls*, 242 F.3d at 1275 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654 (1995)).

191. *Id.* at 1276.

192. *Id.*

193. *Id.* (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 658).

194. *Id.*

195. *Id.* (quoting *Vernonia Sch. Dist. 47J*, 515 U.S. at 660).

196. *Earls ex rel Earls*, 242 F.3d at 1277.

197. *Id.*

198. *Id.*

199. *Id.* at 1278 (quoting United Teachers v. Orleans Parish Sch. Bd., 142 F.3d 853, 857 (5th Cir. 1998)).

200. *Id.*

Accordingly, based on a balancing of the three major interests concerned, the court concluded that the drug testing policy adopted by the School District was unconstitutional and violated the students' Fourth Amendment protections.[201]

C. *Other Circuits*

The Eleventh Circuit also employed the analysis presented by the Supreme Court in *Vernonia*, in determining whether suspicionless searches of school children were constitutional in light of the Fourth Amendment.[202] In *Thomas ex rel Thomas v. Roberts*, a fifth grade teacher and a police officer, on campus to do a drug prevention demonstration, conducted strip searches of students after one student's school trip money disappeared in class.[203] The students affected filed suit claiming they had been deprived of their constitutional rights, including a Fourth Amendment claim.[204] Although ruling that the strip searches were unconstitutional, the district court held that the individual defendants were shielded by qualified immunity.[205]

On appeal, the Eleventh Circuit noted that a "search may be conducted without individualized suspicion when 'the privacy interests implicated by the search are minimal, and . . . an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.'"[206] Applying this test to the facts of the case, the court concluded that the theft of the student's money did not present a threat to the discipline or safety of the school such that students could be strip searched without individualized suspicion.[207] Accordingly, the court held that the searches were unconstitutional under the Fourth Amendment.[208]

A different result was reached by the Seventh Circuit in *Joy v. Penn-Harris-Madison School Corporation*.[209] In *Joy*, students brought suit against Penn-Harris-Madison School Corporation ("PHM"), challenging the constitutionality of a policy that provided for "random, suspicionless drug testing of students involved in extracurricular activities and of students driving to school."[210] The policy sought to test for "drugs, alcohol, and tobacco,"[211] and required students who participated in extra-

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201. *Id.*
202. *See Thomas ex rel Thomas v. Roberts*, 261 F.3d 1160, 1167-69 (11th Cir. 2001).
203. *See Thomas ex rel Thomas*, 261 F.3d at 1163-64.
204. *Id.* at 1165.
205. *Id.*
206. *Id.* at 1167 (quoting Skinner v. Ry. Labor Executives' Ass'n., 489 U.S. 602, 624 (1989)).
207. *Id.* at 1169.
208. *Id.*
209. 212 F.3d 1052, 1067 (7th Cir. 2000).
210. *Joy*, 212 F.3d at 1054.
211. *Id.*

curricular activities or who received a parking permit to sign a consent form agreeing to be tested.[212] The policy outlined a strict procedure for the testing, and provided for confidentiality of the results.[213] Furthermore, a student "receiving a positive test result, [could] be subject to exclusion from any extracurricular activities and/or to revocation of parking privileges."[214] At the trial level, the district court upheld the testing of both students involved in extracurricular activities and those who drove to school.[215]

On appeal, the Seventh Circuit noted that it had addressed the issue of student drug testing in *Todd v. Rush County Schools*,[216] in which it upheld suspicionless testing of students for drugs, alcohol, and nicotine[217] without reviewing the factors enunciated in *Vernonia*.[218] Notwithstanding its decision in *Todd*, the court stated that if "we were reviewing this case based solely on *Vernonia* and *Chandler*, we would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities."[219] The court subsequently undertook an analysis of PHM's testing policy based on the factors enunciated by the Supreme Court in *Vernonia*.[220]

First, the court noted that the "expectation of privacy for students in extracurricular activities . . . [was] greater than the expectation of privacy for athletes,"[221] which the Supreme Court assessed in *Vernonia*. Second, the court stated that the "character of the intrusion [wa]s not overly invasive."[222] Third, the court noted that PHM failed to demonstrate any connection between students involved in extracurricular activities and drug use, nor did it "explain[] how drug use affects students in extracurricular activities differently than students in general."[223] Fourth, the court noted that there was no indication that testing students involved in extracurricular activities would address the problem.[224] Furthermore, PHM failed to demonstrate how requiring individualized suspicion would be unfeasible.[225] Thus, based on the *Vernonia* factors, the court believed that the PHM testing policy was unconstitutional.[226] However, applying the doc-

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212. *Id.* at 1055.
213. *See id.* at 1057.
214. *Id.*
215. *See id.*
216. 133 F.3d 984 (7th Cir. 1998).
217. *See Joy*, 212 F.3d at 1061 (citing *Todd*, 133 F.3d at 986-87).
218. *Id.*
219. *Id.* at 1063.
220. *See id.* at 1063-65.
221. *Id.* at 603.
222. *Id.* at 1064.
223. *Joy*, 212 F.3d at 1064.
224. *Id.* at 1065.
225. *See id.* ("PHM has made no showing that teachers, staff and sponsors of extracurricular activities would not be able to observe the students for suspicious behavior.").
226. *Id.*

trine of *stare decisis* and its prior ruling in *Todd*, the court affirmed the district court's decision permitting testing of students involved in extra-curricular activities.[227]

In addressing the suspicionless testing of student drivers, the Seventh Circuit reached a similar result, concluding that testing for drugs and alcohol was reasonable, but withholding the ability to test for nicotine.[228] In reaching this decision, however, the court relied on the analysis outlined in *Vernonia*, instead of precedent.[229] Specifically, the court recognized "a legitimate and pressing need for drug and alcohol testing of students driving vehicles on school property,"[230] because the risk imposed was substantial in nature[231] and requiring individualized suspicion was not feasible.[232] The need to test for nicotine, however, was unjustifiable[233] because there was no demonstrated risk and the policy could punish students for legal behavior.[234]

D. *Analysis*

In deciding *Earls*, the Tenth Circuit was presented with a case of first impression.[235] The court used the factors adopted by the Supreme Court in *Vernonia* as guidance in determining if the drug testing policy was reasonable by balancing the privacy interests of the high school students involved and the governmental interests in effectuating the policy.[236] Unlike the Supreme Court in *Vernonia*, however, the Tenth Circuit was faced with a negligible drug problem at Tecumseh High School[237] and was unwilling to allow suspicionless drug testing of students without a showing that the intrusion would redress the problem at hand.[238] While the Tenth Circuit was restrained in its unwillingness to allow for searches based on such a non-demonstrable showing, the "special needs" exception adopted to analyze the issue is but one more test which centers on the reasonableness of the governmental policy and pays little heed to the Fourth Amendment Warrant Clause.

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227. *Id.* at 1066.
228. *Id.* at 1065.
229. *Joy*, 212 F.3d at 1063-65.
230. *Id.* at 1064.
231. *See id.*
232. *Id.* at 1065.
233. *Id.*
234. *Id.* at 1064.
235. *See* Earls *ex rel* Earls v. Bd. of Educ., 242 F.3d 1264, 1278-79 (10th Cir. 2001).
236. *See Earls ex rel Earls*, 242 F.3d at 1275-78.
237. *See id.* at 1272-75.
238. *Id.* at 1278 ("Unless a [school] district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school.").

V. CONCLUSION

During the survey period, the Tenth Circuit continued to adopt new and broadening exceptions to the Fourth Amendment's warrant requirement. The Supreme Court, and the Tenth Circuit with it, "has shifted . . . from a conjunctive interpretation of the Fourth Amendment to an interpretation that is increasingly disjunctive and, for searches unrelated to criminal investigations, reliant upon the special needs balancing test to determine reasonableness."[239] While the saying that the Fourth Amendment has a preference for warrants might have once been true, the past year does not mirror that sentiment in the Tenth Circuit. At this current pace, the exceptions might soon swallow the warrant and probable cause rule, leaving the private individual to the discretion of the police and unable to rely on the impartiality and detachment of a neutral and informed magistrate.

Charles W. Chotvacs

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239. Jennifer E. Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U. L. REV. 811, 836 (2001) ("Under the conjunctive approach, . . . the Fourth Amendment does not permit warrantless searches and seizures, while under the disjunctive approach, warrantless searches are allowed, provided that they are 'reasonable.'").

DEPORTABILITY, DETENTION AND DUE PROCESS: AN ANALYSIS OF RECENT TENTH CIRCUIT DECISIONS IN IMMIGRATION LAW

INTRODUCTION

Immigration Law encompasses a substantial number of sub-topics, ranging from determinations of asylum status to judicial jurisdiction to hear appeals to consular access.[1] Plenary power over immigration belongs to Congress under Article I of the United States Constitution, which grants the federal legislature the power "to establish an uniform Rule of Naturalization . . . throughout the United States."[2] Congress's authority over immigration and naturalization has faced little challenge throughout the nation's history, as the United States Supreme Court has held that the right to exclude aliens is a "fundamental act of sovereignty."[3] However, because the Supreme Court has repeatedly held "that all individuals within U.S. borders enjoy constitutional protection,"[4] Congress's actions as they relate to aliens in America must be consistent with Due Process.[5]

Because of the massive scope of Immigration and Naturalization Law, the following survey will focus only on two major sub-topics: the aggravated felony category and the detention of lawful permanent residents. Part I addresses the aggravated felony category, which may be applied to aliens in two ways – first, by making a lawful permanent resident deportable,[6] and, second, by increasing the sentence of a previously deported alien found to have illegally entered the United States after deportation.[7] Part II will discuss the detention of aliens, under the Illegal

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1. For an updated discussion of developments in the full range of Immigration Law, *see Federal Court Update: Summaries of Recent Immigration Decisions*, 78 No. 36 INTER. REL. 1485 (Sept. 2001). West Group releases these updates, containing a report and analysis of immigration and nationality law, monthly.

2. U.S. CONST. art. I, § 8, cl. 4

3. United States ex rel. Knauff v. Shaugnessy, 338 U.S. 537, 542 (1950). For a general discussion of Congress's plenary power over immigration law, *see* Daniel R. Dinger, *When We Cannot Deport, Is It Fair to Detain?: An Analysis of the Rights of Deportable Aliens Under 8 U.S.C. § 1231(a)(6) and the 1999 INS Interim Procedures Governing Detention*, 2000 B.Y.U. L. REV. 1551, 1555-63 (2000) (discussing the intersection of Congress's plenary power over immigration with the Fifth Amendment's Due Process provision); *see generally* Melinda Smith, *Criminal Defense Attorneys and Noncitizen Clients: Understanding Immigrants, Basic Immigration Law & How Recent Changes in Those Laws May Affect Your Criminal Cases*, 33 AKRON L. REV. 163 (1999) (examining both the sociological and legal history of immigration in America).

4. Lisa Cox, *The Legal Limbo of Indefinite Detention: How Long Can You Go?*, 50 AM. U. L. REV. 725, 742 (2001).

5. *See id.* at 742-43.

6. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2001) (classifying as deportable "any alien who is convicted of an aggravated felony at any time after admission").

7. *See* 8 U.S.C. § 1326 (2001) (making it a crime to re-enter the United States following a deportation). Sentencing Guidelines § 2L1.2(b)(1)(A) allow a sixteen-level increase in base offense

Immigration Reform and Death Immigrant Responsibility Act of 1996 ("IIRIRA"), which provides for the detention of an alien pending removal as an aggravated felon, prior to the completion of such removal proceedings.[8]

I. THE AGGRAVATED FELONY REQUIREMENT: 8 U.S.C. § 1227(a)(2)(A)(III)

A. *Background: The Evolution of the Aggravated Felony Definition*

The aggravated felony penalty as applied to aliens first appeared in a 1988 anti-drug law, reflecting a Congressional effort to rid the nation of its least desirable aliens.[9] Although the original aggravated felony category included only murder, drug-trafficking and firearms trafficking,[10] the categorical definition has expanded with virtually every major crime and immigration act since then.[11] Both the 1996 Antiterrorism and Effective Death Penalty Act ("AEDPA")[12] and the IIRIRA[13] greatly expanded the category.[14]

Today, the category includes a lengthy list of crimes, ranging from the original offenses of the 1988 act to prostitution and pornography offenses, from fraud and forgery to a repeat conviction for drug possession.[15] Perhaps the most significant expansion of the category was accomplished by reducing the minimum sentencing requirement.[16] While the category formerly included offenses receiving a five-year minimum sentence, today the category includes offenses with only one-year minimum sentences; "[t]he effect of this is to render virtually all non-regulatory felonies aggravated felonies . . ."[17] Notably, the definition re-

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level for an alien who re-enters after deportation based on a conviction for an "aggravated felony." U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A) (2001).

8. *See* 8 U.S.C. § 1226(c)(2) (2001) (allowing the Attorney General to release an alien deportable under § 1227 only if that release is necessary for the purposes of a separate criminal investigation, provided that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

9. *See* 1988 Anti Drug Abuse Act, Pub. L. 100-690 § 7342 (hereinafter 1988 Act). For a general overview of the evolution of the Aggravated Felony category, *see* Kari Converse, *Criminal Law Reforms: Defending Immigrants in Peril*, 21 AUG. CHAMPION 10, 11-12 (1997); Robert James McWhirter, *Hell Just Got Hotter: The Rings of Immigration Hell and the Immigration Consequences to Aliens Convicted of Crimes Revisited*, 11 GEO. IMMIGR. L.J. 507, 515-20 (1997).

10. *See* 8 U.S.C. § 1226(c)(2) (2001).

11. *See* McWhirter, *supra* note 9, at 518.

12. Pub. L. No. 104-132, 110 Stat. 1214 (1996) (hereinafter AEDPA).

13. Pub. L. No. 104-302, 110 Stat. 3656 (1996) (hereinafter IIRIRA).

14. *See* McWhirter, *supra* note 9, at 515-20.

15. *See* 8 U.S.C. § 1101(a)(43) (2001).

16. *See* Converse, *supra* note 9, at 11-12.

17. *Id.* at 11.

ceives retroactive application, with potentially devastating consequences for some resident aliens.[18]

In the years since the passage of the 1996 acts, many lawful permanent residents have faced deportation proceedings, including several whom Congress most likely would not have considered undesirable or deportable.[19] Some of these aliens may have received only suspended sentences at a time when their offenses were not considered aggravated felonies for deportation purposes, and have lived in the United States for several years since their convictions, with no further criminal activity.[20]

Consider Xuan Wilson, who came to America from Vietnam at age four, wrote a forged check for $19.83 in 1989, and "now faces deportation to a homeland she hardly remembers, as well as a permanent bar against any future re-entry into the United States."[21] Likewise, Sokhom Oeur, a Cambodian refugee who arrived in the States as a teenager, now faces deportation based on an assault conviction, for which he received only a suspended sentence, stemming from his self-defensive use of a weapon when threatened by a group of young men in 1995.[22] By greatly expanding the aggravated felony category, and by applying it retroactively, "Congress cast a big net, and they're catching some dolphins in it."[23]

This survey will focus on two categories of crimes used by the INS as a basis for invoking deportation proceedings. First, this survey will address the transportation of aliens as a potential "aggravated felony." While the IIRIRA refers to an offense "relating to alien smuggling,"[24] the courts have recently had an opportunity to determine if the offense includes the transportation of aliens strictly within American borders.[25] Both the Tenth Circuit and the Fifth Circuit have held that the transportation of aliens falls within an aggravated felony category for deportation purposes, and have, thus, further expanded the category from its original form in 1988.[26]

Second, the survey will address another frequent conviction that may result in deportation, driving under the influence. The Tenth Circuit has disagreed with all other circuits in its interpretation of the "crime of violence" sub-category within the aggravated felony category, particu-

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18. *See* Smith, *supra* note 3, at 194 (discussing the potential of AEDPA to "put legal resident aliens in jeopardy of removal for even minor offenses which may have been committed years ago").

19. *See generally* Terry Coonan, *Dolphins Caught in Congressional Fishnets – Immigration Law's New Aggravated Felons*, 12 IMMIGR. L.J. 589 (1998).

20. *See id.* at 590-92.

21. *Id.* at 591.

22. *See id.*

23. *Id.* at 589 (quoting Russ Bergeron, INS spokesman).

24. *See* 8 U.S.C. § 1101(a)(43)(N) (2001).

25. *See* United States v. Salas-Mendoza, 237 F.3d 1246 (10th Cir. 2001); Ruiz-Romero v. Reno, 205 F.3d 837 (5th Cir. 2000).

26. *See Salas-Mendoza*, 237 F.3d at 1248; *Ruiz-Romero*, 205 F.3d at 840.

larly as it applies to drunk-driving convictions.[27] The definition of aggravated felony includes "a crime of violence (as defined in section 16 of title 18, United States Code, but not including a purely political offense) for which the term of imprisonment [is] at least one year."[28] While four other circuits have considered the issue and determined that a DUI conviction does not constitute an aggravated felony,[29] the Tenth Circuit recently concluded that a DUI conviction constitutes a "crime of violence," and, therefore, satisfies the aggravated felony requirement for the institution of deportation proceedings.[30]

B. *Transportation of Aliens as an Aggravated Felony*

1. Tenth Circuit: *United States v. Salas-Mendoza*[31]

a. Facts

In *United States v. Salas-Mendoza*, the defendant, Leobardo Salas-Mendoza, was convicted of one count of re-entry of a removed alien in violation of 8 U.S.C. § 1326(a).[32] The district court, in sentencing him to 84 months imprisonment, increased his base offense level by 16 points as required by U.S.S.G. § 2L1.2(b)(1)(A).[33] The Sentencing Guidelines require that where a defendant is initially deported based upon an aggravated felony, his base sentence be increased by 16 points.[34] Salas-Mendoza was previously convicted of transporting aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(ii).[35] Salas-Mendoza challenged the court's finding that a conviction for the transportation of aliens constituted an aggravated felony for sentencing purposes, noting the distinction between "alien smuggling," which necessarily requires cross-border movement, and mere transportation, which involves only intra-country movement.[36]

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27. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

28. 8 U.S.C. § 1101(a)(43)(F). Title 18, section 16, defines "crime of violence" as "(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense." 18 U.S.C. § 16 (2001).

29. *See* United States v. Chapa-Garza, 243 F.2d 921 (5th Cir. 2001); Dalton v. Ashcroft, 257 F.3d 200 (2nd Cir. 2001); United States v. Trinidad-Aquino, 259 F.3d 1140 (9th Cir. 2001); Bazan-Reyes v. INS, 256 F.3d 600 (7th Cir. 2001).

30. *See* Tapia Garcia v. INS, 237 F.3d 1216, 1222 (10th Cir. 2001).

31. 237 F.3d 1246 (10th Cir. 2001).

32. *See Salas-Mendoza*, 237 F.3d at 1246.

33. *See id.*

34. *See id.*

35. *See id.*

36. *See id.* at 1247.

b. Decision

Salas-Mendoza's claim that the definition of "aggravated felony" as found in 8 U.S.C. § 1101(a)(43)(N), which includes "an offense described in paragraph (1)(A) or (2) of §1324(a) of this title *(relating to alien smuggling)*," is limited by the parenthetical text, was rejected by the Tenth Circuit.[37] The court expressly rejected the defendant's claim that the "smuggling of aliens, by definition, requires the movement of aliens across the border between Mexico and the United States whereas transportation of aliens involves the movement of aliens solely within the United States."[38] The Tenth Circuit's analysis relied on case law from the Fifth Circuit, which ruled that the parenthetical "relating to alien smuggling" served to describe, rather than to limit, the offenses listed in § 1324(a).[39]

The court further found a clear relationship between the transportation and smuggling of aliens based on both the language of the statute and congressional intent.[40] The court noted that the enumerated offenses listed in § 1324(a) all involve "the transportation, movement and hiding of aliens whether crossing into or within the United States."[41] It bolstered this reading by contrasting the parenthetical in § 1101(a)(43)(N) with those parentheticals elsewhere in § 1101 that expressly limit offenses.[42] Additionally, the court inferred from Congress's continuing expansion of § 1324 since its initial passage an intent to include the act of transportation within the anti-smuggling laws.[43] Having determined that the transportation of aliens fell within the offenses listed in the aggravated felony category, the Tenth Circuit affirmed Salas-Mendoza's increased sentence.[44]

2. Fifth Circuit: *Ruiz-Romero v. Reno*[45]

a. Facts

Less than a year prior to the Tenth Circuit's decision in *Salas-Mendoza*, the Fifth Circuit had the occasion to consider the same issue in *Ruiz-Romero v. Reno*. Here, the defendant, who had achieved lawful permanent resident status in 1990, was convicted of transporting eight

37. *See id.* at 1246 (emphasis added).
38. *Tapia Garcia*, 237 F.3d at 1247.
39. *See id.* (citing United States v. Monjares-Castaneda, 190 F.3d 326, 331 (5th Cir. 1999)).
40. *See id.*
41. *Id.* at 1247.
42. *See id.* at 1248.
43. *See id.* at 1247.
44. *See Tapia Garcia*, 237 F.3d at 1248.
45. 205 F.3d 837 (5th Cir. 2000).

Mexican aliens within the state of New Mexico alone, in violation of § 1324(a)(1)(A)(ii).[46] The law penalizes:

> [Any person who] knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law.[47]

Ruiz-Romero was consequently facing deportation proceedings pursuant to 8 U.S.C. § 1227(a)(2)A)(iii).[48] The defendant moved to terminate the deportation proceedings on the ground that his conviction for the transportation of aliens did not constitute an "aggravated felony."[49] After the immigration judge denied the motion, and the Board of Immigration Appeals ("BIA") upheld that order, the defendant appealed to the Fifth Circuit.[50]

b. Decision

As in *Salas-Mendoza*, the Fifth Circuit was faced with the issue of whether the parenthetical phrase found in § 1101(a)(43)(N) ("relating to alien smuggling") limited or described the statutory definition of aggravated felony preceding it.[51] Here, the court relied on its own precedent of *United States v. Monjaras-Castaneda*,[52] which held in a sentencing-guidelines context that the parenthetical phrase served only a descriptive, rather than restrictive, purpose.[53] Reaffirming the statutory construction found in *Monjaras-Castaneda*, the Fifth Circuit upheld the BIA's finding that the transportation of aliens within American borders constituted an aggravated felony for deportation proceedings.[54]

3. Analysis

The combined rulings of the Tenth Circuit, in *Salas-Mendoza*, and the Fifth Circuit, in *Ruiz-Romero*, suggest that the transportation of aliens within American borders constitutes an aggravated felony for both sentencing and deportation purposes.[55] However, the broad definition and sweeping categorical approach applied by the courts may result in some extremely harsh consequences for some aliens. Consider the following hypothetical. A lawful permanent resident lives in a tight-knit immigrant

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46. 8 U.S.C. § 1324(a)(1)(A)(ii) (1997).
47. *Id.*
48. *See Ruiz-Romero*, 205 F.3d at 838.
49. *See id.*
50. *See idd.*
51. *See id.*
52. 190 F.3d 326 (5th Cir. 1999).
53. *See Monjaras-Castaneda*, 190 F.3d at 329.
54. *See Ruiz-Romero*, 205 F.3d at 839.
55. *See Salas-Mendoza*, 237 F.3d at 1246-47; *Ruiz-Romero*, 205 F.3d at 839.

community in San Antonio, Texas. He agrees to drive a group of his neighbors to Dallas, Texas. Not having determined the legal status of any of his passengers, the lawful permanent resident, through his "reckless disregard" for the illegal status of his neighbors, has committed an aggravated felony and will be subject to deportation proceedings for his neighborly act. Surely, this is not the sort of activity that Congress intended to target.

Consider the following actual scenario. One resident alien, originally from Canada and married to a United States citizen, was ruled deportable for what most would consider a harmless exercise of poor judgment.[56] In 1985, Gabriela Dee, at the age of twenty, sought to help her Israeli boyfriend sneak across the Canadian border into the States.[57] The brief legal proceeding that followed imposed only a $25 fine for her "alien smuggling" conviction.[58] Eleven years later, when the INS was reviewing Dee's application for permanent residency, they discovered the conviction, "retroactively applied the new aggravated felon provisions to Dee's case, and commenced deportation proceedings against her."[59]

In both of these situations, a seemingly innocent (or at least relatively harmless) act renders the actor, an otherwise lawful and upstanding American resident, subject to deportation proceedings. But these actors are not committing the heinous crime most of us imagine when we refer to "alien smuggling." Contrast their actions with the 1993 "Golden Venture" tragedy, where a dilapidated freighter carrying approximately 285 illegal Chinese immigrants washed upon the shore of the Rockaway Peninsula in Queens, New York, resulting in the death of at least six passengers.[60] More recently, Jesus Lopez-Ramos plead guilty to alien smuggling charges after smuggling in dozens of illegal immigrants across the Mexican border, leaving 14 of them to die in the Arizona desert.[61] Surely these are the sorts of criminal acts Congress envisioned when it added the offense of "alien smuggling" to the aggravated felony requirement.[62] By construing the "alien smuggling" category so broadly, the courts have expanded its scope with unintended consequences for countless resident aliens.

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56. *See* Coonan, *supra* note 19, at 590-91.
57. *See id.* at 591.
58. *See id.*
59. *Id.*
60. *See* Samuel Pyeatt Menefee, *The Maritime Slave Trade: A 21st Century Problem?*, 7 ILSA J. INT'L & COMP. L. 495, 501 (2001).
61. *See Man Admits Alien Smuggling*, ORLANDO SENTINEL, Oct. 19, 2001, at A, *available at* 2001 WL 28417985.
62. *See* 8 U.S.C. § 1101(a)(43)(N).

C. *Driving Under the Influence: Aggravated Felony?*

In the past year, several circuits have addressed the issue of whether a drunk driving conviction (either a DUI or a DWI) constitutes a "crime of violence" so as to fall within the aggravated felony category,[63] thereby resulting in either deportation or an increased sentence following an illegal reentry into the United States.[64] Out of the five circuits addressing the issue, only the Tenth Circuit found that a drunk driving conviction constitutes a "crime of violence" as intended by the Immigration and Nationality Act as defined in 18 U.S.C. § 16(b).[65] The remaining circuits all construed the "crime of violence" definition as excluding drunk-driving offenses, based not only on a reading of the definition itself, but also on the distinction between the definition as found at 18 U.S.C. § 16(b) and as found in the Sentencing Guidelines.[66]

1. Tenth Circuit: *Tapia Garcia v. INS*[67]

a. Facts

Jose G. Tapia-Garcia was a Mexican citizen but a legal permanent resident of the United States when he received a conviction for driving under the influence in Idaho in 1998.[68] Tapia-Garcia served only two months of his five year sentence before being released, and the INS subsequently commenced deportation proceedings against him based on his conviction for an "aggravated felony" pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).[69] An immigration judge concluded that Tapia-Garcia's DUI offense satisfied the "crime of violence" category of the "aggravated felony" conviction, and ordered Tapia-Garcia's removal to Mexico.[70] The BIA affirmed the judge's finding, dismissing Tapia-Garcia's appeal and issuing a final removal order that resulted in Tapia-Garcia's deportation to Mexico.[71]

b. Decision

The central issue before the court was whether Idaho's DUI offense constituted an "aggravated felony," and therefore rendered Tapia-Garcia

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63. *See Tapia Garcia v. INS*, 237 F.3d 1216 (10th Cir. 2001); *United States v. Chapa-Garza* 243 F.3d 921 (5th Cir. 2001); *Bazan-Reyes v. INS*, 256 F.3d 600 (7th Cir. 2001); *Dalton v. Ashcroft* 257 F.3d 200 (2d Cir. 2001); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001).

64. *See* discussion regarding the significance of an aggravated felony conviction *supra* Part I-A.

65. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

66. *See* discussion *infra* Part I-C, 2 -5.

67. 237 F.3d 1216 (10th Cir. 2001).

68. *See Tapia Garcia*, 237 F.3d at 1217.

69. *See id.*

70. *See id.*

71. *See id.*

subject to deportation proceedings pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii).[72] In order to determine the issue, the court looked to the definition of aggravated felony under 8 U.S.C. § 1101(a)(43)(F), which included "crime of violence" as described in 18 U.S.C. § 16.[73]

Tapia-Garcia claimed that Idaho's DUI offense did not constitute a crime of violence "because it does not 'by its nature involve a substantial risk that physical force . . . may be used in the course of committing the offense,'" as required by 18 U.S.C. § 16(b).[74] Rather, argued the defendant, the statute was written broadly, so as to encompass both violent and nonviolent crimes.[75]

The Tenth Circuit, however, rejected the defendant's argument, declining to consider the DUI offense in light of the particular facts of the defendant's case, and instead applying a "categorical approach that considers only the generic elements of the offense."[76] The court's analysis relied upon BIA precedent, which called for a categorical approach to the "crime of violence" analysis, requiring that "'the nature of the crime – as elucidated by the generic elements of the offense – is such that its commission would ordinarily present a risk that physical force would be used against the property of another' irrespective of whether the risk develops or harm actually occurs.'"[77] Moreover, the court invoked another BIA decision, which held that a state DUI offense constituted a "crime of violence," so long as the offense was considered a felony under state law, and which noted that "the statutory definition of crime of violence in 18 U.S.C. § 16(b) did not require intentional conduct."[78]

Finally, the court looked to federal precedent, including its own, which held that driving under the influence constituted a "crime of violence" for purposes of the Sentencing Guidelines.[79] Based on the categorical approach to the "crime of violence" analysis, and the federal Sentencing Guidelines precedent, the Tenth Circuit concluded that an Idaho DUI offense constituted a "crime of violence" within the aggravated felony definitions, and therefore rendered the defendant subject to deportation proceedings.[80]

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72. *See id.*
73. *See id.* at 1221.
74. *Tapia Garcia*, 237 F.3d at 1221.
75. *See id.*
76. *Id.* at 1221-22.
77. *Id.* at 1222 (quoting *Matter of Magallanes-Garcia*, Interim Decision 3341, 1998 WL133301 (BIA Mar. 19, 1998) (quoting *Matter of Alcantar*, 20 I. & N. Dec. 801 (BIA 1994), *available at* 1994 WL 232083).
78. *Id.* (citing *Matter of Puente-Salazar*, Interim Decision 3412, 1999 WL 770709 (BIA Sept. 29, 1999).
79. *See Tapia Garcia*, 237 F.3d at 1222-23.
80. *See id.* at 1223.

2. Fifth Circuit: *United States v. Chapa-Garza*[81]

a. Facts

In *United States v. Chapa-Garza*, the Fifth Circuit considered the consolidated appeals of five defendants separately convicted of unlawful presence in the United States after being deported.[82] All defendants faced increased sentences upon a finding that their prior removal from the United States was based upon an "aggravated felony."[83] As in *Tapia Garcia*, the court's decision turned upon whether a conviction for a state drunk driving felony, here a Driving While Intoxicated ("DWI") charge, constituted a "crime of violence" as defined in 18 U.S.C. § 16(b).[84]

b. Decision

The Fifth Circuit's analysis set forth three reasons for determining that the DWI does not constitute a "crime of violence," and therefore is not an aggravated felony that would result in increased sentences for the defendants.[85] First, the court declined to interpret the "crime of violence" language of 18 U.S.C. § 16(b) to include the same offenses as the definition set forth in Sentencing Guideline § 4B1.2(a)(2), which includes "any offense that involves 'pure recklessness,' i.e. a conscious disregard of a substantial risk of injury to others."[86] Instead, the court relied upon an alternative reading of § 16(b), which "applies only when the nature of the offense is such that there is a substantial likelihood that the perpetrator will intentionally employ physical force against another's person or property in the commission thereof."[87] In reaching this decision, the court distinguishes Sentencing Guideline § 4B1.2(a)(2), which considers the effect of the defendant's conduct, from 8 U.S.C. § 16(b), which considers the conduct itself.[88] Moreover, the court noted that the definition of crime of violence found in the Sentencing Guidelines was changed in 1989 from a reference to 18 U.S.C. § 16(b) to the new, broader definition currently found there.[89] The Fifth Circuit then concluded that this change in definition suggests that the two standards must be interpreted differently.[90]

The second reason given by the Fifth Circuit for its holding was that the relevant language of 18 U.S.C. § 16(b), "'substantial risk that physi-

81. 243 F.3d 921 (5th Cir. 2001).
82. *See Chapa-Garza*, 243 F.3d at 923.
83. *See id.*
84. *See Chapa-Garza*, 243 F.3d at 923.
85. *See id.* at 924.
86. *Id.* at 925.
87. *Id.*
88. *See id.*
89. *See id.* at 926.
90. *See Chapa-Garza*, 243 F.3d at 926.

cal force . . . may be used' contemplates only reckless disregard for the probability that *intentional* force may be employed."[91] The court viewed this construction, which favors a requirement of intentional conduct on the part of the defendant, as opposed to requiring only an "accidental, unintended event," as the most reasonable interpretation of the phrase "may be used."[92]

Finally, the Fifth Circuit stated, "the physical force described in § 16(b) is that 'used in the course of committing the offense,' not that force that could result from the offense having been committed."[93] Again, the focus is on the intent of the perpetrator and on the conduct itself, as opposed to the unintended effects that may result from such conduct. Based on these factors, the Fifth Circuit determined that force is not intentionally "used" against another person by the perpetrator of a DWI, and, therefore, a DWI felony does not constitute a "crime of violence," as defined by 18 U.S.C. § 16(b).[94]

3. Seventh Circuit: *Bazan-Reyes v. INS*[95]

a. Facts

In *Bazan-Reyes v. INS*, the Seventh Circuit addressed the consolidated appeals of three resident aliens facing removal based on state drunk driving offenses under Indiana, Illinois, and Wisconsin law.[96] Defendant Bazan-Reyes, a Mexican citizen, had been a legal resident in the United States for eleven years prior to his Indiana DWI conviction.[97] Defendant Maciasowicz, a Polish citizen, had been a lawful permanent resident for nearly five years when he pled guilty to two counts of homicide by intoxicated use of a vehicle under Wisconsin law.[98] The third defendant, Gomez-Vela, was a Mexican citizen admitted as a lawful permanent resident in 1971.[99] After twenty-five years of residence, Gomez was charged with aggravated driving under the influence based on two prior DUI convictions in Illinois.[100]

b. Decision

The Seventh Circuit faced the question of whether state drunk driving offenses constituted "aggravated felonies" for deportation purposes, as all three defendants had received removal orders from the INS based

91. *Id.* at 924 (emphasis in original).
92. *See id.* at 926.
93. *Id.* at 924.
94. *See id.* at 927.
95. 256 F.3d 600 (7th Cir. 2001).
96. *See Bazan-Reyes*, 256 F.3d at 602.
97. *See id.*
98. *See id.* at 603.
99. *See id.*
100. *See id.*

on their convictions.[101] The court ultimately rejected decisions by the INS and the BIA, which had ruled that state drunk driving offenses constituted aggravated felonies because they were crimes of violence, as defined by 18 U.S.C. § 16.[102]

Relying on its own precedent, the Seventh Circuit concluded that their prior "finding that the word 'use' requires volitional conduct prohibits a finding that drunk driving is a crime of violence under §16(a)."[103] Additionally, the Seventh Circuit, like the Fifth Circuit in *Chapa-Garza*, distinguished between "crime of violence" as defined in § 16 and as defined in the Sentencing Guidelines.[104] Accordingly, the court held that a "crime of violence" finding, for aggravated felony purposes, "is limited to crimes in which the offender is reckless with respect to the risk that intentional physical force will be used in the course of committing the offense."[105] The court then applied a categorical approach to the drunk driving statutes, and determined that "intentional force" is almost never used to commit such offenses.[106] The court concluded, therefore, that the drunk-driving offenses did not constitute crimes of violence, and that the defendants were therefore not convicted of aggravated felonies for removal purposes.[107] In reaching its decision, the court specifically rejected the Tenth Circuit's contrary determination that drunk driving is a crime of violence.[108]

4. Second Circuit: *Dalton v. Ashcroft*[109]

a. Facts

In *Dalton v. Ashcroft*, the Second Circuit reviewed the decision of the BIA, which upheld an immigration judge's order of removal based on a resident alien's DWI conviction.[110] The petitioner, Thomas Anthony Dalton, although a citizen of Canada, had been living in the United States as a lawful permanent resident since 1958, prior to his first birthday.[111] Dalton's parents and siblings were also residing in the United States at the time of his deportation proceedings.[112] In 1998, Dalton pled guilty to a DWI offense, and based on two previous convictions within the pre-

101. *See id.* at 604.
102. *See Bazan-Reyes*, 256 F.3d at 605.
103. *Id.* at 609.
104. *See id.*
105. *Id.* at 612.
106. *See id.*
107. *See id.* at 612.
108. *See Bazan-Reyes*, 256 F.3d at 610.
109. 257 F.3d 200 (2d Cir. 2001).
110. *See Dalton*, 257 F.3d. at 203.
111. *See id.* at 202.
112. *See id.*

ceding ten years, Dalton's crime and sentence were increased to a class D felony under New York law.[113]

Subsequently, while Dalton was serving his prison sentence, the INS began removal proceedings against him as an alien convicted of an aggravated felony.[114] An immigration judge ordered Dalton removed without the opportunity to request relief, and the BIA affirmed.[115] The BIA's decision relied on its own precedent, as well as a Fifth Circuit opinion which was later withdrawn, in determining that a DWI conviction under New York law constituted a "crime of violence," and therefore fell within an aggravated felony category.[116]

b. Decision

The Second Circuit applied a categorical approach to its statutory interpretation of the New York DWI statute.[117] In doing so, the court relied upon recent language of the New York Court of Appeals regarding the statute, which noted the "sweeping" nature of conduct covered by the statute.[118] The court noted the many situations in which a person could be convicted under the New York statute, including situations where an intoxicated person is found asleep at the wheel of a car that is neither in motion nor running.[119] Comparing the broad range of conduct covered by the New York statute to the federal "crime of violence" definition, the court concluded that a New York DWI conviction did not necessarily involve the "use of physical force" as required by the "crime of violence" definition.[120] The Second Circuit, like the Fifth Circuit in *Chapa-Garza*, distinguished between the "risk of injury" and a risk of the "use of physical force," thereby focusing on intent and conduct, rather than potential and unintended effects.[121]

5. Ninth Circuit: *United States v. Trinidad-Aquino*[122]

a. Facts

In *United States v. Trinidad-Aquino*, the Ninth Circuit considered whether a prior deportation based on a California DUI conviction should result in an elevated sentence due to the aggravated felony penalty.[123] The defendant, Trinidad-Aquino, received a 1994 conviction for driving un-

113. *Id.*
114. *See id.* at 203.
115. *See id.*
116. *See Dalton*, 257 F.3d at 203.
117. *See id.* at 204.
118. *See id.* at 205.
119. *See id.*
120. *See id.* at 206.
121. *See id.* at 207.
122. 259 F.3d 1140 (9th Cir. 2001).
123. *See Trinidad-Aquino*, 259 F.3d at 1142.

der the influence of alcohol with bodily injury under California law and was subsequently deported.[124] Five years later, Trinidad-Aquino pled guilty to illegally re-entering the United States following a deportation order.[125] Under the Sentencing Guidelines, if a defendant was previously deported after receiving an "aggravated felony" conviction, a sixteen-level increase in base offense will be applied to his sentence.[126] The district court, ruling that Trinidad-Aquino's prior DUI conviction did not satisfy the "aggravated felony" definition, refused to apply this sentencing increase.[127] The government appealed.[128]

b. Decision

The Ninth Circuit upheld the determination of the district court that, because the DUI conviction required merely "a negligence mens rea" under California law, the offense was not a "crime of violence" and therefore did not constitute an aggravated felony for sentencing purposes.[129] In reviewing the district court's finding, the Ninth Circuit applied a categorical approach, based on the statutory definition of the crime.[130] Following its own precedent of *United States v. Baron-Medina*,[131] the court ruled that, because "'[c]rime of violence' is not a traditional common law crime . . . it can only be construed by considering the ordinary, contemporary, and common meaning of the language Congress used in defining the crime."[132] The court relied on the word "use" in the statutory definition for a "crime of violence," holding that the word "use" as commonly understood involves a "volitional requirement absent from negligence."[133] In applying this understanding of the "crime of violence" to the case at bar, the court considered not the specific facts of Trinidad-Aquino's crime, which may have involved a mens rea above negligence, but only the DUI statute as a whole, which allows a conviction for mere negligence.[134] Accordingly, the Ninth Circuit ruled that a DUI conviction under California law was not sufficient to result in an elevated sentence for Trinidad-Aquino.[135]

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124. *See id.*
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.* at 1142.
129. *See Trinidad-Aquino*, 259 F.3d at 1146.
130. *See id.* at 1143.
131. 187 F.3d 1144 (9th Cir. 1999).
132. *Trinidad-Aquino*, 259 F.3d at 1144.
133. *Id.*
134. *See id.* at 1146.
135. *See id.*

6. Analysis

In the last year, five circuits considered the precise issue of whether a drunk driving violation could constitute an aggravated felony for purposes of both removal proceedings and sentence enhancements after being convicted of illegal reentry.[136] Four circuits found that such an offense cannot constitute an "aggravated felony."[137] Only the Tenth Circuit has determined within the last year that a DUI is a "crime of violence," and therefore an aggravated felony for immigration law purposes.[138] However, because the Tenth Circuit issued its decision on January 19, 2001, while the other circuits issued their decisions in March, July and August of 2001,[139] it is questionable whether the Tenth Circuit ruling will stand, should the same issue arise again.

II. THE MANDATORY DETENTION REQUIREMENT: 8 U.S.C. § 1226(C)

A. *Background*

1. Generally

IIRIRA provides for the detention of an alien pending removal as an aggravated felon, prior to the completion of such removal proceedings.[140] IIRIRA amended the Immigration and Nationality Act ("INA") to include § 236(c), which requires the Attorney General to "take into custody any alien who . . . is deportable by reason of having committed" an aggravated felony, as expanded under IIRIRA.[141] The 1996 amendment was not Congress's first attempt at such a stringent detention provision. The 1988 Anti-Drug Abuse Act ("ADAA") provided a similar detention requirement for those aliens who had committed "aggravated felonies"[142] – albeit under a much narrower definition of "aggravated felony."[143] The majority of courts who reviewed the ADAA's mandatory detention provision declared it unconstitutional as violating due process.[144] Consequently, Congressional amendments in 1990 and 1991 allowed for the discretionary release of lawful aliens who could demonstrate that they posed neither flight nor public safety risks.[145] The current mandatory de-

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136. *See* cases cited *supra* notes 66, 80, 94, 108, 121.

137. *See* cases cited *supra* notes 80, 94, 108, 121.

138. *See* Tapia Garcia v. INS, 237 F.3d 1216 (10th Cir. 2001).

139. *See* cases cited *supra* notes 66, 80, 94, 108, 121.

140. *See* 8 U.S.C. § 1226(c)(2) (allowing the Attorney General to release an alien deportable under § 1227 only if that release is necessary for the purposes of a separate criminal investigation, provided that "the alien will not pose a danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding").

141. 8 U.S.C. § 1226(c)(1)(B).

142. ADAA § 7343(a).

143. *See supra* notes 8 – 17 and accompanying text.

144. *See* Ellis M. Johnston, *Once a Criminal, Always a Criminal? Unconstitutional Presumptions for Mandatory Detention of Criminal Aliens*, 89 GEO. L.J. 2593, 2597 (2001).

145. *See id.*

tention provision represents a Congressional response to a growing public perception of the danger of criminal aliens.[146]

The ongoing debate over the rights of lawful permanent resident aliens within the United States, and the mandatory detention of an alien prior to a final removal order, has become extremely relevant in light of the recent terrorist attacks on America and the subsequently enacted legislation.[147] On October 26, 2001, President Bush signed the USA Patriot Act, a stark piece of anti-terrorism legislation swiftly drafted and passed in response to the September 11th terrorist attacks on America.[148] A key provision of the new law allows "the attorney general to hold foreigners considered suspected terrorists for up to seven days before charging them with a crime or beginning deportation proceedings."[149] The provision was a compromise insofar as the administration had initially sought the authority to detain immigrants suspected of terrorism indefinitely.[150]

Whether the seven-day limit included in the bill will place any actual restraints on the government's treatment of immigrants is questionable. The executive branch detained some 700 to 800 immigrants in the weeks following the attacks,[151] and has invoked a variety of justifications for doing so.[152] First, the government may hold people as material witnesses if "they are thought to have pertinent information and prosecutors want to depose them or get them to testify before a grand jury. A material witness has a right to a hearing but can be held without bail if he is considered a flight risk."[153]

A second group involves individuals detained by the government on immigration charges, who "can be held virtually indefinitely once deportation proceedings have begun."[154] Although the period of time be-

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146. *See id.* at 2596-97.

147. *See* Robin Toner & Neil A. Lewis, *House Passes Terrorism Bill Much Like Senate's, But With 5-Year Limit*, N.Y. TIMES, Oct. 13, 2001, *available at* 2001 WL-NYT 0128600053. The legislation requires the Attorney General to release suspects after seven days, or to charge them with a criminal or immigration violation. *See id.*

148. *See Bush Signs Sweeping New Laws to Combat Terrorism*, Oct. 26, 2001, *at* http://news.findlaw.com/politics/s/20011026/attackbushdc.html (last visited Oct. 26, 2001).

149. *Id.*

150. *See* Adam Clymer, *Senate Passes Anti-Terror Bill to Expand Government's Powers*, Oct. 26, 2001, N.Y. TIMES NEWS SERV., *available at* 2001 WL-NYT 0129900024.

151. *See* Mae M. Cheng, *Detentions Raise Legal Concerns: Some Immigrants held for long periods*, NEWSDAY, Oct. 22, 2001, *available at* 2001 WL 9257317; Laurie P. Cohen, *The Response to Terror: Material-Witness Warrants in U.S. Draw Criticism*, ASIAN WALL ST. J., Oct. 23, 2001, at 12, *available at* 2001 WL-WSJA 22059219.

152. *See* Judy Peres, *War on Terror: The Detained*, CHI. TRIB., Oct. 16, 2001, at 8, *available at* 2001 WL 4126317.

153. *Id.*

154. *Id.* The authority to detain these immigrants virtually indefinitely is discussed in Part II of this survey. *See also* Anita Ramasastry, *Indefinite Detention Based Upon Suspicion: How the Patriot Act Will Disrupt Many Lawful Immigrants' Lives*, *at* http://writ.news.findlaw.com/commentary/

tween detention and the decision to commence deportation proceedings was traditionally regulated at 48 hours, Attorney General Ashcroft recently expanded it to "48 hours except in emergencies or extraordinary circumstances, where you can be detained for any reasonable time."[155] With the authority to invoke the current state of "emergency" facing the country, the Attorney General may effectively detain immigrants guilty of even the slightest immigration infringements for an unlimited period of time.

Civil rights groups and attorneys have reacted with great concern over the detention of immigrants following the September 11th attacks.[156] Some of the common concerns include the federal government's failure to release information regarding "the nationality or ethnicity of many of the detainees, the criteria authorities are using to pick them up, what kind of access they have been given to attorneys or how many people have been released."[157] So far, a great deal of anecdotal evidence has emerged to reinforce these concerns.[158] Some of the more egregious examples include the beating of a Pakistani student being held in a Mississippi jail,[159] the holding of a Middle Eastern man for two weeks without allowing him to contact his attorney,[160] and, for a Saudi man in Texas, the denial of "an attorney, a mattress, a blanket, a drinking cup and a clock to remind him when to say his Muslim prayers."[161]

2. 8 U.S.C. § 1226(c)

Under section 1226(c), the Attorney General is authorized to release such "deportable" aliens only if such release:

> is necessary to provide protection to a witness, a potential witness, a person cooperating with an investigation into major criminal activity, or an immediate family member or close associate of a witness, potential witness , or person cooperating with such an investigation, and the alien satisfies the Attorney General that the alien will not pose a

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20011002_ramasastry.html (last visited Nov. 11, 2001) (discussing the potential for detention based on secret evidence as a serious threat to the constitutional rights of lawful permanent residents living in the U.S.).

155. Peres, *supra* note 152.

156. *See* Toner & Lewis, *supra* note 147; Editorial, *Protect Public, Constitution*, SUN SENTINEL, Oct. 25, 2001, 28A, *available at* 2001 WL 22763920; William Carlsen, *Rights Violations, Abuses Alleged by Detainees: Beatings,Lack of Legal Representation Cited*, S.F. CHRON., Oct. 19, 2001, A12, *available at* 2001 WL 3417445; Cheng, *supra* note 151.

157. Cheng, *supra* note 151.

158. *See* Cheng, *supra* note 151; Sun Sentinel Editorial, *supra* note 156; Carlsen, *supra* note 156.

159. *See* Carlsen, *supra* note 156.

160. *See* Cheng, *supra* note 151.

161. Sun Sentinel Editorial, *supra* note 156.

> danger to the safety of other persons or of property and is likely to appear for any scheduled proceeding.[162]

Thus, section 1226(c) presents a two-fold problem for so-called "deportable" aliens: (1) it deprives them of an individual consideration of whether they ought to be detained or ought to be released on bond, prior to any actual decision that a removal order will result; and (2) by omitting any mention of a time limit for such detention or for the determination of whether to issue a removal order, it places them in jeopardy of a potentially unlimited detention, without any hearing.[163]

Once an alien has received a final removal order, their detention and deportation is governed by 8 U.S.C. § 1231.[164] However, many aliens facing removal orders are unable to be deported, "either because their foreign citizenship cannot be clearly established or because their country of origin is unwilling to accept them."[165] In *Ho v. Greene*,[166] the Tenth Circuit considered the detention of a removable alien under 8 U.S.C. § 1231(a)(6), and found statutory authority to indefinitely detain an alien who cannot be removed within the ninety-day removal period and who the Attorney General determines to present either a flight risk or a security risk.[167] In upholding the constitutionality of such indefinite detention, the Tenth Circuit determined that an alien who has been ordered removed retains no liberty interest, and therefore has not been deprived constitutional Due Process.[168]

The Supreme Court recently addressed this issue in *Zadvydas v. Davis*,[169] and rejected the authority of the INS to indefinitely detain these "un-deportable" aliens.[170] In reaching this conclusion, the Supreme Court expressly overturned both the Fifth and Ninth Circuits, finding that the indefinite detention of a resident alien facing a final removal order raises serious Fifth Amendment Due Process issues.[171] The Supreme Court held that the post-removal detention period of an "un-deportable" alien under § 1231 must contain an implicit reasonableness limitation, and that the presumptive limit would be six months.[172] In light of the Supreme Court's

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162. 8 U.S.C. § 1226(c)(2) (1999).

163. *See* § 1226(c)(2).

164. 8 U.S.C. § 1231 (2001).

165. Barry J. Lipson, *Federally Speaking*, 3 NO. 18 LAW. J. 6, 6 (2001). *See generally* Victoria Cook Capitaine, *Life in Prison Without a Trial: The Indefinite Detention of Immigrants in the United States*, 79 TEX. L. REV. 769, 773-74 (2001) (discussing the plight of the so-called "stateless" aliens, those without citizenship of any country, who therefore cannot be deported).

166. 204 F.3d 1045 (10th Cir. 2000).

167. *See Ho*, 204 F.3d at 1056.

168. *See id.* at 1058-59.

169. 121 S.Ct. 2491 (2001).

170. *See Zadvydas*, 121 S.Ct. at 2505.

171. *See id.* at 2498.

172. *See id.* at 2505.

decision in *Zadvydas*, the Tenth Circuit's decision in *Ho* likely carries little precedential value.

However, neither the *Zadvydas* decision, nor the Tenth Circuit ruling in *Ho*, is directly binding upon whether the mandatory detention of aliens who have yet to receive a final removal order is constitutional.[173] With neither binding Supreme Court nor Tenth Circuit precedent as to the matter of the mandatory detention provision of § 1226(c), it is not surprising that the district courts are split as to the constitutionality of the provision.[174] This survey examines the split within the Tenth Circuit as to this issue, and discusses the Seventh Circuit decision that directly considered and upheld the constitutionality of the mandatory detention provision.[175]

B. *Current Confusion under § 1226(c)*

1. Tenth Circuit Split: Mandatory Detention as Unconstitutional

a. *Son Vo v. Greene*[176]

i. Facts

In *Son Vo v. Greene*, the District Court considered the detention, without bond, of Son Dien Vo, a lawful permanent resident facing potential deportation due to his conviction for Bank Fraud and aiding and abetting in violation of 18 U.S.C. § 1344 and 18 U.S.C. § 2.[177] Vo, a native of Vietnam, had been living in Denver as a lawful permanent resident of the United States at the time of his conviction.[178] Vo appealed the immigration judge's determination that Vo was statutorily ineligible for bond as an aggravated felon, claiming that the mandatory statutory detention requirement violated both his procedural and substantive Due Process rights.[179]

ii. Decision

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173. Although the Supreme Court briefly addressed section 1226(c) in dicta, it specifically limited its holding to those aliens already facing removal orders but who are nonetheless "undeportable," stating that "the issue we address is whether aliens that the Government finds itself unable to remove are to be condemned to an indefinite term of imprisonment within the United States." *Id.* at 2503.

174. *See* Son Vo v. Greene, 109 F. Supp. 2d 1281, 1283 (D. Colo. 2000); Gonzalez-Portillo v. Reno, 172 F.3d 954 (7th Cir. 1999); Kwon v. Comfort, 174 F. Supp. 2d 1141 (D. Colo. 2001).

175. *See* Parra v. Perryman, 172 F.3d 954 (7th Cir. 1999). Despite the continuing disagreement as to the constitutionality of the provision, no other Circuit has directly confronted this issue since. *See* Son Vo v. Greene, 109 F. Supp. 2d 1281, 1283 (D. Colo. 2000).

176. 109 F. Supp. 2d 1281 (D. Colo. 2000).

177. *See Son Vo*, 109 F. Supp. 2d at 1281.

178. *See id.*

179. *See id.* at 1282.

In assessing the constitutionality of the provision, Judge Kane rejected the reasoning of three prior bench decisions, which followed the Seventh Circuit decision in *Parra v. Perryman*[180] upholding the constitutionality of § 1226(c).[181] Judge Kane distinguished *Parra*, where the alien was fully deportable to Mexico, with the case at bar, where Vo could not be deported to Vietnam even if he received a final removal order.[182] Judge Kane, in enjoining the INS from applying § 1226(c) to Vo, held that the mandatory provision "deprived [Vo] of his liberty without due process of law," concluding that "due process requires that a person 'charged' with being an aggravated felon be afforded the opportunity to present evidence establishing that he is not what he is merely 'charged' to be."[183]

b. *Gonzalez-Portillo v. Reno*[184]

i. Facts

A few months after Judge Kane's decision in *Son Vo*, Federal Magistrate Judge Coan considered the detention of a lawful permanent resident facing deportation proceedings based on her convictions for multiple crimes of moral turpitude and for her aggravated felony conviction.[185] The petitioner, Gonzalez-Portillo, although a citizen of El Salvador who originally entered the United States as an undocumented alien, obtained lawful permanent resident status in 1989.[186] Eleven years later, Gonzalez-Portillo pled guilty to two counts of forgery, a third degree felony.[187] She received a sentence of an indeterminate term, not to exceed five years, but served only fifteen days in county jail.[188]

Subsequently, the INS initiated removal proceedings.[189] Gonzalez-Portillo challenged her removability, claiming that her status as a lawful permanent resident provided her with immunity from removal, that she did not commit an aggravated felony for deportation purposes, and that the mandatory detention provision of § 1226(c) violates her Fifth Amendment right to Due Process and her Eighth Amendment right to reasonable bond.[190]

ii. Decision

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180. 172 F.3d 954 (7th Cir. 1999). *See* discussion, *infra*, Part II.B.2.a.
181. *See Son Vo*, 109 F. Supp. 2d at 1283.
182. *See id.*
183. *Son Vo*, 109 F. Supp. 2d at 1283-84.
184. 2000 WL 33191534 (D. Colo. 2000).
185. *See Gonzalez-Portillo*, 2000 WL 33191534, at *1.
186. *See id.*
187. *See id.*
188. *See id.*
189. *See id.*
190. *See id.*

After rejecting her first two claims, the court considered Gonzalez-Portillo's claim of the unconstitutionality of the mandatory detention provision.[191] First, the court determined that a strict scrutiny standard must be applied to the government's provision, requiring that the INS "demonstrate that the detention of aliens without opportunity for release pending finalization of removal proceedings is narrowly tailored to serve a compelling government interest."[192] Next, having determined that the Congress has a compelling interest in preventing the flight of criminal aliens and the commission of additional crimes, the court considered whether section 1226(c)'s detention requirement was excessive in relation to that interest.[193]

Here, the court considered the mandatory nature of the provision, which "does not afford the Attorney General any discretion to make an individualized determination about whether the reasons justifying Congress' enactment of the detention statute apply to a particular alien."[194] Additionally, the court noted the indefinite nature of the requirement, as the provision failed to provide any specific time limit for the issuance of a final removal order.[195] Based on both the inflexible nature of the provision, and the potentially indefinite detentions that it authorized, the magistrate deemed § 1226(c) unconstitutional and ordered that the INS must provide Gonzalez-Portillo with an individualized bond hearing "to determine whether she presents a substantial risk of flight or a threat to persons or property."[196]

c. Mandatory Detention as Constitutional: *Kwon v. Comfort*[197]

i. Facts

In *Kwon*, a Colorado district court considered the mandatory detention provision of IIRIRA as it addressed an appeal from a lawful permanent resident facing immigration proceedings pursuant to his conviction for an aggravated felony.[198] The petitioner, a Korean citizen but a lawful permanent resident of the United States, was convicted of second and third degree sexual assault and received a sentence of nine months in jail

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191. *See id.* at *5.

192. *Id.* at *7. In reaching this decision, the court relied upon the language of Reno v. Flores, 507 U.S. 292, 302 (1993), which "distinguished the juvenile alien's liberty interest from a fundamental liberty interest such as 'freedom from physical restraint' in the sense of a barred cell." *Id.* at *6.

193. *See id.* at *8.

194. *Id.* at *10.

195. *See id.*

196. *Id.* at *12.

197. 174 F. Supp. 2d 1141 (D. Colo. 2001).

198. *See Kwon*, 174 F. Supp. 2d at 1143.

followed by eight years of probation.[199] Subsequently, the INS initiated removal proceedings against Kwon as an aggravated felon.[200]

ii. Court's Reasoning

Here, the court rejected the petitioner's argument that the mandatory detention provision is unconstitutional, and instead followed the Seventh Circuit's decision in *Parra*.[201] The court's analysis focused first on Congress' "near-complete power over immigration," which stems from more than mere Constitutional authority, but also from an inherent sovereign right "to determine which aliens it will admit or expel."[202] Next, the court applied a relaxed standard for evaluating the constitutionality of the provision, requiring only that the provision be "bas[ed] upon a facially legitimate and bona fide reason."[203]

In applying this "facially legitimate" purpose test, the court concluded that the detention requirement, along with IIRIRA as a whole, serves a legitimate governmental purpose by preventing the risk of flight as well as the risk of further criminal activities through the duration of the removal proceedings.[204] Moreover, the court noted that even prior to IIRIRA, the release of an alien pending removal proceedings was a matter of discretion, rather than entitlement.[205] Finally, the court asserted that the detention under § 1226(c) "is not indefinite but is limited to the time it takes to adjudicate the removal proceedings, consider any request Petitioner makes for relief from removal . . . and, if relief is rejected, to execute the final order of removal."[206] Based on these considerations, the court in *Kwon* upheld 8 U.S.C. § 1226(c) as constitutional.[207]

2. Other Circuits

a. *Parra v. Perryman*[208]

i. Facts

In *Parra v. Perryman*, the Seventh Circuit considered and upheld the constitutionality of 8 U.S.C. § 1226(c), requiring the mandatory detention of a deportable alien pending removal proceedings.[209] Manuel Parra, a Mexican citizen convicted of aggravated criminal sexual assault,

199. *See id.*
200. *See id.*
201. *See id.* at 1146.
202. *Id.* at 1144-45.
203. *Id.* at 1146 (quoting Fiallo v. Bell, 430 U.S. 787, 794-95 (1977)).
204. *Kwon*, 174 F. Supp. 2d at 1146.
205. *See id.*
206. *Id.*
207. *See id.* at 1144.
208. 172 F.3d 954 (7th Cir. 1999).
209. *See Parra*, 172 F.3d at 958.

was held by the INS pending a final removal order.[210] In his appeal, Parra conceded both that he was an alien and that he had been convicted of an aggravated felony for removal purposes.[211] Accordingly, Parra presented no doubt as to the fact that his removal order would be made final, but only challenged whether the INS could detain him until such an order was officially issued.[212]

ii. Decision

In addressing Parra's claim, the Seventh Circuit relied both on the plain language of § 1226(c), which mandates the detention of aliens who are "deportable," and on the immediate facts before it.[213] The court noted that Parra's case, where his ultimate deportability was not in question, presented no dilemma but that there might be closer cases:

> [I]t is easy to imagine cases – for example, claims by persons detained under § 1226(c) who say that they are citizens rather than aliens, who contend that they have not been convicted of one of the felonies that authorizes removal, or who are detained indefinitely because the nation of which they are citizens will not take them back – in which resort to the Great Writ may be appropriate. Today's case presents none of these possibilities, however, for Parra concedes that he is an alien removable because of his criminal conviction, and Mexico accepts return of its citizens.[214]

After comparing Parra's liberty interest with the government's need to prevent his flight, the Seventh Circuit found no constitutional bar to Parra's detention.[215]

3. Analysis

The Seventh Circuit's holding must be construed extremely narrowly, for it evaluated the constitutionality of the mandatory detention requirement not on its face, but only as applied to these particular facts.[216] The court assessed Parra's liberty interest not as "liberty in the abstract, but liberty *in the United States* by someone no longer entitled to remain in this country but eligible to live at liberty in his native land."[217] Accordingly, the Seventh Circuit did not actually address the constitutionality of the detention as applied to a resident alien contesting either his or her legal status or the nature of the criminal conviction.[218]

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210. *See id.* at 955.
211. *See id.* at 956.
212. *See id.*
213. *See id.* at 957.
214. *Id.*
215. *See Parra*, 172 F.3d at 958.
216. *See id.* at 957.
217. *Id.*
218. *See id.* at 957.

In *Kwon v. Comfort*, the Colorado district court's reasoning is flawed in two major ways. First, in upholding the statute's detention provision, the court describes the decision to release an alien pending removal as one that has traditionally been discretionary.[219] Based on this premise, the court ultimately ends up preserving a statute that removes this traditional discretion, and instead requires a mandatory detention.[220] Second, the court's reliance on *Parra* may be misplaced. While *Parra* focused specifically on a defendant who conceded all aspects of his removability,[221] the court in *Kwon* makes no mention of whether the defendant had conceded his ultimate removability.[222]

With no on-point precedent as to the constitutionality of the mandatory detention of lawful permanent residents prior to a final removal order, the confusion within the Tenth Circuit is understandable. However, given the recent surge in INS activity as against both illegal immigrants and aliens lawfully present within the United States, the Due Process limitations on alien confinement will become increasingly important.

CONCLUSION

Throughout American history, our national crises have been reflected in our legal treatment of immigrants, from the restrictions on Japanese-Americans following the attack on Pearl Harbor[223] to the recent USA Patriot Act, passed in swift response to the September 11th terrorist attacks on America.[224] While excluding or deporting those aliens who lack any established ties to and who pose significant safety threats to American society is certainly a worthwhile goal, the achievement of this goal must be tempered with reasonableness and limited by the constitutional restraint of Due Process, particularly regarding those aliens lawfully present.

The "aggravated felony" category, as repeatedly expanded by Congress and broadly interpreted by the courts, has resulted in total upheaval for countless non-citizens who have lived peaceably in the United States for the majority of their lives. Additionally, these same non-citizens face a mandatory detention prior to any final determination of their removability, regardless of any flight or safety risk they pose. The allowance of this constitutionally questionable practice not only risks the integrity of the Due Process clause, but drains INS resources on the detention of

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219. *See Kwon*, 174 F. Supp. 2d at 1146.
220. *See id.* at 1146-47.
221. *See Parra*, 172 F.3d at 957.
222. *See id.* at 956.
223. *See generally* Hirabayashi v. United States, 320 U.S. 81 (1943) (upholding as constitutional federal legislation placing both curfew restrictions and geographic exclusions upon all persons of Japanese ancestry, whether U.S. citizens or immigrants).
224. *See* notes 148-162, *supra*, and accompanying text.

relatively harmless individuals rather than in the pursuit of the truly dangerous elements in our society. In order to ensure a constitutional and level response to threats on our national security, the courts must be vigilant in reviewing the legal treatment of immigrants in America in the coming months.

Kathleen O'Rourke

COMBATING THE ILLICIT INTERNET: DECISIONS BY THE TENTH CIRCUIT TO APPLY HARSHER SENTENCES AND LESSENED SEARCH REQUIREMENTS TO CHILD PORNOGRAPHERS USING COMPUTERS

There is no adequate way to measure the damage caused by those who produce and sell child pornography. Child pornographers rob children of their innocence and leave them harmed for life. Society must not tolerate this behavior, and the federal government must have the resolve and the necessary tools to combat it.

. . . In light of these significant harms, it is essential that those who are caught and convicted for this conduct be punished severely.[1]

With its inexpensive, unlimited and instantaneous transmission characteristics, the Internet has been termed "the most efficient pornography distribution engine ever conceived."[2] About one-fifth of worldwide Internet users regularly visit a commercial pornography site,[3] making the Internet the "primary medium for pornography transmission."[4] Estimates of the annual U.S. sales revenue from child pornography approach one billion dollars.[5]

In 1994, about twenty-three percent of federal child pornography cases involved the use of a computer.[6] In 1995, that number increased by more than one-fifth, to twenty-eight percent.[7] In response to such growth, Congress enacted legislation to stiffen the penalties assessed against child pornographers.[8] The legislation subjects suspected child pornographers to lessened search and seizure requirements and subjects convicted pornographers to increased sentencing terms.[9] If crimes were committed by using the computer, the pornographers may have restrictions on Internet use that reach into their parole terms.[10] The lessened search and sei-

1. H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61.

2. Lesli C. Esposito, Note, *Regulating the Internet: The New Battle Against Child Pornography*, 30 CASE W. RES. J. INT'L L. 541, 541 (1998) (quoting Bill Frezza, *Morality and Imagination: Technology Challenges Both*, COMM. WK., Jan. 13, 1997, at 31, 1997 WL 7691238).

3. *See* Kelly M. Doherty, Comment, *www.obscenity.com: An Analysis of Obscenity and Indecency Regulation on the Internet*, 32 AKRON L. REV. 259, 263 (1999).

4. Esposito, *supra* note 2, at 541.

5. *See* HOWARD A. DAVIDSON & GREGORY A. LOKEN, U.S. DEP'T. OF JUSTICE, CHILD PORNOGRAPHY AND PROSTITUTION 1 (1987).

6. *See* U. S. SENTENCING COMM'N, REPORT TO THE CONGRESS: SEX OFFENSES AGAINST CHILDREN, at 30 (1996), http://www.ussc.gov/r_congress/scac.htm (last visited Feb. 18, 2002).

7. *See id.*

8. *See* H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61.

9. *See id.*

10. *See* discussion *infra* Parts I.B. & II.B.

zure standard applies whether authorities discover pornography, or even merely believe it may exist, on the defendant's computer.[11]

During this past year, the Court of Appeals for the Tenth Circuit expanded the definition of "solicitation" of a minor,[12] supported offense-level enhancements for child pornographers who use computers to commit crimes,[13] upheld Internet restrictions on paroled child pornography defendants,[14] and widened the scope of warranted searches to encompass all material on computer hard drives and disks.[15] The change in the court's traditional interpretation is in response to the realization that computers present extraordinarily wide distribution capabilities and, by exploiting a child's fascination with computers, may be effective in enticing minors to engage in pornographic activity.[16]

As presented in several cases that came before the Tenth Circuit in 2000-2001, this survey examines the current movement toward reinterpreting traditional search and seizure requirements, and increasing penalties for defendants convicted of child pornography crimes involving computer usage. Part I examines the legislation behind the increased sentencing and parole penalties, and the Court of Appeals' corresponding interpretation of that legislation. Part II continues that analysis, focusing on the lowered standards applied to both the execution of search warrants, and the search and seizure of computer equipment.

I. PENALTIES INCREASE WHEN A COMPUTER IS USED IN THE SOLICITATION OF MINORS

A. *Legislation that Controls the Crime of Child Pornography*

The federal crimes constituting sex offenses against children fall into three major categories: pornography, transportation, and criminal sexual abuse.[17] This paper focuses on the first category.

Sex offenses against children constitute a small percentage of the total federal criminal sentencings.[18] In 1995, courts sentenced only fifty-eight defendants for committing child pornography crimes, constituting 0.2% of all federal sentencings.[19] That same year, the total number of federal convictions for violations of all child sex crime laws numbered

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11. *See* discussion *infra* Part II.C.1.a.2.
12. *See* discussion *infra* Part I.C.
13. *See* discussion *infra* Part I.C.1.a.
14. *See* discussion *infra* Part I.D.
15. *See* discussion *infra* Part II.B.1.a.3.
16. *See, e.g.*, United States v. Reaves, 253 F.3d 1201, 1204-05 (10th Cir. 2001) (construing H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61).
17. *See* U. S. SENTENCING COMM'N, *supra* note 6, at 1.
18. *See id.* at 2.
19. *See id.*

209, approximately 0.6% of all federal convictions.[20] However, federal prosecutions account for only a small number of child pornography defendants.[21] In cases involving the rape of a minor, which is one category from which accurate state and federal numbers may be drawn, state courts convicted an estimated 8,662 offenders in 1992.[22] Using this estimated figure, federal convictions constituted only 1.6% of the total nationwide convictions for rape of a minor.[23] These numbers suggest that child sex offenders commit a staggering number of crimes in the United States each year.

Federal law criminalizes the production of child pornography under 18 U.S.C. §§ 2251 and 2252.[24] Section 2251 provides:

> Any person who employs, uses, persuades, induces, entices, or coerces any minor to engage in . . . any sexually explicit conduct for the purpose of producing any visual depiction of such conduct, shall be punished . . . if such person knows or has reason to know that such visual depiction will be transported in interstate or foreign commerce or mailed, if that visual depiction was produced using materials that have been mailed, shipped, or transported in interstate or foreign commerce by any means, *including by computer*, or if such visual depiction has actually been transported in interstate or foreign commerce or mailed.[25]

In the United States, pornography is "more freely available over the Internet than in other mass communications media."[26] The increasing use of the Internet to purchase, trade, and download pornographic materials subjects many child pornographers to the interstate transport clause of § 2251.[27] Courts may impose sentences ranging from ten years to life imprisonment for violations of § 2251.[28]

In addition to restricting production, federal law also prohibits the interstate transport, receipt, reproduction, and sale of child pornography.[29] Similar to § 2251's provision, § 2252A explicitly provides

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20. *See id.* (citing fifty-eight sentences for child pornography, six sentences for transportation of a minor, and 145 sentences for criminal sexual abuse).

21. *See id.*

22. *See id.*

23. *See* U. S. SENTENCING COMM'N, *supra* note 6, at 2.

24. *See id.* at 1.

25. 18 U.S.C. § 2251(a) (2000) (emphasis added).

26. Anthony L. Clapes, *The Wages of Sin: Pornography and Internet Providers*, COMPUTER LAW, July 1996, at 1.

27. *See* Esposito, *supra* note 2, at 541 ("the Internet has caused a surge in the production and distribution of child pornography"); Clapes, *supra* note 26, at 1 ("pornography is not rampant on the Internet; it is, however, more freely available over the Internet than in other mass communications media in the United States").

28. *See* 18 U.S.C. § 2251(d).

29. *See* 18 U.S.C. § 2252A (2000).

that interstate transport includes transmission via computer.[30] A violation of § 2252A carries a penalty of up to thirty years of imprisonment.[31]

In 1984, Congress created the United States Sentencing Commission (hereinafter "Sentencing Commission") to develop and maintain uniform sentencing guidelines for use by federal judges.[32] The guidelines established base offense levels for each federal crime.[33] As part of the guidelines, the Sentencing Commission also established sentence-level enhancements, which increase the offense level of the crime committed.[34] Balancing such enhancements against any applicable credits results in a "total 'offense level' number" that "corresponds to a sentencing table which, together with considerations of prior criminal history, sets forth the appropriate sentencing range (in months) that the judge must employ when sentencing an offender."[35] Each year, the Sentencing Commission proposes revisions to its published guidelines, which enter into effect unless Congress acts to modify or block them.[36]

A defendant's use of a computer to produce or solicit child pornography subjects the defendant to sentence enhancement under the U. S. Sentencing Guidelines Manual (hereinafter "Sentencing Guidelines").[37] Similarly, sentence enhancements also apply when the defendant used a computer to transmit child pornography.[38]

B. *Pornography's "Significant Harms" Caused Congress to Call for Increased Sentence Terms*

Federal legislation protecting children from sexual exploitation has existed at least since 1977, when Congress enacted the Protection of Children Against Sexual Exploitation Act of 1977.[39] That law made it illegal to engage a minor in any sexually explicit conduct for the purpose of producing a visual depiction of that conduct, when such depiction would be transported via interstate commerce.[40] Since the 1977 act resulted in only a single conviction, Congress modified the law by passing

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30. *See* 18 U.S.C. § 2252A(a)(1).
31. *See* 18 U.S.C. § 2252A(b).
32. *See* H.R. REP. NO. 104-90, at 3 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760.
33. *See id.*
34. *See id.*
35. *Id.*
36. *See id.*
37. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.1(b)(3)(B) (2001).
38. *See id.* at § 2G2.2(b)(5).
39. Pub. L. No. 95-225, 92 Stat. 7 (1977) (codified as amended at 18 U.S.C. §§ 2251-53 (2000)). *See* Anthony Miranda, *A Survey of Federal Cases Involving the Child Pornography Prevention Act of 1996*, 9 B.U. PUB. INT. L.J. 483, 484 (2000).
40. *See* Miranda, *supra* note 39, at 484.

the Child Protection Act of 1984,[41] itself amended by the Child Sexual Abuse and Pornography Act of 1986.[42]

Congress continued to refine the law by passing the Child Protection and Obscenity Enforcement Act of 1988,[43] which criminalized using a computer "to transport, distribute, or receive child pornography."[44] Later reforms included the Child Protection Restoration and Penalties Enhancement Act of 1990[45] and the Sex Crimes Against Children Prevention Act of 1995,[46] discussed below. Congress next passed the Child Pornography Prevention Act of 1996,[47] which was a turning point because the act regulated content rather than conduct[48] by criminalizing "visual depictions [made by computer] that create the impression that children are involved in sexually explicit acts."[49] Congress recently reformed the law by passing the Protection of Children from Sexual Predators Act of 1998.[50]

In the Sex Crimes Against Children Prevention Act of 1995, Congress increased the penalties for certain sex crimes against children that involved the use of a computer.[51] These changes found their genus in the Family Reinforcement Act, which addressed crimes against children, and Congress' perceived need to control child pornography.[52] Perceiving "significant harms"[53] arising at the nexus between computer use and child pornography, the House of Representatives passed H.R. 1240.[54] In the words of the House Committee on the Judiciary:

> Distributing child pornography through computers is particularly harmful because it can reach an almost limitless audience. Because of its wide dissemination and instantaneous transmission, computer-assisted trafficking is also more difficult for law enforcement officials to investigate and prosecute. Additionally, the increasing use of com-

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41. Pub. L. No. 98-292, 98 Stat. 204 (1984) (codified as amended at 18 U.S.C. §§ 2251-53).

42. Pub. L. No. 99-628 § 2, 100 Stat. 3510 (1986) (codified as amended at 18 U.S.C. § 2251). *See* Miranda, *supra* note 39, at 484.

43. Pub. L. No. 100-690 § 7511, 102 Stat. 4181 (1988) (codified as amended at 18 U.S.C. §§ 2251A-2252).

44. Miranda, *supra* note 39, at 484.

45. Pub. L. No. 101-647 § 301, 104 Stat. 4789 (1990) (codified as amended in scattered titles of the U.S.C.).

46. Pub. L. No. 104-71, 109 Stat. 774 (1995) (codified as amended at 18 U.S.C. § 2423 (1995); 28 U.S.C. § 994 (1995)).

47. Pub. L. No. 104-208 § 121, 110 Stat. 3009 (1997) (codified as amended in scattered titles of the U.S.C.).

48. *See* Dawn A. Edick, Note, *Regulation of Pornography on the Internet in the United States and the United Kingdom: A Comparative Analysis*, 21 B.C. INT'L & COMP. L. REV. 437, 445 (1998).

49. Miranda, *supra* note 39, at 485.

50. Pub. L. No. 105-314, 112 Stat. 2974 (1998) (codified as amended in scattered titles of the U.S.C.).

51. *See* Pub. L. No. 104-71, 109 Stat. 774.

52. *See* H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61.

53. *Id.* at 4.

54. *See* Pub. L. No. 104-71, 109 Stat. 774.

> puters to transmit child pornography substantially increases the likelihood that this material will be viewed by, and thus harm, children. Finally, the Committee notes with particular concern the fact that pedophiles may use a child's fascination with computer technology as a lure to drag children into sexual relationships.[55]

Essentially, the House Committee not only feared that pornographers would entice children to engage in pornographic acts by merely enabling children to view images, but also that computer usage might increase the overall number of images disseminated due to the ease with which pornographers can copy and transmit material to a virtually unlimited market. In the Sentencing Commission's words: "Persons who transmit the images . . . may be mailing a single photo to a friend, or they may be more similar to a person who opens an adult bookstore in every city in the world."[56] However, § 2G2.1 of the Sentencing Guidelines "does not distinguish between persons who e-mail images to a single voluntary recipient and those who establish a BBS [bulletin board system] and distribute child pornography to large numbers of subscribers."[57]

Finding great potential for significant harm to children, the House concluded "it is essential that those who are caught and convicted for this conduct be punished severely."[58] Thus, H.R. 1240 directed the Sentencing Commission to "increase the base offense level by at least 2 levels for an offense committed under section 2251(c)(1)(A) and 2252(a) of title 18, United States Code, if a computer was used to transmit the notice or advertisement to the intended recipient or to transport or ship the visual depiction."[59]

The Sentencing Commission complied, and on April 30, 1996, submitted to Congress the guidelines that increased those sentences.[60] Increasing the offense level directly resulted in an increase to the sentencing term: in the case of a child pornography producer, the sentence increases from the original range of fifty-seven to seventy-one months, to seventy to eighty-seven months per count; in the case of a child pornography trafficker, the range increases from the original range of eighteen to twenty-four months, to twenty-four to thirty months per count.[61] By

55. H.R. REP. NO. 104-90, at 3-4.

56. U. S. SENTENCING COMM'N, *supra* note 6, at 29.

57. *Id.* at 30.

58. H.R. REP. NO. 104-90, at 4.

59. Sex Crimes Against Children Prevention Act of 1995, Pub. L. No. 104-71 § 53, 109 Stat. 774.

60. *See* U. S. SENTENCING COMM'N, *supra* note 6, at i. H.R. 1240 ordered the Sentencing Commission to complete this report within 180 days of the enactment of the Sexual Crimes Against Children Prevention Act of 1995. *See* H.R. REP. NO. 104-90, at 2.

61. *See* U. S. SENTENCING COMM'N, *supra* note 6, at 4 tbl.1.

simply using a computer to commit a child pornography offense, a person increases his or her sentence by roughly twenty-five percent.[62]

C. *The Expanded Definition of "Solicit"*

Taking the House Committee on the Judiciary's concerns as a mandate, the Sentencing Guidelines provide offense-level enhancement if a computer is used to *solicit* participation by a minor in sexually explicit conduct.[63] In *United States v. Reaves,*[64] the Tenth Circuit confronted an issue of first impression: what is the definition of the term "solicit?"[65] Interpreting the House Committee on the Judiciary's "broad concerns," the Court expanded the meaning of solicitation of a minor to include *any* situation in which a computer is used, whether or not that use is directly related to a common notion of "solicitation."[66]

1. Tenth Circuit Cases

a. *United States v. Reaves*[67]

i. Facts

In *Reaves*, the defendant acquired several child pornography images from the Internet.[68] Using his computer, the defendant showed those images to children to entice and lure them into sexual relationships, and to produce sexually explicit materials.[69] The defendant pled guilty to five counts of producing child pornography, and "one count each of interstate transportation, distribution, and possession, of child pornography."[70]

Reasoning that "the computer played an integral part in a solicitation scheme presumably designed to accustom the minors to child pornography and encourage the sexual conduct depicted therein," the United States District Court for the District of Wyoming determined that the defendant's actions constituted solicitation, which thus subjected him to the offense-level enhancer § 2G2.1(b)(3).[71] Following those guidelines, the district court increased the defendant's offense level by two.[72] The defendant appealed, arguing that because he did not directly *ask* or *re-*

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62. *See id.* at ii.

63. *See* U.S. SENTENCING GUIDELINES MANUAL § 2G2.1(b)(3)(B) (2001).

64. 253 F.3d 1201 (10th Cir. 2001).

65. *See Reaves*, 253 F.3d at 1202.

66. *Id.* at 1205; *see also* discussion *infra* Part I.C.2.a.2.

67. 253 F.3d 1201 (10th Cir. 2001).

68. *See Reaves*, 253 F.3d at 1203.

69. *See id.*

70. *Id.* at 1202. The defendant's production of pornography violated 18 U.S.C. § 2251(a). *See id.* The defendant's "interstate transportation, distribution, and possession, of child pornography" violated "18 U.S.C. §§ 2252A(a)(1) and (b)(1), (a)(2)(B) and (b)(1), and (a)(5)(B) and (b)(2), respectively." *Id.*

71. *Reaves*, 253 F.3d at 1203.

72. *See id.* at 1202-03.

quest children to participate in creating the pornography, he did not "solicit" minors via his computer, and therefore the offense-level enhancement did not apply.[73]

ii. Decision

Noting that § 2G2.1 provides no definition of "solicit," the Tenth Circuit struggled to determine whether the phrase "if a computer was used to solicit participation" meant "if a computer was used to *directly request* participation," or "if a computer was used to *lure or entice* participation."[74] In order to determine the intent of the Sentencing Commission, the Tenth Circuit turned to the congressional mandate underlying the Sentencing Commission's change to the guidelines.[75]

After considering the House Commission on the Judiciary's statements outlining the reason for the offense-level enhancing statute, the Court noted that "[l]imiting 'solicit' . . . to 'direct requests' . . . solely penalizes *how* a pedophile exploits a child's fascination with computers rather than *if* a pedophile does so—an unacceptable result given Congress's broad concerns."[76] The court concluded that "solicit" was not narrowly limited to situations where a defendant used a computer to directly contact a victim; rather it applied in a more general sense, to situations where a defendant used a computer at all.[77] The Tenth Circuit thus upheld the offense-level enhancement.[78]

2. Other Circuits

a. *United States v. Brown*[79]

Brown represents the only other appellate opinion to address the solicitation definition issue presented in *Reaves. Brown* extended the scope of solicitation to include the defendant's use of a computer as a desensitizing tool, which enabled him to obtain minors' cooperation in the creation of pornography.[80]

i. Facts

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73. *See id.* at 1203.

74. *Id.* at 1204-05. The court applied the version of the offense-level enhancing statute in force at the time of defendant's commission of the crime, which provided for an increased sentence "[i]f a computer was used to solicit participation by or with a minor in sexually explicit conduct for the purpose of producing sexually explicit material." *Id.* at 1202 (quoting U.S. SENTENCING GUIDELINES MANUAL § 2G2.1(b)(3) (1998)).

75. *See Reaves*, 253 F.3d at 1204-05.

76. *Id.*

77. *See id.* at 1205.

78. *See id.*

79. 237 F.3d 625 (6th Cir. 2001).

80. *See Brown*, 237 F.3d at 629.

As part of a worldwide child pornography investigation, the United States Customs Service learned that Internet Relay Chat (hereinafter "IRC") software was being used to exchange child pornography images.[81] During the course of the investigation, British authorities seized a computer belonging to a member of a private IRC group, which used the computer to exchange child pornography.[82] The seized computer revealed several IRC nicknames, including one that U.S. law enforcement officials ultimately tied to the defendant, who officials subsequently arrested.[83]

The defendant pled guilty to three counts of "producing child pornography for transportation in interstate commerce" and one count of "possessing child pornography using materials shipped via interstate commerce," among other charges.[84] The United States District Court for the Western District of Michigan determined the defendant "allowed his victims unmonitored access to the computer wherein they observed that other children were being filmed and sexually abused by adults."[85] Finding the defendant thus used his computer to solicit the children's participation in the production of pornography, the district court applied § 2G2.1(b)(3) and sentenced the defendant to a 405-month term of imprisonment.[86]

ii. Decision

On appeal, the defendant argued that § 2G2.1(b)(3)'s sentence enhancement did not apply because he did not use a computer to *solicit* minors' participation in the creation of pornography.[87] The defendant interpreted "solicit" to require that he "specifically ask minors [via his computer] to engage in sexually-explicit conduct."[88] The Sixth Circuit disagreed, determining that Congress did not intend such a narrow definition of the term "solicit."[89] In a short analysis, the Court held that allowing children to view child pornography gave them the "impression that this is acceptable conduct," which aided in the defendant's ability to use those children to produce child pornography.[90] The Sixth Circuit con-

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81. *See id.* at 626-27. IRC allows users to communicate without using their real names. *See* ORIN S. KERR, U.S. DEP'T OF JUSTICE, SEARCHING AND SEIZING COMPUTERS AND OBTAINING ELECTRONIC EVIDENCE IN CRIMINAL INVESTIGATIONS 91 (2001), http://www.usdoj.gov/criminal/cybercrime/searchmanual.pdf (Feb. 16, 2001).

82. *See Brown*, 237 F.3d at 627.

83. *See id.*

84. *Id.* at 626. The defendant's production of child pornography violated 18 U.S.C. § 2251(a). *See Brown*, 237 F.3d at 626. The defendant's possession of child pornography violated 18 U.S.C. § 2252(a)(4)(B). *See Brown*, 237 F.3d at 626.

85. *Brown*, 237 F.3d at 628.

86. *See id.* at 626.

87. *See id.* at 628.

88. *Id.*

89. *See id.* at 628-29 (construing H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61).

90. *See id.* at 629.

cluded that because the defendant used his computer "to desensitize his victims to deviant sexual activity, he was using it to solicit participation" in the creation of child pornography.[91]

3. Analysis

As the Tenth Circuit noted, § 2G2.1(b)(3) provides no express definition of the term "solicit."[92] In both of the above cases, the appellate courts deduced the meaning of the term by using the House Committee on the Judiciary's statements regarding the dangers of computer usage in association with child pornography.[93] Both the Tenth Circuit and the Sixth Circuit interpreted the broad concerns outlined by the House Committee on the Judiciary as requiring a defendant's mere use of a computer in connection with child pornography to suffice as solicitation.[94] The common notion of solicitation cannot be strictly applied because, as Congress recognized, the dangers found at the nexus between computers and child pornography are very high—so high that there may be no way to adequately measure the damages.[95]

The Tenth Circuit's expansive interpretation of the term "solicit" comports with the only other appellate opinion on this issue. It remains to be seen whether this expansive view will become the court's standard interpretation.

D. *A Defendant's Use of a Computer May Prompt the Court to Institute Post-Sentence Parole Requirements*

Child pornography, coupled with computer use, may result in penalty increases that reach beyond sentencing. In some circumstances, this coupling can affect a defendant's parole term when a court mandates compliance with special conditions. In the cases below, the Tenth Circuit permitted parole-phase Internet restrictions on convicted child pornographers, provided courts narrowly construe such restrictions.

1. Tenth Circuit Cases

a. *United States v. White*[96]

i. Facts

Responding to an Internet advertisement posted as part of a United States Customs Service sting operation, the defendant ordered three

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91. *Brown*, 237 F.3d at 629.
92. *See* United States v. Reaves, 253 F.3d 1201, 1204 (10th Cir. 2001).
93. *See Brown*, 237 F.3d at 628-29; *Reaves*, 253 F.3d at 1204-05.
94. *See Brown*, 237 F.3d at 629; *Reaves*, 253 F.3d at 1205.
95. *See* H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61.
96. 244 F.3d 1199 (10th Cir. 2001).

videotapes advertised as containing child pornography.[97] United States Customs officers made a controlled delivery, which triggered the defendant's arrest.[98] A federal grand jury indicted the defendant for violating a federal statute that prohibits a person from receiving child pornography, among other charges.[99] The defendant pled guilty and served a two-year sentence.[100]

One week after serving out his sentence, the defendant violated a requirement of his supervised release by consuming alcohol.[101] After a second such violation, the government then filed a petition to revoke the defendant's supervised release.[102] In a subsequent hearing, the United States District Court for the District of New Mexico sentenced the defendant to six months incarceration followed by a two-year period of supervised release.[103] The court imposed five special conditions upon the supervised release.[104] One of these conditions prevented the defendant from possessing sexually explicit material and any computer with access to the Internet.[105] The defendant challenged this special condition by arguing that a "plea to a single count of receiving child pornography which he ordered over the Internet . . . is not 'reasonably related' to prohibiting him from all access to the Internet."[106] The defendant further argued that this "special condition [wa]s 'greater than necessary' in the equation balancing protection of the public with the goals of sentencing."[107]

ii. Decision

The Tenth Circuit held that while a federal statute[108] permitted the district court to exercise discretion in imposing a term of supervised release, the district court is limited by the requirement that it "shall impose a sentence sufficient, but not greater than necessary."[109] The court held that the special condition preventing the defendant from owning a computer with Internet access potentially is both too narrow and overbroad.[110] The court found the condition potentially too narrow because the terms

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97. *See White*, 244 F.3d at 1201.

98. *See id.*

99. *See id.* (noting the grand jury indicted the defendant for violating 18 U.S.C. § 2252(a)(2)(A), among other statutes).

100. *See id.*

101. *See id.*

102. *See id.*

103. *See White*, 244 F.3d at 1201.

104. *See id.*

105. *See id.* The provision in question provided that the defendant "shall not possess erotica, or any other sexually explicit material, and shall not possess a computer with Internet access throughout his period of supervised release." *Id.*

106. *White*, 244 F.3d at 1201-02, 1205.

107. *Id.*

108. 18 U.S.C. § 3583(a) (2001).

109. *White*, 244 F.3d at 1204 (quoting 18 U.S.C. § 3553(a)).

110. *See id.* at 1206. The relevant portion of the condition provided that the defendant "shall not possess a computer with Internet access throughout his period of supervised release." *Id.*

of the condition were too indeterminate and, thus, the condition did not bar the defendant from *accessing* to the Internet, but simply from *owning* a computer with such access.[111] The court found the condition potentially too broad because the district court could have intended for the word "possess" to restrict all of the defendant's Internet and computer usage, even usage unrelated to the defendant's underlying crime.[112] From that viewpoint, the sentence was "greater than necessary."[113]

The Tenth Circuit determined that instead, the district court should have limited the condition to *use* of the Internet, as opposed to *possession* of a computer with an Internet connection, as many alternative means existed by which the defendant could have accessed the Internet without owning a computer.[114] The court thus found the restriction "neither reasoned nor reasonable" and remanded the case for clarification on the condition prohibiting the defendant from owning a computer with Internet access.[115]

Although restrictive, the Tenth Circuit's decision is not as strict as the Third Circuit's decision in *United States v. Crandon*,[116] below, where the Third Circuit supported the total ban on a defendant's possession of, procurement of, purchase of, or other access to any form of computer network, including networks operating outside the Internet.[117]

2. Other Circuits

a. *United States v. Crandon*[118]

i. Facts

The defendant solicited a minor via e-mail, then traveled to her location and "engaged in sexual relations with her."[119] The defendant took forty-eight photographs of the minor.[120] Two of the photographs portrayed sexually explicit activity, including one photograph of the defendant and the minor participating in oral sex.[121] The defendant mailed the film to a Seattle film developer and received the developed pictures by

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111. *See id.* at 1205.

112. *See id.* at 1206.

113. *See id.* (quoting 18 U.S.C. § 3553(a)).

114. *See id.* at 1206-07.

115. *White*, 244 F.3d at 1207 (holding that "any condition limiting [the defendant's] use of a computer or access to the Internet must reflect these realities and permit reasonable monitoring by a probation officer. The purpose of the special condition must be articulated and enforceable as defined. As presently written, the special condition is neither reasoned nor reasonable.").

116. 173 F.3d 122 (3d Cir. 1999).

117. *See Crandon*, 173 F.3d at 125.

118. 173 F.3d 122 (3d Cir. 1999).

119. *Id.*

120. *See id.*

121. *See id.*

return mail.[122] After his return to New Jersey, the defendant continued to contact the minor.[123] The defendant again traveled to the minor's location, and this time he picked her up and began to return home.[124] Soon after their departure from the minor's home, the defendant discovered the police were looking for him.[125] The defendant sent the minor home on a bus and then returned to his home state.[126] The police later arrested the defendant and seized his cache of pornographic photographs.[127]

The defendant pled guilty to receiving child pornography in violation of a federal statute.[128] The United States District Court for the District of New Jersey sentenced the defendant to seventy-eight months of imprisonment and three years of supervised release.[129] The terms of the defendant's parole "included a special condition directing that [the defendant] not 'possess, procure, purchase or otherwise obtain access to any form of computer network, bulletin board, Internet, or exchange format involving computers unless specifically approved by the United States Probation Office.'"[130] The defendant appealed on the basis that the special condition "unnecessarily infringe[d] upon his liberty interests and b[ore] no logical relation to his offense."[131]

ii. Decision

The Third Circuit held that because the defendant "used the Internet as a means to develop an illegal sexual relationship with a young girl over a period of several months[,] . . . the condition of release limiting [the defendant's] Internet access is related to the dual aims of deterring him from recidivism and protecting the public."[132] As such, the Third Circuit upheld the restriction on Internet use as a reasonable limitation, noting that "[a] sentencing judge is given wide discretion in imposing supervised release."[133]

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122. *See id.*
123. *See id.*
124. *See Crandon*, 173 F.3d at 125.
125. *See id.*
126. *See id.*
127. *See id.*
128. *See id.* (noting the defendant pled guilty to violating 18 U.S.C. § 2252(a)(2)).
129. *See id.*
130. *Crandon*, 173 F.3d at 125.
131. *Id.* at 127.
132. *Id.* at 127-28.
133. *Id.* at 127. *See generally* 18 U.S.C. § 3583(d). The court read 18 U.S.C. § 3583(d) to hold that

> a District Court may order any appropriate condition to the extent it:
>
> (1) is reasonably related to certain factors, including (a) the nature and circumstances of the offense and the history and characteristics of the defendant, (b) deterring further criminal conduct by the defendant, or (c) protecting the public from further criminal conduct by the defendant; [and] (2) involves no greater deprivation of liberty than is reasonably necessary for the purposes of deterrence and protection of the public.

The court further held that even though this special restriction "may hamper his employment opportunities upon release," and infringe upon the defendant's First Amendment rights, "the restrictions . . . are permissible because the special condition is narrowly tailored and is directly related to deterring [the defendant] and protecting the public."[134]

3. Analysis

The Tenth Circuit strictly adhered to Congress's expressed intent. Not only will a defendant be subjected to an increased term of incarceration, but when that defendant returns to society upon rehabilitation, his parole restrictions may legally include restrictions upon Internet use.[135] The Third Circuit took that notion farther, expressly comparing the relative harm to a defendant's constitutional rights with the risk of public harm, and determined that a total ban on Internet use is permissible, provided that the restriction remains narrowly construed towards averting that harm.[136]

After determining that Internet restrictions are proper, the Tenth Circuit discussed the technical means by which effective control of Internet use could occur.[137] One method is to install a database-centered software program specifically designed to restrict access to pornographic sites.[138] The mayor of Boston, Massachusetts, Thomas Menino, required the Boston Public Library to install such software "on every computer accessible to children."[139] The program, CyberPatrol, prevents access to web sites listed in its database of objectionable web sites.[140] An alternative means of preventing access to pornographic web sites is to employ a program that scans the target site for objectionable words and blocks web sites containing these objectionable words.[141]

While useful, neither restriction method is perfect: in the case of a database restriction method, someone must continually update the database to afford protection from an expanding number of Internet sites.[142] In the case of objectionable word scanning, such software may restrict access in an overbroad fashion.[143] For example, such a program might

Crandon, 173 F.3d at 127 (alteration in original).

134. *See Crandon*, 173 F.3d at 128.

135. *See* United States v. White, 244 F.3d 1199, 1207 (10th Cir. 2001).

136. *See Crandon*, 173 F.3d at 127.

137. *See White*, 244 F.3d at 1206 (noting the availability of filtering software capable of monitoring the defendant's Internet usage).

138. *See id.*

139. Edick, *supra* note 48, at 449.

140. *See id.*

141. *See id.*

142. *See White*, 244 F.3d at 1206.

143. *See* Edick, *supra* note 48, at 449-50.

restrict access to "medical and educational information on 'breast' cancer and 'Middlesex, England.'"[144]

II. LESSENED SEARCH AND SEIZURE REQUIREMENTS APPLY WHEN COMPUTERS ARE INVOLVED IN CHILD PORNOGRAPHY INVESTIGATIONS

While the previous section focused on the penalties applicable to a defendant who used a computer when committing a child pornography crime, this section analyzes the pre-trial effects upon search and seizure requirements when the defendant's commission of the crime involved a computer. As above, the defendant's use of a computer changes the way courts view and treat such a defendant.

A. *Background*

The Fourth Amendment to the Constitution provides for freedom from unreasonable search and seizure.[145] The United States Supreme Court has held that the Fourth Amendment's protections are only available upon the showing of a reasonable expectation of privacy.[146] The "reasonable expectation" determination requires both that a defendant have "an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"[147]

Before officers may conduct a search, they must establish probable cause and must ensure the search warrant describes with particularity the property to be seized.[148] Probable cause is established when "given the totality of the circumstances, 'there is a fair probability that contraband or evidence of a crime will be found in a particular place.'"[149] On the issue of particularity, the Tenth Circuit has held that "[t]he Fourth Amendment requires that a search warrant describe the things to be seized with sufficient particularity to prevent a general exploratory rummaging in a person's belongings."[150] The reason for the particularity requirement is to leave the officer serving the warrant no discretion,

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144. *Id.* at 450.

145. The Fourth Amendment provides:

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

U. S. CONST. amend. IV.

146. *See* Katz v. United States, 389 U.S. 347, 351 (1967), *accord* Minnesota v. Olson, 495 U.S. 91, 95-96 (1990).

147. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

148. *See* U. S. CONST. amend. IV.

149. United States v. Simpson, 152 F.3d 1241, 1246 (10th Cir. 1998) (quoting Illinois v. Gates, 462 U.S. 213, 238 (1983)).

150. United States v. Carey, 172 F.3d 1268, 1272 (10th Cir. 1999).

thereby preventing general searches.[151] A warrant's description qualifies as sufficiently particular if it "enables the searcher to reasonably ascertain and identify the things authorized to be seized."[152]

When computers are involved, several issues complicate the particularity requirement: the ability of a computer to store large quantities of data, the computer's ability to hide data,[153] and the fact that a file's title need bear no relation to that file's content.[154] These issues may require law enforcement officials to seize a computer and remove it from a location in order to search the computer's contents.[155]

According to the U.S. Department of Justice, two potential seizure options exist, and the option selected by law enforcement officials depends upon the role of the computer in the underlying crime:

> If the hardware is itself evidence, an instrumentality, contraband, or a fruit of crime, agents will usually plan to seize the hardware and search its contents off-site. If the hardware is merely a storage device for evidence, agents generally will only seize the hardware if less disruptive alternatives are not feasible.[156]

When a defendant uses a computer in the transmission of child pornography, the government considers the computer an instrumentality of the crime.[157] As such, seizure of the entire computer is the usual practice.[158] Rule 41 of the Federal Rules of Criminal Procedure comports with this assessment.[159] In a case where seizure of the computer itself becomes

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151. *See* Marron v. United States, 275 U.S. 192, 196 (1927) ("The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible, and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.").

152. United States v. Wolfenbarger, 696 F.2d 750, 752 (10th Cir. 1982).

153. According to the U.S. Department of Justice:

> [f]iles may be stored on a floppy diskette, on a hidden directory in a suspect's laptop, or on a remote server located thousands of miles away. The files may be encrypted, misleadingly tilted, stored in unusual file formats, or commingled with millions of unrelated, innocuous, and even statutorily protected files.

KERR, *supra* note 80, at 29. *See also* Erickson v. Comm'r of Internal Revenue, 937 F.2d 1548, 1554 (10th Cir. 1991) (noting that drug trafficking activity is often concealed or masked by deceptive records).

154. *See* Stephan K. Bayens, *The Search and Seizure of Computers: Are We Sacrificing Personal Privacy for the Advancement of Technology?*, 48 DRAKE L. REV. 239, 263 (2000).

155. *See* KERR, *supra* note 81, at 31.

156. *Id.*

157. *See id.; see also* Davis v. Gracey, 111 F.3d 1472, 1480 (10th Cir. 1997) (holding that computer equipment used to display and distribute pornographic images constitutes an instrumentality of the crime).

158. *See* KERR, *supra* note 81, at 32. When the instrumentality is not a single computer, but instead is a network, the impossibilities of seizure are obvious. In such a case, "agents will want to take a more nuanced approach to obtain the evidence they need." *Id.*

159. The rule provides:

> A warrant may be issued under this rule to search for and seize any (1) property that constitutes evidence of the commission of a criminal offense; or (2) contraband, the fruits

necessary, the Tenth Circuit requires both that the search warrant adequately describe the hardware and that the hardware seized by law enforcement officials fits within the warrant's description.[160]

B. *What Standard Applies to the Search and Seizure of Evidence Contained In Computer Hard Drives?*

1. Tenth Circuit Cases

a. *United States v. Campos*[161]

i. Facts

In *Campos*, a jury found the defendant violated a federal statute that prohibits the transmission of child pornography in interstate commerce when the defendant e-mailed pornographic images over the Internet.[162] The recipient of the images notified the FBI and gave agents copies of the e-mailed images.[163] FBI agents determined that the defendant sent the images.[164] The agents received a warrant enabling them to search the defendant's home and computer for those images.[165] The FBI found and seized the defendant's computer.[166] In examining the computer's hard drive, agents located the two pornographic images sent over the Internet, plus six more pornographic images containing children.[167] At trial, the defendant motioned to suppress the images.[168] The United States District Court for the Northern District of Oklahoma denied that motion.[169] Subsequently, a jury convicted the defendant, and the court sentenced the defendant to thirty-seven months of incarceration.[170]

ii. Decision

On appeal, the defendant argued that the search was overbroad, as agents "had grounds to search only for the two images that had been sent."[171] The Tenth Circuit disagreed, finding the warrant within permissible bounds because the warrant specified that it covered "items relating

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> of crime, or things otherwise criminally possessed; or (3) property designed or intended for use or which is or has been used as the means of committing a criminal offense; or (4) person for whose arrest there is probable cause, or who is unlawfully restrained.

FED. R. CRIM. P. 41(b).

160. *See Davis*, 111 F.3d at 1478.

161. 221 F.3d 1143 (10th Cir. 2000).

162. *See Campos*, 221 F.3d at 1145 (noting the court convicted the defendant for violating 18 U.S.C. § 2252(a)(1)).

163. *See id.*

164. *See id.*

165. *See id.*

166. *See id.* at 1145-46.

167. *See id.* at 1146.

168. *See Campos*, 221 F.3d at 1146.

169. *See id.*

170. *See id.*

171. *Id.*

to child pornography."[172] The court held that although the warrant permitted agents to seize anything related to child pornography, the warrant did not authorize "an unfocused inspection of all of [the defendant's] property."[173]

The court reiterated testimony given by an FBI agent during the district court proceeding, in which the agent stated that due to the ability to conceal evidence on a computer, "all the stored data [must be examined] to determine whether it is included in the warrant."[174] The court agreed with this assessment, distinguishing this situation from its decision in *United States v. Carey*,[175] below, by stating that "the officers here did not expand the scope of their search in a manner not authorized by the warrant."[176] Rather, the search warrant in *Campos* specified the exact type of material the agents found: child pornography.[177] Thus, the court upheld the agents' search of all files on the computer hard drive.[178]

2. Analysis

The Tenth Circuit held that in order to determine which computer files fall under the scope of the search warrant, FBI agents could examine all the data stored upon the computer's hard drive.[179] Interestingly, the court noted that a computer search is constrained to information only on that hardware and does not constitute the authorization of "an unfocused inspection of all [the defendant's] property."[180]

Despite the broad search allowed in *Campos*, the court's opinion did note several restrictions on the scope of a computer search.[181] First, when an investigator finds intermingled documents, those "containing both relevant and irrelevant information," the investigator should seal those documents and await approval of a magistrate before proceeding.[182] Second, the court pointed out that its holding does not permit an officer to conduct a generalized search, where the discovery of the pornographic images is collateral to the reason for the initial search.[183] In that case, it is

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172. *Id.*
173. *Id.*
174. *See Campos*, 221 F.3d at 1146.
175. 172 F.3d 1268 (10th Cir. 1999).
176. *Campos*, 221 F.3d at 1148.
177. *See id.* at 1147.
178. *See id.*
179. *See id.*
180. *Id.* at 1148.
181. *See id.*
182. *Campos*, 221 F.3d at 1148.
183. *See id.; see also* discussion *infra* Part II.D.1.b. (discussing the court of appeals' approach to an argument alleging a generalized search).

improper for law enforcement officials to delve into every file on a defendant's computer.[184]

C. *What Constitutes a "Fair Probability" that the Search of a Residence Will Uncover Material Evidence?*

The search and seizure issues associated with finding the location of a particular pornographic image are not limited to the search of computer hard drives but extend to the search of residences.[185] Where the only indication of a file's origination is the Internet e-mail address of the sender, does that provide probable cause that those images will be located at the sender's home? The Tenth Circuit determined that it does provide probable cause, holding in *United States v. Cervini*,[186] below, that a simple e-mail header provided officers with probable cause to search for pornographic images within the sender's home.[187]

1. Tenth Circuit Cases

a. *United States v. Cervini*[188]

i. Facts

In this case, the defendant posted on an Internet newsgroup web site two pornographic pictures containing children.[189] The e-mail header from the posting contained an Internet protocol address that allowed investigators to subsequently link the photos to the defendant.[190] The FBI obtained a search warrant and executed a search at the defendant's residence.[191]

Authorities indicted the defendant for "knowingly transporting and shipping child pornography in interstate commerce," in violation of federal statute.[192] In addition, authorities also indicted the defendant for "knowingly possessing an image of child pornography that was produced using materials shipped and transported in interstate commerce," also in violation of federal statute.[193]

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184. *Compare Campos*, 221 F.3d at 1147 (inadvertent discovery of items related to child pornography during search for drug-related evidence), *with* United States v. Carey, 172 F.3d 1268, 1271 (10th Cir. 1999) (discovery of items related to child pornography pursuant to a warrant permitting a search for such items).

185. *See* United States v. Cervini, 16 Fed.Appx. 865, 867 (10th Cir. 2001).

186. 16 Fed.Appx. at 865.

187. *See id.* at 866-67.

188. 16 Fed. Appx. 865 (10th Cir. 2001).

189. *See id.*

190. *See id.* at 867.

191. *See id.*

192. *Id.* (noting authorities indicted the defendant for violating 18 U.S.C. § 2252A(a)(1)).

193. *Id.* (noting authorities indicted the defendant for violating 18 U.S.C. § 2252A(a)(5)(B)).

The defendant motioned to suppress all evidence obtained from the search of his home.[194] The defendant argued that "the affidavit in support of the warrant provided insufficient probable cause that evidence of criminal activity would be found at his residence."[195] The United States District Court for the Western District of Oklahoma denied the defendant's motion.[196]

ii. Decision

Upon review, the Tenth Circuit stated that a search warrant must only "demonstrate a 'fair probability' that a search of [the] residence would uncover evidence connecting [the defendant] to the pornographic postings."[197] The court held that the e-mail header gave officers sufficient probable cause, constituting a fair probability that officers would find contraband or other criminal evidence at the sender's residence.[198] Even if other locations existed where such images could be found, the Tenth Circuit found no requirement for the district court to "eliminate all other possible conclusions which could be derived from the alleged facts" when authorizing a search warrant.[199] The court noted that "the totality of the facts enable a reasonable person to draw the common-sense conclusion that evidence of the crime would be found at [the defendant's] residence."[200]

Under *United States v. Charbonneau*,[201] below, the United States District Court for the Southern District of Ohio determined that even an illegal search of a residence does not require suppression of seized evidence because had a legal search occurred, officers would have inevitably discovered the evidence.[202]

2. Other Jurisdictions

a. *United States v. Charbonneau*[203]

i. Facts

In *Charbonneau*, an FBI agent investigating child pornography on the Internet posed as a pedophile and monitored two private America OnLine chat rooms titled "Boys" and "Preteen."[204] Chat room members

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194. *See Cervini*, 16 Fed.Appx. at 867.
195. *Id.*
196. *See id.*
197. *Id.* at 868 (quoting United States v. Simpson, 152 F.3d 1241, 1246 (10th Cir. 2000)).
198. *See id.*
199. *Id.*
200. *Cervini*, 16 Fed.Appx. at 868.
201. 979 F. Supp. 1177 (S.D. Ohio 1997).
202. *See* discussion *infra* Part II.C.2.
203. 979 F. Supp. 1177 (S.D. Ohio 1997).
204. *See Charbonneau*, 979 F. Supp. at 1179.

exchanged graphic child pornography image files.[205] The federal agent recorded the typed conversations between chat room users.[206] Chat room users e-mailed the agent pornographic images of children.[207]

The agent identified one sender, a chat room member, by his screen name.[208] Using a search warrant, the FBI identified the defendant as the sender.[209] Agents obtained a search warrant for the defendant's address.[210] The agents did not execute that search warrant.[211] Instead, the agents entered the residence after obtaining a signed consent form from the defendant's wife.[212] The agents seized two computers and several computer disks that contained child pornography.[213]

ii. Decision

The defendant motioned to suppress both the chat room conversations and the physical evidence seized from his home as a result of those conversations.[214] The defendant argued that both his freedom of speech and reasonable expectation of privacy protected his chat room conversations.[215] Finding the freedom of speech claim to be "[in]adequately supported by case law," the United States District Court for the Southern District of Ohio dismissed that claim as meritless.[216]

As to the reasonable expectation of privacy claim, the court reasoned that, like a letter, an e-mail message is protected while in the *process* of transmission.[217] However, once a recipient opens that e-mail, the expectation of privacy dissipates.[218] Making an interesting point, the court stated, "a sender of e-mail runs the risk that he is sending the message to an undercover agent."[219] Basing its decision on *Hoffa v. United States*,[220] the district court determined that no expectation of privacy exists where "a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it."[221] In that case, the "letter" is opened, and the recipient may reveal the contents to anyone. The court noted that this rule of law applies to forwarded e-mail messages as well,

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205. *See id.*
206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.*
210. *See Charbonneau*, 979 F. Supp. at 1179.
211. *See id.* at 1180.
212. *See id.*
213. *See id.*
214. *See id.* at 1183.
215. *See id.*
216. *Charbonneau*, 979 F. Supp. at 1184.
217. *See id.*
218. *See id.*
219. *Id.*
220. 385 U.S. 293 (1966).
221. *Charbonneau*, 979 F. Supp. at 1184-85 (quoting *Hoffa*, 385 U.S. at 302).

stating that "messages sent to an addressee who later forwards the e-mail to a third party do not enjoy the same reasonable expectations of privacy once they have been forwarded."[222] The court applied this reasoning to chat room transmissions, finding that "[m]essages sent to the public at large in [a] 'chat room' . . . lose any semblance of privacy."[223]

On the question of illegal search and seizure, the court determined that while the search of the defendant's home was illegal, the evidence seized was admissible under the doctrine of inevitable discovery.[224] The court determined that the agents had a valid search warrant, that absent the permission to enter, the agents would have done so anyway, and that, "the items seized would have been inevitably discovered through the execution of the search warrant."[225] The court thus denied the defendant's motions to suppress the physical evidence and statements.[226]

3. Analysis

While the Tenth Circuit has yet to rule on the issue of the expectation of privacy in e-mail communications, both the United States District Court for the Southern District of Ohio and the Sixth Circuit Court of Appeals have done so. The court in *Charbonneau* held that the Fourth Amendment does not protect e-mail messages sent to an undercover federal agent: "an e-mail message, like a letter, cannot be afforded a reasonable expectation of privacy once that message is received."[227] The Sixth Circuit concurred with the latter assessment, holding that "the e-mailer would be analogous to a letter-writer, whose 'expectation of privacy ordinarily terminates upon delivery' of the letter."[228] Similarly, the Court of Appeals for the Armed Forces has ruled that no expectation of privacy exists if a user forwards that original e-mail message to another person.[229]

Although no expectation of privacy exists for a received e-mail message, while an e-mail message is in transmission the sender does have an expectation of privacy.[230] The Court of Appeals for the Armed Forces has held that "the transmitter of an e-mail message enjoys a rea-

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222. *Id.* at 1185.

223. *Id.* (quoting United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996)).

224. *See id.* at 1187. The court found the search illegal because officers obtained the consent to search through coercion. *See id.* at 1186. Among other coercive acts, the FBI agents told the defendant's wife that if she did not consent to the search, the agents would break down the front door to access their home. *See id.*

225. *Id.* at 1186-87.

226. *See id.* at 1187 (although the court granted one of the defendant's motions, the court denied both motions discussed herein).

227. *Charbonneau*, 979 F. Supp. at 1184.

228. *See* Guest v. Leis, 255 F.3d 325, 333 (6th Cir. 2001) (quoting United States v. King, 55 F.3d 1193, 1196 (6th Cir. 1995)).

229. *See* United States v. Maxwell, 45 M.J. 406, 419 (C.A.A.F. 1996).

230. *See id.* at 418.

sonable expectation that police officials will not intercept the transmission."[231]

D. *Seizure Rules When Police Discover Child Pornography While Executing a Warrant Issued for Another Purpose*

While the above cases dealt with probable cause issues surrounding the search of a computer used in connection with child pornography crimes, this section focuses on the seizure standard applied when child pornography materials are discovered during a search authorized for other purposes. Police only need to demonstrate a fair probability that child pornography is located at a defendant's residence in order to receive a search warrant to search that home.[232] In the cases below, the Tenth Circuit extended the fair probability standard to include the situation where police view possible child pornography while conducting a search for other items.[233]

1. Tenth Circuit Cases

a. *United States v. Wolfe*[234]

i. Facts

While executing a search warrant for counterfeiting evidence, which resulted in the seizure of the defendant's computer and several disks, Secret Service agents noticed three items of possible child pornography in the defendant's residence.[235] The agents chose not to seize those items.[236] After interviewing an accomplice, the agents, alerted to the possibility that the defendant was involved in child pornography, sought another search warrant.[237]

Once issued, that second search warrant permitted the agents to search the defendant's computer hard drive and the previously seized disks for evidence of child pornography.[238] The agents discovered an "extensive" number of child pornography images.[239] The government charged the defendant with possession of child pornography.[240]

At trial, the defendant asserted that the affidavit submitted in support of the second warrant was insufficient as a matter of law to establish probable cause that the defendant possessed child pornography on his

231. *Id.*
232. *See* United States v. Rabe, 848 F.2d 994, 997 (9th Cir. 1988).
233. *See* discussion *infra* Part II.D.3.
234. No. 00-5045, 2000 WL 1862667 (10th Cir. Dec. 20, 2000).
235. *See Wolfe*, 2000 WL 1862667, at *1.
236. *See id.*
237. *See id.*
238. *See id.* at *2.
239. *Id.*
240. *See id.* (prosecutors charged the defendant with violating 18 U.S.C. § 2252 (2000)).

computer, and thus the seized images were the result of an illegal search.[241] The government argued that the affidavit supporting the warrant was sufficient to support a probable cause finding, based both on the accomplice's statements that he had seen child pornography images on the defendant's computer, and that the defendant told the accomplice he downloaded those pictures onto his computer.[242] The United States District Court for the District of Oklahoma agreed, denying the defendant's motion to exclude that evidence.[243]

ii. Decision

The Tenth Circuit determined that "the evidence presented to the magistrate judge . . . established a fair probability that a search of [the defendant's] computer would reveal contraband within the meaning of 18 U.S.C. §§2252, 2256, such that the magistrate had a 'substantial basis' to determine that probable cause existed to issue the second search warrant."[244] Namely, the three items of possible child pornography that the agents observed in the defendant's home, plus the accomplice's statement that he had seen an image of a nude child on the defendant's computer monitor, and that the defendant told the accomplice he had more pictures on his computer, together established "a 'fair probability' that evidence of possession of child pornography would be found on the hard drive of [the defendant's] personal computer" or disks.[245]

Obtaining a second search warrant is required; in *United States v. Carey*,[246] below, the Tenth Circuit suppressed child pornography images seized collateral to an original search warrant where, unlike here, authorities did not seek a second search warrant.[247]

b. *United States v. Carey*[248]

i. Facts

During his arrest, the defendant, a cocaine dealer, consented to a search of his apartment.[249] The defendant also consented in writing to the removal of any property under his control, "if said property shall be essential in the proof of the commission of any crime in violation of the Laws of the United States."[250] As a result of that search, the police seized two computers under the belief that the computers "would either be sub-

241. *See Wolfe*, 2000 WL 1862667, at *2.
242. *See id.* at *1-*2.
243. *See id.* at *2.
244. *Id.* at *3.
245. *Id.* at *4.
246. 172 F.3d 1268 (10th Cir. 1999).
247. *See Carey*, 172 F.3d at 1271, 1276.
248. 172 F.3d 1268 (10th Cir. 1999).
249. *See id.* at 1270.
250. *Id.*

ject to forfeiture or [provide] evidence of [the defendant's] drug dealing."[251]

The police obtained a warrant to search "the [two] computers for 'names, telephone numbers, ledger receipts, addresses, and other documentary evidence pertaining to the sale and distribution of controlled substances.'"[252] In the course of that warrant's execution, the police discovered a large number of "files with sexually suggestive titles and the label 'JPG.'"[253] The police copied those files to a floppy disk and opened them on another computer.[254] The police discovered numerous images containing child pornography.[255]

The defendant "was charged with . . . possessing a computer hard drive that contained three or more images of child pornography produced with materials shipped in interstate commerce."[256] The defendant moved to suppress the seized evidence, arguing that the police seized the hard drive as a result of an illegal "general, warrantless search,"[257] and that "files not pertaining to the sale or distribution of controlled substances were opened and searched, and [therefore] . . . should have been suppressed."[258] The United States District Court for the District of Kansas denied that motion to suppress.[259]

ii. Decision

On appeal, the defendant argued that despite the clear specificity of the warrant, the detective searched files that were outside the scope of the search warrant.[260] The government counter-argued that the plain view doctrine permitted the file discovery.[261] Under the plain view doctrine,

> [a] police officer may properly seize evidence of a crime without a warrant if:
>
> (1) the officer was lawfully in a position from which to view the object seized in plain view; (2) the object's incriminating character was immediately apparent -- i.e., the officer had probable cause to believe

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251. *Id.*

252. *Id.*

253. *Id.* "JPG" is a code appended to a file's name (a "filename extension"), which designates that the file has been compressed by a method developed by the Joint Photographic Experts Group. *See* Joint Photographic Experts Group, *at* http://wombat.doc.ic.ac.uk/foldoc/foldoc.cgi?Joint+Photographic+Experts+Group (Sept. 11, 2000). JPG is one of a number of compression schemes used to reduce the size of digital images for easy electronic transmission. *Id.*

254. *See Carey*, 172 F.3d at 1271.

255. *See id.*

256. *Id.* at 1270 (noting that prosecutors charged the defendant with violation of 18 U.S.C. § 2252A(a)(5)(B)).

257. *Id.*

258. *Id.* at 1272.

259. *See id.* at 1271.

260. *See Carey*, 172 F.3d at 1272.

261. *See id.*

> the object was contraband or evidence of a crime; and (3) the officer had a lawful right of access to the object itself.[262]

The Tenth Circuit did not agree that the plain view doctrine applied, reasoning that while the detective did not expect to find child pornography upon opening the first image file, after that point he had probable cause to suspect that the rest of the image files contained child pornography.[263] However, the detective improperly, and illegally, continued his search.[264] "When he opened the subsequent files, he knew he was not going to find items related to drug activity as specified in the warrant."[265] He knew he would find additional pornographic images.[266] Therefore, the files were not "inadvertently discovered"; they were illegally seized.[267] Following reasoning set out by the United States Supreme Court in *Coolidge v. New Hampshire*, where the Supreme Court determined that "the 'plain view' doctrine may not be used to extend a general exploratory search from one object to another until something incriminating at last emerges,"[268] the Court of Appeals for the Tenth Circuit suppressed those files, stating that "closed files . . . [are] not in plain view."[269]

The Tenth Circuit disagreed with the government's argument that the defendant's consent to search his apartment implicitly included his computer files' contents.[270] Because the police had the computers in their custody, their search needed to proceed more cautiously.[271] The Tenth Circuit concluded that the police "exceeded the scope of the warrant" and should have used a more narrowly tailored method to search the drive.[272] The court suggested several less intrusive methods, including "observing files types and titles listed on the directory, doing a key word search for relevant terms, or reading portions of each file stored in the memory."[273] Although the court based its decision only on the facts at issue, it implied that when the police remove a computer from a defendant's home pursuant to a valid search warrant, the subsequent search of that computer must not expand into a general search.[274]

A situation where the computer remains in the defendant's control is distinguishable from this case, where authorities removed the computer because "no 'exigent circumstance or practical reason [permitted] offi-

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262. *Id.* (citing United States v. Soussi, 29 F.3d 565, 570 (10th Cir. 1994)).
263. *See id.* at 1273.
264. *See id.*
265. *Id.* at 1274.
266. *See Carey*, 172 F.3d at 1274.
267. *Id.* at 1273.
268. Coolidge v. New Hampshire, 403 U.S. 443, 466 (1971).
269. *Carey*, 172 F.3d at 1272-73.
270. *See id.* at 1274.
271. *See id.* at 1276.
272. *Id.*
273. *Id.*
274. *See id.* at 1273.

cers to rummage through all of the stored data regardless of its relevance or its relation to the information specified in the warrant.'"[275] The Court of Appeals for the Tenth Circuit suggested that had the computers remained in the defendant's apartment, the detectives permissibly could have searched each file or proceeded in a less circumspect manner.[276] Courts likely would distinguish this situation from the situation where detectives search for child pornography under a warrant.[277] In that case, the detectives could search each file.[278] The United States District Court for the Eastern District of Virginia, below, failed to base its decision on a warrant's scope; when searching for specific information, irrespective of the underlying crime, the search of a computer may include all of its files.[279]

2. Other Jurisdictions

a. *United States v. Gray*[280]

i. Facts

Pursuant to a warrant, FBI agents conducted a search at the defendant's home for information relating to computer intrusions at the National Library of Medicine.[281] The agents seized four computers and copied their hard drives onto CD-ROMs.[282] Following the FBI's Computer Analysis and Response Team practices, an agent opened and briefly reviewed each file in the directories and subdirectories, both to aid in the discovery of warrant-specified material and to determine how many files would fit on each CD-ROM.[283] The agent opened approximately eighty percent of the files on each hard drive.[284]

During that process, the agent discovered a folder entitled "Tiny Teen."[285] He opened the folder "because it was the next [one] listed and he was opening all of the [folders] as part of his routine search for the items listed in the warrant."[286] While the agent knew that the files he was searching for were likely text files, he opened "picture files because computer files can be misleadingly labeled, particularly if the owner of

275. *Carey*, 172 F.3d at 1275-76 (quoting Raphael Winick, *Searches and Seizures of Computers and Computer Data*, 8 HARV. J.L. & TECH. 75, 107 (1994)).

276. *See id.*

277. *See supra* text accompanying note 184.

278. *See supra* text accompanying notes 183-84.

279. *See* United States v. Gray, 78 F. Supp. 2d 524, 528-29 (E.D. Va. 1999).

280. 78 F. Supp. 2d 524.

281. *See Gray*, 78 F. Supp. 2d at 526.

282. *See id.*

283. *See id.* The Computer Analysis and Response Team is an FBI unit specializing in the forensic examination of computers. *See FBI Laboratory: Computer Analysis and Response Team, at* http://www.fbi.gov/hq/lab/org/cart.htm (last visited Feb. 18, 2002).

284. *See Gray*, 78 F. Supp. 2d at 527.

285. *See id.*

286. *Id.*

those files is trying to conceal illegal materials."[287] The agent discovered pornographic pictures, some of which he thought contained images of minors.[288] The agent obtained a second search warrant that authorized a search of the defendant's computer files for evidence of child pornography.[289] The defendant sought to suppress all the images discovered on the computer, contending that the search of the folders "was beyond the scope of the [original search] warrant."[290]

ii. Decision

The United States District Court for the Eastern District of Virginia disagreed.[291] While holding that a search warrant must be particular to be executable, the court noted that

> [i]n some searches, however, it is not immediately apparent whether or not an object is within the scope of a search warrant; in such cases, an officer must examine the object simply to determine whether or not it is one that he is authorized to seize. . . . As a result, in any search for records or documents, "innocuous records must be examined to determine whether they fall into the category of those papers covered by the search warrant."[292]

The court held that an agent, acting under the authorization of a search warrant "to search a home or office for documents containing certain specific information [is] entitled to examine all files located at the site to look for the specified information."[293] Thus, the district court determined that the law permitted the agents to look at each file.[294] In addition, the court held that if, in the course of that search,

> an agent sees, in plain view, evidence of criminal activity other than that for which she is searching, this does not constitute an unreasonable search under the Fourth Amendment, for "[v]iewing an article that is already in plain view does not involve an invasion of privacy."[295]

The court thus permitted seizure of those pornographic pictures under the "plain view" exception and held that the investigator's search and seizure of the images contained in the "Tiny Teen" folder "was not beyond the scope of the search warrant."[296]

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287. *Id.* at 527 n.5. *See also supra* note 153.
288. *See Gray*, 78 F. Supp. 2d at 527.
289. *See id.* at 527-28.
290. *Id.* at 528.
291. *See id.* at 531.
292. *Id.* at 528 (quoting United States v. Kufrovich, 997 F. Supp. 246, 264 (D. Conn. 1997)).
293. *Id.* at 528.
294. *See Gray*, 78 F. Supp. 2d at 531.
295. *Id.* at 528 (quoting United States v. Jackson, 131 F.3d 1105, 1108 (4th Cir. 1997)).
296. *Id.* at 528-29.

3. Analysis

In the conclusion of *Carey*, the Tenth Circuit stated:

> [The detective's] seizure of the evidence upon which the charge of conviction was based was a consequence of an unconstitutional general search, and the district court erred by refusing to suppress it. Having reached that conclusion, however, we are quick to note these results are predicated only upon the particular facts of this case, and a search of computer files based on different facts might produce a different result.[297]

Foreshadowing the situation in *United States v. Campos*,[298] Justice Baldock's concurrence stated, "if the record showed that [the agent] had merely continued his search for drug-related evidence and, in doing so, continued to come across evidence of child pornography, I think a different result would be required."[299] The distinction here is that had the agent continued to find evidence of child pornography collaterally, while remaining within the scope of his original search warrant, that collateral discovery of pornography would have been admissible.[300] Where, as here, the detective exceeded the scope of the search warrant, the court found the evidence inadmissible.[301]

When authorities conduct a warranted search in a child pornography case, authorities must open and examine each file, to counter the "hiding" issues.[302] That search may turn up additional evidence of child pornography that the Court would find permissible.[303] The Court places a restriction upon this search when authorities find the pornographic material collateral to an investigation.[304] In that case, the investigator must stop and obtain a search warrant before proceeding.[305] The United States District Court for the Eastern District of Virginia, however, sees this issue differently and, in *Gray*, permitted the type of search disallowed by the Tenth Circuit.[306]

III. CONCLUSION

During this past year, the Tenth Circuit made several changes in how it interprets and applies the law concerning child pornography. The

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297. United States v. Carey, 172 F.3d 1268, 1276 (10th Cir. 1999).

298. 221 F.3d 1143 (10th Cir. 2000).

299. *Carey*, 172 F.3d at 1277 (Baldock, J., concurring). *Cf.* discussion *supra* Parts II.B.2. and II.B.3.

300. *See Carey*, 172 F.3d at 1276-77 (Baldock, J., concurring). *Cf.* discussion *supra* Parts II.B.2. and II.B.3.

301. *See Carey*, 172 F.3d at 1276.

302. *See* KERR, *supra* note 81, at 29.

303. *See* United States v. Gray, 78 F. Supp. 2d 524, 527 n.5, 531 (E.D. Va. 1999).

304. *See Carey*, 172 F.3d at 1277 (Baldock, J., concurring).

305. *See id.*

306. *See Gray*, 78 F. Supp. 2d at 530-31.

Court made these changes in response to concerns Congress expressed when enacting the Sex Crimes Against Children Prevention Act.[307] The essence of Congress' worry was that the nexus of child pornography and computers may produce particularly harmful effects. Not only might children be enticed to engage in pornographic activity by merely viewing pornographic images but, due to the ease with which a computer allows people to copy and disseminate images over a virtually limitless market, a computer's use may increase the overall number of images disseminated.[308] In response to Congress' concerns, the Tenth Circuit expanded its interpretation of solicitation of a minor by computer, supported sentence-level enhancements for child pornography defendants who used computers to commit their crimes, expanded traditional search and seizure standards by employing a fair probability standard to determine the appropriateness of complete search of a computer, and supported Internet-use restrictions on paroled child pornographers.

While Congress' concerns are legitimate, the changes wrought by the Court of Appeals' new interpretations are worrisome. Although we no longer live in a society where "an eye for an eye" is our basis for determining punishment, we must strike a proper balance between actual harm and its subsequent punishment. Perceived harm alone should not form that basis. However, according to the Sentencing Commission, such perceived harm may do just that.[309] "[T]he federal cases sentenced to date typically do not involve the type of computer use that would result in either wide dissemination or a likelihood that the material will be viewed by children."[310] The Sentencing Commission made that statement in early 1996, when the Sentencing Commission examined each of the 423 cases involving sex offenses against minors that came before the federal courts during 1994 and 1995.[311] These cases were likely the same cases Congress had in mind when stating its reasoning for enacting the Sex Crimes Against Children Prevention Act. Congress' fears thus may be unfounded, or at minimum, unrepresentative of the entire body of child pornography defendants using computers.

The changes brought about by the Sex Crimes Against Children Prevention Act have materially affected defendants' rights and sentencing. At least two circuit courts, the Tenth Circuit and the Sixth Circuit, have relied upon Congress' concerns when interpreting child pornography laws. If Congress' underlying fears are either unfounded or unrepresentative of the whole, then the Sixth and Tenth circuits have expanded laws and limited rights based upon faulty or misguided policy. Applying

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307. Pub. L. No. 104-71, 109 Stat. 774 (1995) (codified as amended at 18 U.S.C. § 2423; 28 U.S.C. § 994).

308. *See* H.R. REP. NO. 104-90, at 3-4 (1995), *reprinted in* 1996 U.S.C.C.A.N. 759, 760-61.

309. *See* U. S. SENTENCING COMM'N, *supra* note 6, at i.

310. *Id.*

311. *See id.*

such inroads to all child pornographers using computers may therefore be excessive, overreaching, and out of balance with the harm caused by such computer use.

When the actual effect of that law abridges fundamental rights, as here, Congress should reassess the law. While Congress has powerful reasons to diminish a sex offender's rights, fear of the possible should not become the basis for decision-making. Congress should reassess its reasoning behind the passage of the Sex Crimes Against Children Prevention Act, in light of the act's effect upon current case law. If Congress finds its concerns currently founded, the changes should remain. Otherwise, Congress and the courts should limit the application of the Sex Crimes Against Children Prevention Act to situations where a defendant *actually* used a computer to entice minors to engage in pornographic activity or to disseminate images containing child pornography.

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SURVEY COMMENT: RECENT DEVELOPMENTS IN TAX LAW IN THE TENTH CIRCUIT

INTRODUCTION

Tax Issues permeate a wide range of legal specialties from estate planning to changes in a business entity's corporate status. During the survey period of September 1, 2000 through August 31, 2001, the Tenth Circuit Court of Appeals published approximately 22 opinions dealing with some aspect of tax law.[1] The Tenth Circuit decided three cases of particular importance, which this comment analyzes.

The current state of tax law is still evolving. Each circuit court places its own spin on how to interpret the tax law contained in the Internal Revenue Code of 1986 ("Code"), as amended.[2] The first two Tenth Circuit decisions discussed in this comment establish "new" law, while the third decision simply reaffirms the past holdings of the Tenth Circuit.

The first case examined in Part I of this comment, addresses date-of-death valuation for determining individual estate tax liability. In *Estate of McMorris v. Commissioner*,[3] a case of first impression, the Tenth Circuit extended the date-of-death valuation rule announced by the United States Supreme Court in *Ithaca Trust Co. v. United States*.[4] The Court held that "events which occur *after* a decedent's death may *not* be considered in valuing" a § 2053(a)(3)[5] "claim against the estate" deduction.[6]

The second case discussed in Part II of this comment, addresses the deductibility of suspended passive activity losses ("PALs") carried forward to an S corporation. In *St. Charles Inv. Co. v. Commissioner*,[7] the Tenth Circuit held that when a taxpayer corporation changes its status from a C corporation to an S corporation, it is permissible to carry forward the suspended PALs, incurred during the years it was a C corporation, to the year it became an S corporation, and fully deduct those suspended PALs.[8]

The third case considered in Part III of this comment, addresses the test for determining the deductibility of salaries by a corporation as rea-

1. Author's count based on Westlaw and Lexis searches.
2. *See* FRED W. PEEL, JR., UNDERSTANDING THE FEDERAL INCOME TAX: A LAWYER'S GUIDE TO THE CODE AND ITS PROVISIONS 4 (1988).
3. 243 F.3d 1254 (10th Cir. 2001).
4. 279 U.S. 151, 155 (1929) (holding "[t]he estate so far as may be is settled as of the date of the testator's death").
5. All statutory references and citations to sections in this comment are to sections of the Internal Revenue Code of 1986, as amended (the "Code"), Title 26 of the United States Code.
6. *McMorris*, 243 F.3d at 1261 (emphasis added).
7. 232 F.3d 773 (10th Cir. 2000).
8. *St. Charles*, 232 F.3d at 779.

sonable business expenses. In *Eberl's Claim Serv., Inc. v. Commissioner*,[9] the Tenth Circuit rejected taxpayer corporation's invitation to adopt an "independent investor test," as recently embraced by other circuits,[10] in favor of *stare decisis*, reaffirming the use of the "multi-factor test of reasonable compensation" set forth in its prior decision, *Pepsi-Cola Bottling Co. v. Commissioner*.[11]

I. DATE-OF-DEATH VALUATION FOR DETERMINING INDIVIDUAL ESTATE TAX LIABILITY

A. *Background*

In 1916, the federal estate tax system was created in order to generate revenue for use in the United State's anticipated entry into World War I.[12] Since its adoption,[13] the federal estate tax system has taxed transfers of property at death, but has allowed deductions for all valid claims.[14] Included in those allowable deductions is § 2053(a)(3), which provides for "claims against the estate."[15] This statute originated in part from § 202 of the 1916 Act, which declared, "the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property."[16] Read in conjunction with the Ways and Means Committee of the House of Representatives' 1916 Report on § 203, which stated, "[i]n determining the value of the net or taxable estate, deductions for all valid claims against the estate are allowed,"[17] § 2053(a)(3) can be construed to mean that Congress intended a deductible claim to be fixed or valued at death.[18]

Contrary to this statutory interpretation and legislative history, the Commissioner of Internal Revenue ("Commissioner") has historically

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9. 249 F.3d 994 (10th Cir. 2001).

10. *Eberl's Claim*, 249 F.3d at 1003-04.

11. 528 F.2d 176 (10th Cir. 1976).

12. *See* WFT-CPET Ch. 17: *The Federal Gift and Estate Taxes*, 2001 WL 423593, at *2.

13. *See generally* Gary Robbins & Aldona Robbins, *The Case for Burying the Estate Tax*, Institute For Policy Innovation, Policy Report #150, at 1-7 (1999), *available at* www.ipi.org (discussing a historical overview of U.S. estate taxes and the developments of modern estate tax law by providing a chronology of legislation, a detailed description, and purpose for the legislation).

14. *See* Robert C. Jones, *Estate and Income Tax: Claims Against the Estate and Events Subsequent to Date of Death*, 22 UCLA L. REV. 654 n.3 (1975) (explaining that a "valid claim" includes "funeral expenses; administrative expenses; claims against the estate; mortgages or indebtedness on property included in the gross estate; certain state and foreign death taxes; casualty or theft losses incurred during settlement of the estate; public, charitable and religious contributions; and bequests to the surviving spouse" (citations omitted)).

15. Craig S. Palmquist, *The Estate Tax Deductibility of Unenforced Claims Against a Decedent's Estate*, 11 GONZ. L. REV. 707 (1976) (discussing how "claims against the estate" are "the personal obligations of the decedent existing at the time of death," which arise from a "contractual arrangement or by operation of law" and are "enforceable under local law").

16. *Id.* at 709 (quoting Revenue Act of 1916, ch. 463, § 202, 39 Stat. 77).

17. *Id.* (quoting H.R. REP. No. 922, 64th Cong., 1st Sess. (1916)).

18. *See id.* at 709-10.

advocated that "a deduction be allowed only for a claim *actually paid* by the estate and whose *value* is determined with accuracy, in light of all events *during the administration of the estate* [as opposed to date-of-death]."[19] Treasury Regulation § 20.2031--1(b) *defines* "value" to mean "fair market value" or "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts,"[20] however the Code fails to specify *how* to value property, so "[t]he method of valuation is determined from regulations, IRS rulings and case law."[21]

Commissioner's position also conflicts with the United States Supreme Court's adoption of the date-of-death valuation approach[22] set forth in its 1929 unanimous decision, *Ithaca Trust Co. v. United States*,[23] in which decedent's trustee, Ithaca Trust Company, sued the United States for recovery of taxes that were overpaid.[24] Under the terms of decedent's will, testator's wife received the residue of the estate for her life, and upon her death, the remainder passed in trust to certain charities.[25] Initially, testator's estate used mortality tables to calculate wife's life expectancy and thus arrive at the amount of the charitable deduction allowed for estate tax purposes.[26] This valuation method was called into question when wife died within six months of testator/husband.[27] Since wife "died before reaching her actuarial life expectancy,"[28] the United States argued that the actual date of wife's death applied in valuing the amount of the charitable deduction, which resulted in Ithaca Trust Company paying a higher estate tax.[29] The Court rejected the United States' argument and held in favor of Ithaca Trust Company paying a lower estate tax by calculating the charitable deduction "according to the wife's life expectancy [using mortality tables] as of the date of the *testator's* [husband's] death."[30] In reaching this conclusion, the Court explained, "[t]he estate so far as may be is settled as of the date of the testator's

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19. *Id.* at 709 (emphasis added).

20. ELAINE R. FORS ET AL., THE MARYLAND INSTITUTE FOR CONTINUING PROFESSIONAL EDUCATION OF LAWYERS, FEDERAL GIFT AND ESTATE TAX RETURNS Ch. IV, at I (2000).

21. *Id.*

22. The date-of-death valuation approach fixes the amount of the claims against the estate deduction at the date of decedent's death. *See* Palmquist, *supra* note 15, at 709. *See also McMorris*, 243 F.3d 1254, 1260 (10th Cir. 2001) (discussing how "events occurring after a decedent's death are irrelevant in valuing an estate's deduction under section 2053(a)(3)").

23. 279 U.S. 151, 155 (1929) (holding "[t]he estate so far as may be is settled as of the date of the testator's death").

24. *Ithaca Trust*, 279 U.S. at 153-54.

25. *Id.* at 154.

26. *Id.* at 155.

27. *Id.*

28. Robert Don Collier, *Survey Article: Federal Taxation*, 32 TEX. TECH. L. REV. 823, 827 (2001).

29. *See Ithaca Trust*, 279 U.S. at 155.

30. *McMorris*, 243 F.3d at 1259-60 (10th Cir. 2001) (emphasis added).

death."[31] Today, this pronouncement of the law as articulated by the Court more than 70 years ago retains its precedential effect, and is known as the "date-of-death valuation rule."[32]

With respect to the Tenth Circuit, the date-of-death valuation topic was one of first impression for the court when it agreed to hear *Estate of McMorris v. Commissioner*.[33] The issue for resolution was whether it was proper in calculating a § 2053(a)(3) deduction to consider post-death events.[34] Since § 2053(a)(3) was silent on the issue and the pertinent tax regulations provided no clear answer,[35] the Tenth Circuit was forced to rely on its own discretion in whether to distinguish the holding of *Ithaca Trust* or extend it to the facts of *Estate of McMorris*.

B. Tenth Circuit Case: *Estate of McMorris v. Commissioner*

1. Facts

Decedent's husband died in 1990, at which time decedent/wife inherited 13.409091 shares of NW Transport Service, Inc. stock.[36] The stock was appraised, at the date of decedent's husband's death, at a value of $1,726,562.50 per share.[37] Shortly thereafter, decedent/wife and NW Transport entered into a stock redemption agreement for $29.5 million, or approximately $2.2 million per share.[38] Meanwhile, the Commissioner of Internal Revenue issued a notice to decedent's husband's estate disputing the value of the NW Transport stock.[39] In January 1996, a settlement agreement was finalized between decedent husband's estate and the Commissioner, which *increased* the value of the NW Transport stock to $2.5 million per share (versus the original appraisal value of $1,726,562.50 per share in 1990).[40] Consequently, the capital gain of $473,437.50 [$2.2 million per share *minus* $1,726,562.50 per share] that decedent/wife had obtained from the stock redemption now resulted in a loss of $300,000 [$2.5 million per share *minus* $2.2 million per share], based on the new $2.5 million per share value set forth by the 1996 settlement agreement.[41] Given this loss realized from the NW Transport stock redemption, decedent/wife's estate filed an amended federal tax return requesting a $3,332,443 refund.[42] In dispute between dece-

31. *Ithaca Trust*, 279 U.S. at 155.
32. *McMorris*, 243 F.3d at 1260.
33. 243 F.3d 1254, 1258 (10th Cir. 2001).
34. *McMorris*, 243 F.3d at 1258.
35. *Id.* at 1259.
36. *Id.* at 1256.
37. *Id.*
38. *Id.*
39. *Id.*
40. *McMorris*, 243 F.3d at 1256. (emphasis added).
41. *Id.*
42. *Id.*

dent/wife's estate and the Commissioner was whether the 1996 settlement agreement was relevant in determining the value of the § 2053(a)(3) deduction taken by decedent/wife's estate in its amended federal tax return.[43] The Commissioner argued the 1996 settlement agreement was relevant, while decedent/wife's estate argued it was not.[44]

2. Decision

The Tenth Circuit ruled in favor of decedent/wife's estate and extended the date-of-death valuation rule announced by the United States Supreme Court in *Ithaca Trust Co. v. United States*,[45] to the instant case, by holding that "events which occur *after* a decedent's death may *not* be considered in valuing" a § 2053(a)(3) claim against the estate deduction.[46] Thus, the 1996 settlement agreement was *not* relevant for purposes of calculating decedent/wife's estate tax liability.[47]

In reaching its conclusion, the Tenth Circuit explained that "[s]ound policy reasons" supported its adoption of the date-of-death valuation principle.[48] In particular, the court reasoned that the date-of-death valuation principle created a "bright line rule," which would alleviate "the uncertainty and delay in estate administration which may result if events occurring months or even years after a decedent's death could be considered in valuing a claim against the estate."[49] The court further explained that its "bright line rule" would achieve a longtime "ideal" of the legal community: bring "more certainty to estate administration."[50] However, in making this determination, the court attempted to dispel any signs of inherent favoritism such a bright line rule could create, by stating the rule could just as easily benefit the Commissioner, rather than the taxpayer/estate depending on "the particular circumstances of each case."[51]

Therefore, the Tenth Circuit created *new* precedent by recognizing the date-of-death valuation principle in calculating a § 2053(a)(3) deduction, which practitioners must now consider when valuing an individual decedent's estate and calculating that estate's tax liability for federal and state income tax purposes.

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43. *Id.* at 1258.
44. *Id.*
45. 279 U.S. 151, 155 (1929) (holding "[t]he estate so far as may be is settled as of the date of the testator's death").
46. *McMorris*, 243 F.3d at 1261 (emphasis added).
47. *Id.* at 1263 (emphasis added).
48. *Id.* at 1261.
49. *Id.* at 1261-62.
50. *Id.* at 1262.
51. *Id.*

C. *Other Circuits*

Despite the United States Supreme Court's unanimous pronouncement in *Ithaca Trust Co. v. United States*,[52] the circuits are split on their extension of the date-of-death valuation rule beyond charitable bequest deductions.[53]

1. Fifth, Ninth and Eleventh Circuits

In agreement with the Tenth Circuit are the Fifth, Ninth, and the Eleventh Circuits,[54] which *accept* the date-of-death valuation approach and *prohibit* the consideration of post-death events in valuing claims against the estate.

a. Fifth Circuit

In *Estate of Smith v. Commissioner*,[55] the decedent, prior to her death, was being sued by Exxon Corporation to recoup an overpayment of royalty proceeds that Exxon had made to decedent and other royalty owners of oil and gas leases.[56] Approximately fifteen months *after* decedent's death, decedent's estate settled the suit with Exxon for $681,840.[57] The Commissioner alleged that this settlement set the value of decedent's estate's § 2053(a)(3) deduction.[58] In a resounding rejection of this argument, the Fifth Circuit held that such post-death facts as the decedent's estate's settlement with Exxon should *not* be considered in valuing a § 2053(a)(3) deduction.[59] The court explained that "the claim generating the estate tax deduction under § 2053(a)(3) . . . must be valued as of the date of the death of the decedent and thus must [be] appraised on information known or available up to (but not after) that date."[60] In reaching this conclusion, the court reasoned that when the date-of-death valuation principle was announced by the United States Supreme Court in *Ithaca Trust Co. v. United States*,[61] it was making a determination about the general nature of the federal estate tax.[62] It is a tax imposed on transferred property that is levied at a discrete time (at death), so it makes sense that

52. 279 U.S. 151, 155 (1929) (holding "[t]he estate so far as may be is settled as of the date of the testator's death").

53. *See McMorris*, 243 F.3d at 1260.

54. *See* cases cited *infra* notes 55, 66, 72. *See generally* 34 A. AM. JUR. 2D *Federal Taxation* § 144,210 (2002) (discussing the Fifth, Tenth, and Eleventh Circuits' mutual agreement regarding the broad application of *Ithaca Trust* in their own jurisdictions).

55. 198 F.3d 515, 517 (5th Cir. 1999).

56. *Smith*, 198 F.3d at 517.

57. *See id.* at 519 (emphasis added).

58. *See id.* at 526.

59. *See id.* at 517-18 (emphasis added).

60. *Id.* at 517.

61. 279 U.S. 151, 155 (1929).

62. *See Smith*, 198 F.3d at 524. *See also Ithaca Trust*, 279 U.S. at 155 (concluding that "the value of the thing to be taxed must be estimated as of the time when the act is done").

the value of the property transferred should be made at that same time.[63] The court further reasoned that since Congress has enacted statutory exceptions to the date-of-death valuation rule,[64] it knows how to derogate from the rule when it wants to, but to date, Congress has "never seen fit to overrule *Ithaca Trust* legislatively," so the courts should not either.[65]

b. Ninth Circuit

Likewise, in *Propstra v. United States*,[66] decedent's estate consisted primarily of two parcels of land, which at the time of his death, were encumbered by liens totaling $202,423.05.[67] Approximately three years *after* decedent's death, his estate settled the lien claims for $134,826.23.[68] The Commissioner alleged decedent's estate was only allowed to deduct the value of the settlement, or that amount actually paid in discharge of the liens, which was *less* than the value of the liens at the time of decedent's death.[69] In ruling in favor of decedent's estate, the Ninth Circuit held that "§ 2053[(a)(3)] precludes the consideration of post-death events in computing the value of certain and enforceable claims against an estate."[70] In reaching this conclusion, the court was persuaded by the teachings of *Ithaca Trust* and the language of Treasury Regulation § 20.2053-4, which "designates 'the time of death' as the critical reference point" for determining what amounts may be deducted as claims against an estate.[71]

c. Eleventh Circuit

Similarly, in *O'Neal v. United States*,[72] decedent's estate in seeking a $1,883,762 estate tax refund claimed it was entitled to a $9,407,226 deduction under § 2053(a)(3)[73] for reimbursement of nine heirs' "transferee gift tax liability" on stock gifts received from decedent,[74] prior to her death.[75] Upon decedent's death, a timely filing of her estate tax return was made, which was selected for audit by the government who challenged the § 2053(a)(3) deduction.[76] A settlement was reached some nine months after decedent's death, but decedent's estate was held liable for

63. *See Smith*, 198 F.3d at 524.

64. *See, e.g.*, funeral expenses in § 2053(a)(1) and estate administration expenses in § 2053(a)(2). *See Smith*, 198 F.3d at 524.

65. *Smith*, 198 F.3d at 524.

66. 680 F.2d 1248 (9th Cir. 1982).

67. *Propstra*, 680 F.2d at 1250.

68. *See id.* at 1250 (emphasis added).

69. *See id.*

70. *Id.* at 1257.

71. *Id.* at 1255.

72. 258 F.3d 1265 (11th Cir. 2001).

73. *O'Neal*, 258 F.3d. at 1270.

74. *Id.* at 1271.

75. *Id.* at 1267.

76. *See id.* at 1268.

$1,883,762 in estate taxes because its § 2053(a)(3) deduction was reduced from $9,407,226 to $563,314.[77] While decedent's estate paid the increase in taxes, it then sought reimbursement by filing the above-mentioned tax refund claim.[78] The issue for resolution by the Eleventh Circuit was whether the post-death settlement, which was determined more than nine months after decedent's death, should influence the value of the estate's § 2053(a)(3) deduction.[79] Aligning itself with the Fifth and Tenth Circuits, the court held in favor of decedent's estate and concluded that limiting *Ithaca Trust* to only charitable bequests was erroneous.[80] Instead, the court determined that the better-reasoned and more persuasive approach was to extend *Ithaca Trust* to cases, such as this one, which involved § 2053(a)(3) deductions.[81] In such cases, the value of the § 2053(a)(3) deduction "must be valued as of the date of the decedent's death. All events occurring after the decedent's death that alter the value must be disregarded."[82] This included the $563,314 settlement amount arrived at *after* decedent's death, which therefore could *not* be considered in valuing the estate's § 2053(a)(3) deduction.[83]

2. Second and Eighth Circuits

In contrast, both the Second Circuit[84] and the Eighth Circuit[85] have *rejected* the date-of-death valuation approach and *allow* post-death events to be considered in valuing a § 2053(a)(3) deduction.

a. Second Circuit

In *Commissioner v. Estate of Shively*,[86] decedent/husband, prior to his death, entered into a separation agreement with his wife, which was later incorporated into their divorce decree that provided wife $40 a week in spousal support until her death or remarriage, and if decedent/husband died first, the weekly payments would be a charge upon his estate.[87] At the time of decedent/husband's death his wife had *not* remarried, but approximately one year *after* decedent's death, she did remarry.[88] Decedent/husband's estate paid wife her weekly support until the date of her remarriage.[89] However, when decedent's estate calculated

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77. *See id.*
78. *See id.*
79. *See O'Neal*, 258 F.3d at 1275.
80. *See id.* at 1273 n.25.
81. *See id.*
82. *Id.* at 1276.
83. *See id.* at 1275 (emphasis added).
84. *See* case cited *infra* note 86.
85. *See* case cited *infra* note 97.
86. 276 F.2d 372, 373 (2d Cir. 1960).
87. *Shively*, 276 F.2d at 373.
88. *See id.* at 373 (emphasis added).
89. *See id.*

its § 2053(a)(3) deduction [formerly § 812(b) deduction], it relied on wife's unmarried status as of decedent/husband's date of death.[90] This created an expectation of paying $27,058.30 for the duration of wife's life, based on the $40 a week charge to decedent's estate for her support.[91] Ruling in favor of the Commissioner, the Second Circuit held that the allowable deduction was limited to $2,079.96, or the amount of the payments wife had received from the date of decedent/husband's death to the date of her remarriage.[92] The court explained, decedent's estate may obtain "no greater deduction than the established sum, irrespective of whether this amount is established through events occurring before or after the decedent's death."[93] In reaching this conclusion, the court reasoned that to allow otherwise would defeat the purpose of the deduction, which was "to define that portion of the property of a decedent that is subject to estate tax."[94]

What is noteworthy about this decision is the attention it brings to the timing and order of events in an estate administration. As described by the dissent, the majority relied upon the "fortuitous circumstance" that the estate tax return was *not* filed until *after* wife had remarried.[95] Had the return been filed *before* wife's remarriage, or if wife had *not* remarried until a few years after the audit, there would have been no grounds for the Commissioner to challenge the estate's deduction.[96]

b. Eighth Circuit

Similarly, in *Estate of Sachs v. Commissioner*,[97] the decedent's estate paid income tax on a gift of stock included in the estate at the time of decedent's death.[98] Four years later, Congress passed the Tax Reform Act of 1984, which resulted in a full refund of the income tax that that's estate had paid on that gift of stock.[99] Consequently, decedent's estate attempted to use the original income tax it had paid on the gift of stock, prior to the refund, as a deduction and claim against the estate under § 2053(a)(3).[100] The estate argued that "since the estate's gross value was diminished by that amount at the time of Sach's death,"[101] and the refund did *not* occur until *after* decedent's date of death, it was entitled to the deduction.[102] In ruling in favor of the Commissioner, the Eighth Circuit

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90. *See id.* at 374.
91. *See id.* at 375.
92. *See id.* at 374.
93. *Shively*, 276 F.2d at 375.
94. *Id.*
95. *Id.* (emphasis added).
96. *See id.* at 376 (emphasis added).
97. 856 F.2d 1158, 1159 (8th Cir. 1988).
98. *Sachs*, 856 F.2d at 1159.
99. *See id.* at 1159.
100. *See id.* at 1159-60.
101. *Id.* at 1158.
102. *Id.* at 1160 (emphasis added).

held that the estate could *not* deduct under § 2053(a)(3), "an income-tax liability which was subsequently forgiven by Congress."[103] The court explained, "an estate loses its § 2053(a)(3) deduction for any claim against the estate which ceases to exist legally, regardless of whether the nullification of the claim could have been foreseen."[104] In reaching this conclusion, the court reasoned that Congress intended the § 2053(a)(3) deduction to accommodate actual claims, those claims already paid or to be paid, rather than just theoretical claims.[105] The court further determined that *Ithaca Trust* was distinguishable and therefore *not* controlling on the grounds that the date-of-death valuation principle enunciated by the Supreme Court was intended to apply only in the narrow context of charitable bequests, which this case was not.[106]

D. *Analysis*

While the Tenth Circuit attributes its holding to a desire to avoid uncertainty and delay in estate administration by adopting a "bright line rule,"[107] one must question whether the advantages of such a strict rule really outweigh the unfairness that can result[108] when a court is unable to exercise flexibility. The practicality of the Tenth Circuit's holding is also questionable with regard to its ability to effectively avoid the uncertainty and delay that all practitioners filing an estate tax return know: every return is subject to audit and every estate has the potential of being dragged out for years before a closing letter is received.[109] Likewise, practitioners know that when a deficiency notice is issued, there are typically several different issues, not just one.[110] Therefore, "[i]t is unlikely that a post-death event would be the sole cause of delay."[111] When the Tenth Circuit's holding is viewed in this light, allowing the valuation of post-death events does *not* seem to create the hardship the court suggests.[112] As one team of commentators has observed, more fairness would be achieved if, instead of the current distinction between date-of-death and post-death valuation, the cases were distinguished based on situations where the final adjustments were due to factors *out of* the estate's control (such as audits or tax law changes) versus factors *within* the

103. *Id.* at 1159 (emphasis added).
104. *Sachs*, 856 F.2d at 1161.
105. *See id.* at 1160.
106. *See id.* at 1162.
107. *McMorris*, 243 F.3d at 1261.
108. *See* Robert E. Madden & Lisa H.R. Hayes, *Estate Tax Deduction Not Altered By Post-Death Events, Rules CA-10 Estate of McMorris*, 28 EST. PLAN. 325, comments (2001).
109. *See id.*
110. *See id.*
111. *Id.*
112. *See id.* (emphasis added).

estate's control (such as choosing to increase liability in order to eliminate future obligations).[113]

In addition, the Tenth Circuit's reassurance that this "bright line rule" can just as easily benefit the government, as it does the estate,[114] rings hollow in light of the fact that the Commissioner has historically argued *against* the date-of-death valuation approach more often than not.[115] Consequently, this unconvincing statement by the court leads one to conclude the professed fairness of the "bright line rule" is a sham and in reality the rule weighs in favor of the estate more frequently than the government.[116]

To make matters worse, by all indications, the split in the circuits regarding date-of-death valuation is irreconcilable.[117] The only way to resolve the conflict of whether *Ithaca Trust* should be read as broadly as the Fifth, Ninth, Tenth and Eleventh Circuits have done, or if instead it should be construed as narrowly as the Second and Eighth Circuits have done, is for Congress to enact specific legislation addressing the issue.[118] Until that time, practitioners would be well advised to check the precedent of their local circuit court and be prepared to advise a client whether or not to challenge a valuation of a post-death event depending upon the approach adopted by their jurisdiction.[119]

II. DEDUCTIBILITY OF SUSPENDED "PALS" CARRIED FORWARD TO AN S CORPORATION

A. *Background*

As a result of Congress's perception that taxpayers were eroding federal tax revenues by using losses from one activity to offset taxable income from another activity, the passive activity loss rules were

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113. *See id.* (emphasis added).

114. *McMorris*, 243 F.3d at 1262.

115. *See* Palmquist, *supra* note 15, at 709 (emphasis added).

116. *See id.*

117. *See* Estate of Smith v. Comm'r, 198 F.3d 515, 522 (5th Cir. 1999). *See also* Estate of Van Horne v. Comm'r, 78 T.C. 728, 736-37 (1982) (explaining how "all of the cases in this field dealing with post-death evidence are not easily reconciled with one another, and at times *it is like picking one's way through a minefield* in seeking to find a completely consistent course of decision in this area") (emphasis added).

118. *See, e.g.*, Robert C. Jones, *Estate and Income Tax: Claims Against the Estate and Events Subsequent to Date of Death*, 22 UCLA L. REV. 654, 682 (1975) (encouraging Congress to aid the executor by "providing a more definitive statement of valuation dates").

119. *See* Madden & Hayes, *supra* note 108. Nevertheless, while it is beyond the scope of this comment, some recourse exists for preparers of estate tax returns by utilizing Code § 2032 or "protective alternate valuation election (PAVE)," which "allows an executor to use the alternate values and recalculate a lower tax after the return is filed -- even if the date-of-death values are used when the return is initially filed." S. Dresden Brunner & Laird A. Lile, *PAVE -- A Self-Help Technique For Estate Tax Valuation Methods*, 75-Oct. FLA. B.J. 44, 44 (2001).

created.[120] While the legislative history reveals that several alternative methods were considered, Congress adopted a system whereby "business losses would only be permitted to offset nonbusiness income (*e.g.*, wages and interest) if the taxpayer *materially participated* in the business that generated the loss."[121] Congress established this "material-participation" standard in order to "prevent taxpayers from basing their investment decisions primarily upon the tax benefits they would receive."[122] Consequently, a passive activity is "any business in which the taxpayer does *not* materially participate;" or, in other words, the taxpayer is *not* involved in the activity on a regular basis.[123]

In general, the passive activity restrictions in § 469 "prevent a taxpayer who is *not* actively involved in a business from deducting losses from the business as an offset against compensation . . . or . . . portfolio investments."[124] However, § 469(c) defines real estate rental activity as a *per se* passive activity "without regard to the taxpayer's level of participation in the activity."[125] Passive activity losses ("PALs") occur when "the amount, if any, by which the passive activity *deductions* for the taxable year *exceed* the passive activity *gross income*."[126] For example, if a corporation has total gross income from its real estate rental activities (passive activities) of $400,000, but it has total deductions from those same real estate rental activities of $600,000, the corporation will sustain PALs of $200,000. Typically, under § 469(a) of the Code, PALs are *not* deductible.[127] However, § 469(b) provides that "PALs can be suspended and 'carried forward' to the following year" and after application of § 469(b)'s carry-over provision, under § 469(g)(1)(A), any remaining PAL "shall be treated as a non-passive loss."[128]

With respect to the Tenth Circuit, the deductibility of suspended PALs carried forward to an S corporation was a topic of first impression for the court when it agreed to hear *St. Charles Inv. Co. v. Commissioner*.[129] The issue for resolution was whether it was proper for the Commissioner to disallow the carry-over of suspended PALs by an S corporation, which had incurred the PALs while it was a C corporation.[130]

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120. *See* NEIL A. RINGQUIST, WORKING WITH THE REVISED PASSIVE ACTIVITY LOSS RULES 5 (1995).

121. *Id.* (emphasis added).

122. *Id.*

123. PEEL, *supra* note 2, at 231 (emphasis added).

124. *Id.* at 230 (emphasis added).

125. RICHARD M. LIPTON ET AL., PASSIVE ACTIVITY LOSSES § 603 (1995).

126. *Id.* at § 1202 (emphasis added).

127. *See id.* at § 1207.1.

128. St. Charles Inv. Co. v. Comm'r, 232 F.3d 773, 774 (10th Cir. 2000).

129. *St. Charles*, 232 F.3d at 775.

130. *See id. See generally* I. RICHARD GERSHON, A STUDENT'S GUIDE TO THE INTERNAL REVENUE CODE 6-7 (4th ed. 1999) (discussing the Code's different corporate tax treatments and explaining how "S" corporations and "C" corporations received their names as a result of the Code

Since this was an issue undecided by any other circuit, the Tenth Circuit relied on its own discretion when interpreting the congressional intent and statutory language of the provisions in question.

B. Tenth Circuit Case: *St. Charles Inv. Co. v. Commissioner*[131]

1. Facts

From 1988 to 1990, St. Charles operated as a closely held C corporation engaged in real estate rental activities (*i.e.*, "passive activities").[132] In 1991, St. Charles changed its tax status to an S corporation[133] and sold some of its rental properties, which had suspended PALs associated with them for the years when St. Charles operated as a C corporation.[134] St. Charles then identified those suspended PALs, totaling $6,038,001, on its 1991 tax return and claimed them as deductions as authorized by § 469(g)(1)(A).[135] In 1996, the Commissioner issued a notice of adjustment *disallowing* St. Charles' use of its suspended PALs based on § 1371(b)(1), which "prohibits an S corporation from carrying any 'carry-forward' from a year in which the corporation was a C corporation to a year in which the corporation is an S corporation."[136] In dispute was the conflict between the two carry-over provisions of § 469(b) and § 1371(b)(1).[137]

2. Decision

The Tenth Circuit ruled in favor of St. Charles and held that when a taxpayer corporation changes its status from a C corporation to an S corporation, it is permissible to carry forward the suspended PALs, incurred during the years it was a C corporation, to the year it became an S corporation, and fully deduct those suspended PALs.[138] The court explained by implementing the rules of statutory construction, the "except as otherwise provided" language of § 469(b)[139] prevented any exceptions *not*

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setting forth the requirements for each type of corporation in Subchapter S and Subchapter C, respectively).

131. 232 F.3d 773 (10th Cir. 2000).

132. *See St. Charles*, 232 F.3d at 774.

133. The Code treats such corporations in a special fashion in that "[t]he income or loss to an S corporation flows through to the shareholders" providing "the advantages of the corporate form without double taxation." PETER C. KOSTANT, BUSINESS ORGANIZATIONS: PRACTICAL APPLICATIONS OF THE LAW 86 (1996). In contrast, a C corporation is taxed on its profits and the shareholders are taxed on any corporate dividends they receive, which results in double taxation. *See id.* at 85.

134. *See St. Charles*, 232 F.3d at 774.

135. *See id.*

136. *Id.* at 775.

137. *See id.* at 776.

138. *See id.* at 779.

139. Specifically, § 469(b) states: "*Except as otherwise provided in this section*, any loss or credit from an activity which is disallowed under subsection (a) shall be treated as a deduction or

expressly stated in § 469(b) from applying, which included § 1371(b)(1)'s restrictions[140] on carry forwards from a C year to an S year.[141] In reaching this conclusion, the court reasoned that Congress intended § 469(b) to be interpreted in this way because the plain language of § 469(f)(2)[142] allowed "the application of § 469 to a corporation's PALs *even after it ceases to be* a closely held C corporation."[143] The court further determined that while its decision created a "windfall in favor of the shareholders of St. Charles, effectively allowing one taxpayer (the shareholder) to offset his income with the losses of a different taxpayer (the corporation)," the result was warranted because the statutory text of § 469 unequivocally supported it.[144]

C. *Other Circuits*

As of the survey period (September 1, 2000 – August 31, 2001), no other circuits had considered this issue.[145]

D. *Analysis*

Unlike *McMorris*, where the Tenth Circuit *denied* that its extension of date-of-death valuation would create unfairness by always favoring the taxpayer/estate,[146] in *St. Charles*, the Tenth Circuit openly admitted that its holding would create a windfall for the taxpayer.[147] Yet, the Tenth Circuit justified the windfall in *St. Charles* as valid because there existed "unequivocal support for such a result in the statutory text."[148] While one can understand how the "unequivocal support" standard provides the minimum floor for which the court must comply, it is less clear why the court is unwilling to exercise its powers of equity to recalibrate the windfall that exists. One can speculate that more was driving the court than just strict compliance with the rules of statutory construction, such as common sense. A common sense evaluation of the case points out that St. Charles was still the *same* company, engaged in the *same* activities in

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credit allocable to such activity in the next taxable year." 26 U.S.C. § 469(b) (2001) (emphasis added).

140. In particular, § 1371(b)(1) provides that "[n]o carryforward, and no carryback, arising for a taxable year for which a corporation is a C corporation may be carried to a taxable year for which such corporation is an S corporation." 26 U.S.C. § 1371(b)(1) (2001).

141. *See St. Charles*, 232 F.3d at 775, 777 (emphasis added).

142. Specifically, § 469(f)(2) states: "If a taxpayer ceases for any taxable year to be a closely held C corporation . . . this section shall continue to apply to losses . . . to which this section applied for any preceding taxable year in the same manner as if such taxpayer continued to be a closely held C corporation." *St. Charles*, 232 F.3d at 778 (quoting 26 U.S.C. § 469(f)(2) (2001)).

143. *St. Charles*, 232 F.3d at 778 (emphasis added).

144. *Id.* at 779.

145. *See id.* at 775.

146. *See supra* text accompanying note 51.

147. *See St. Charles*, 232 F.3d at 779.

148. *Id.*

1991 as it was in 1988,[149] and it had merely elected for different tax treatment under a different chapter of the Code: subchapter S, rather than subchapter C of chapter 1.[150] Viewed in this light, the result achieved by the court in *St. Charles* is both reasonable and distinguishable from *McMorris*, where the court was dealing with a situation that was *not* the same, because the settlement agreement was executed *after* the decedent's death, by parties other than the decedent himself.

III. TEST FOR DETERMINING THE DEDUCTIBILITY OF SALARIES BY A CORPORATION AS REASONABLE BUSINESS EXPENSES

A. *Background*

Pursuant to § 162(a)(1), a taxpayer corporation is authorized to deduct a "reasonable allowance for salaries and other compensation"[151] of its employees as an "ordinary and necessary business expense."[152] However, several "suspect situations" exist in which the Commissioner is more likely to challenge an employee's salary as excessive,[153] such as when "the payor and payee are related parties"[154] or the related taxpayers' "economic interests are essentially identical" [155] and income-shifting is occurring, as in closely held corporations.[156] It is within this context of closely held corporations that the rationale for the reasonableness limitation is particularly evident.[157] Absent the reasonableness limitation, income-shifting would occur in the form of the employer-corporation paying an excessive salary to its controlling shareholder (who also serves as the corporation's executive so that "the corporation is practically a one-person company"),[158] which is deductible to the employer-corporation, in lieu of paying a dividend to the shareholder-executive, which is not deductible to the employer-corporation.[159] As a result, the corporation shifts the income that was due and owing to the shareholder-executive away from itself by not paying a dividend and reduces its own tax liability by the dollar-amount of the shareholder-executive's compen-

149. *See id.* at 774.

150. *See* PEEL, *supra* note 2, at 186.

151. MARVIN A. CHIRELSTEIN, FEDERAL INCOME TAXATION: A LAW STUDENT'S GUIDE TO THE LEADING CASES AND CONCEPTS 117 (3d ed. 1982).

152. DANIEL Q. POSIN, FEDERAL INCOME TAXATION OF INDIVIDUALS WITH DIAGRAMS FOR EASY UNDERSTANDING OF THE LEADING CASES AND CONCEPTS ¶ 6.03(2)(a) (4th ed. 1998).

153. DANIEL Q. POSIN, FEDERAL INCOME TAXATION OF INDIVIDUALS AND BASIC CONCEPTS IN THE TAXATION OF ALL ENTITIES 321 (Student ed. 1983).

154. For example, "corporation and shareholder or as members of the same family--so that the 'overpayment' actually entails no economic loss to the employer." CHIRELSTEIN, *supra* note 151, at 117.

155. *Id.* at 118.

156. *See id.*

157. *See id.*

158. TIMOTHY P. BJUR & DENNIS JENSEN, FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2129.10 (1995).

159. *See* CHIRELSTEIN, *supra* note 151, at 118.

sation.[160] Of course, since the shareholder-executive's "economic interests are essentially identical" to the closely held corporation's[161] (*i.e.*, pay as little tax to the Commissioner as possible by reducing "their total tax burden"),[162] without the reasonableness limitation, the choice to pay an excessive salary rather than a dividend[163] would result in great revenue losses to the Commissioner.

Thus, in the event the Commissioner is successful in proving an executive's salary is excessive, the executive can still get paid, however the salary will be "disallowed" and "recharacterized as a dividend," which is taxable to the executive as income arising from his role as shareholder, but is not deductible by the corporation as a reasonable business expense.[164] Throughout the dispute, the burden of proof remains with the taxpayer asserting the compensation is "reasonable."[165]

With regard to federal circuit court law on this topic of reasonable compensation, there is a vast body of established law.[166] However, as the topic relates to the Tenth Circuit, one specific approach, the "multi-factor test," was adopted in 1976 in *Pepsi-Cola Bottling Co. v. Commissioner*,[167] and it provides nine factors to consider when determining whether a salary is "reasonable."[168] In *Eberl's Claim Serv., Inc. v. Commissioner*,[169] the Tenth Circuit was confronted with the decision of whether to continue its use of the "multi-factor test" or adopt the "independent investor test," as recently embraced by other circuits.[170]

B. Tenth Circuit Case: *Eberl's Claim Serv., Inc. v. Commissioner*

1. Facts

Taxpayer corporation, a closely held Colorado claims adjusting company, provided independent claims adjuster's services to insurance companies following major disasters.[171] Eberl was the corporation's founder, president, sole shareholder and claims adjuster.[172] While a 1988 employment agreement existed between Eberl and taxpayer corporation, Eberl's salary or a formula for its computation was *not* specified.[173] A

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160. *See id.*
161. *Id.*
162. POSIN, *supra* note 153, at 365.
163. *See* CHIRELSTEIN, *supra* note 151, at 119.
164. *Id.*
165. *See* Kurzet v. Comm'r, 222 F.3d 830, 834 (10th Cir. 2000).
166. *See* discussion *infra* Part III.C.
167. 528 F.2d 176, 179 (10th Cir. 1976).
168. *Eberl's Claim*, 249 F.3d at 999.
169. 249 F.3d 994 (10th Cir. 2001).
170. *Eberl's Claim*, 249 F.3d at 1003.
171. *See id.* at 996.
172. *See id.*
173. *See id.* (emphasis added).

1992 amendment to the agreement also did *not* fix the amount of Eberl's compensation, but did loosely tie his salary to gross revenues.[174] The only other employees receiving regular salaries were part-time clerical staff.[175] At no time during taxpayer corporation's existence were dividends paid.[176] Taxpayer corporation's gross receipts typically ranged from $2 million to $4 million, but sharp inclines were recorded in 1992 ($20,438,803) and 1993 ($9,168,585) based on the large number of major catastrophes in those years.[177] Consequently, Eberl's salary was significantly higher in those years: $4,340,000 for 1992 and $2,080,000 for 1993 (versus $190,000 to $608,000 in prior years).[178] When taxpayer corporation attempted to claim Eberl's salary as a deductible business expense, the Commissioner objected to Eberl's 1992 and 1993 salaries as "excessive."[179] The issue before the Tenth Circuit was whether Eberl's salaries in 1992 and 1993 were "reasonable," or whether they in fact constituted disguised dividend payments that should have been taxed.[180]

2. Decision

The Tenth Circuit ruled in favor of the Commissioner and rejected taxpayer corporation's invitation to adopt an "independent investor test," as recently embraced by other circuits,[181] in favor of *stare decisis* by reaffirming the use of the "multi-factor test of reasonable compensation" set forth in its prior decision, *Pepsi-Cola Bottling Co. v. Commissioner*.[182] The court explained that a compensation plan is considered "reasonable" if it is a result of a "longstanding, consistently applied plan negotiated at arm's length."[183] Here, it was not. No written documentation that a formula for calculating Eberl's salary existed[184] and even if such formula had existed, it was not negotiated at arm's length since Eberl was both controlling shareholder and employee.[185] Moreover, Eberl's salary was not determined until the end of each year, once taxpayer corporation's expenses were known, which enabled Eberl to receive virtually all of the corporation's net profits as compensation (not taxable) in lieu of paying a dividend (taxable).[186] Under the totality of these circumstances, the court concluded Eberl's salary was unreasonable and "a disguise for non-deductible profit distributions,"[187] on which taxpayer corporation had a

174. *See id.* at 996-97 (emphasis added).
175. *See id.* at 997.
176. *See Eberl's Claim*, 249 F.3d at 997.
177. *See id.*
178. *See id.*
179. *Id.* at 996.
180. *See id.*
181. *See id.* at 1003-04.
182. 528 F.2d 176 (10th Cir. 1976).
183. *Eberl's Claim*, 249 F.3d at 1000.
184. *See id.* at 1000 n.2.
185. *See id.* at 1000.
186. *See id.*
187. *Id.*

duty to pay taxes.[188] In reaching this conclusion, the court acknowledged that while the "independent investor test"[189] had the potential to provide a simpler and more purposive solution than the multi-factor approach, it was bound, absent en banc rehearing, to adhere to the totality of the circumstances/multi-factor approach adopted in *Pepsi-Cola Bottling*.[190]

C. *Other Circuits*

Among the other circuits which have agreed with the Tenth Circuit that a multi-factor test is best to use in determining the reasonableness of salaries, there is variation in the actual number of factors that must be satisfied.[191] For example, the Tenth Circuit's *Pepsi-Cola Bottling* case[192] lists nine factors,[193] as does the Sixth Circuit, as set forth in *Mayson Mfg. Co. v. Commissioner*,[194] but the Fifth Circuit applies only eight factors, as listed in *Owensby & Kritikos, Inc. v. Commissioner*.[195] Despite these quantitative discrepancies in the factors employed by the above circuits to determine reasonableness of salary, in the end, they all employ a form of balancing the totality of the circumstances, rather than focusing on just one dispositive issue.

In contrast, of those circuits that have adopted the "independent investor test,"[196] only the Seventh Circuit in *Exacto Spring Corp. v.*

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188. *See id.* at 1002.

189. Specifically, the independent investor test asks, "whether an inactive, independent investor would be willing to compensate the employee as he was compensated." *Eberl's Claim* 249 F.3d at 1003 (quoting Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1245 (9th Cir. 1983)).

190. *Eberl's Claim*, 249 F.3d at 1003-04.

191. *See id.* at 999.

192. Pepsi-Cola Bottling Co. v. Commissioner, 528 F.2d 176, 179 (10th Cir. 1976). Those nine factors are:

(1) [t]he employee's qualifications; (2) [t]he nature, extent and scope of the employee's work; (3) [t]he size and complexities of the business; (4) [a] comparison of salaries paid with the gross income and the net income; (5) [t]he prevailing general economic conditions; (6) [a] comparison of salaries with distributions to stockholders; (7) [t]he prevailing rates of compensation for comparable positions in comparable concerns; (8) [t]he salary policy of the taxpayer as to all employees; [and] (9) [i]n the case of small corporations with a limited number of officers the amount of compensation paid to the particular employee in previous years.

Id. at 179.

193. *See Eberl's Claim*, 249 F.3d at 999.

194. 178 F.2d 115, 119 (6th Cir. 1949) (employing identical factors as the 10th Circuit in *Pepsi-Cola Bottling Co.*).

195. 819 F.2d 1315, 1323 (5th Cir. 1987) (applying the same factors as the 6th Circuit in *Mayson Mfg. Co.*, except for factor (9), which was not relevant, "[b]ecause the taxpayers have not argued that the payments in the years at issue were made in recompense for underpayments in previous years").

196. *See, e.g.*, Dexsil Corp. v. Comm'r, 147 F.3d 96, 100-201 (2d Cir. 1998) (explaining how the independent investor test "is not a separate autonomous factor; rather, it provides a lens through which the entire analysis should be viewed"); Elliotts, Inc. v. Comm'r, 716 F.2d 1241, 1245 (9th Cir. 1983) (applying a multi-factor test "from the perspective of an independent investor"); and Rapco, Inc. v. Comm'r, 85 F.3d 950, 954-55 (2d Cir. 1996) (same). *See also Eberl's Claim*, 249 F.3d at 1003.

Commissioner[197] has completely rejected the multi-factor test.[198] The Seventh Circuit in adopting the "independent investor test" held that the CEO's "'exorbitant' salary (as it might appear to a judge or other modestly paid official)" was "presumptively reasonable" because the investors in the company were "obtaining a far higher return than they had any reason to expect."[199] The court explained this result was justified, hence the qualifying language "presumptively reasonable," as long as the higher rate of return being generated was due to the CEO's own exertions, and not someone else's.[200] In reaching this conclusion, the court reasoned that by tying salary to performance, executive retention was encouraged because "killing the goose that lays the golden egg"[201] would not be good business for the company or its investors. In addressing the inadequacies associated with the multi-factor test, the court explained that "judges are not competent to decide what business executives are worth,"[202] and yet that is exactly what the multi-factor test requires judges to do. In particular, the court criticized the lack of directive provided by the multi-factor test in that "[n]o indication is given of how the factors are to be weighed in the event they don't all line up on one side."[203] The court explained that such an imbalance is resolved by a judge using his own discretion and his "own ideas of what jobs are comparable, what relation an employee's salary should bear to the corporation's net earnings, what types of business should pay abnormally high (or low) salaries, and so forth."[204] The court further explained that since judges are neither trained nor experienced in such industry-specific matters, and the multi-factor "test cannot itself determine the outcome of a dispute because of its nondirective character," the results are arbitrary.[205] As a result, corporations have no uniform guidance from the law when it comes to determining executive compensation, and this lack of predictability creates expensive and unavoidable legal risks for the corporation.[206] As a replacement for the "redundant, incomplete, and unclear"[207] multi-factor test, the court proposed that the "independent investor test" provided a more logical and fair approach to determining executive salaries by, in essence, allowing the supply and demand needs of the market dictate, like other prices, what was reasonable.[208] This supply and demand approach is reflected in whether the corporation, through the efforts of its executives surpasses the investors' expectations of return on their in-

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197. 196 F.3d 833, 838 (7th Cir. 1999).
198. *See Eberl's Claim*, 249 F.3d at 1004 n.6.
199. *Exacto Spring*, 196 F.3d at 839.
200. *Id.*
201. *Id.* at 838.
202. *Id.*
203. *Id.* at 835.
204. *Id.*
205. *Exacto Spring*, 196 F.3d at 839.
206. *See id.*
207. *Id.* (quoting Palmer v. City of Chicago, 806 F.2d 1316, 1318 (7th Cir. 1986)).
208. *See id.* at 836, 838.

vestment in the corporation.[209] When an executive achieves a higher rate of return than investors expect, he can command a greater salary, which in turn, is an incentive for the executive to stay with the corporation and continue to make it profitable for the investors, allowing everyone to win.[210]

D. Analysis

In *McMorris*, the Tenth Circuit expressly announced favoritism for the date-of-death valuation method because it offered all of the advantages of a "bright line rule."[211] Yet, when the Tenth Circuit was presented with the opportunity to adopt the "independent investor test" in *Eberl's Claim*, which is clearly more of a "bright line rule" than the multi-factor test, the court declined to do so.[212] While this decision is attributable to the court's desire to conform to the principle of *stare decisis*, there are two hints that the court is leaving the door open for future consideration of the "independent investor test." First, the Tenth Circuit's remark that "absent en banc rehearing" it must conform with its prior precedent in *Pepsi-Cola Bottling*, suggests the inclusion of such a statement means the court may consider changing to the "independent investor test" if given the opportunity for an en banc rehearing.[213] Second, and perhaps providing more convincing evidence is the court's acknowledgement that the "independent investor test is an attractive solution."[214] For the numerous reasons articulated by Chief Judge Posner in *Exacto Spring Corp. v. Commissioner*,[215] the more simplified "independent investor test" is a convincing approach for determining the reasonableness of salaries by eliminating the arbitrary and unpredictable decisions arising from a court's free exercise of judicial discretion in an area it has no experience: the private, for-profit, corporate world.[216]

CONCLUSION

In general, tax law is substantially driven by statutes and IRS regulations, which limit courts in their interpretations. Typically, the rules for statutory construction are strictly complied with leaving little room for courts to exercise flexibility or make changes in the law without receiving criticism. Thus, it is no surprise that while the Tenth Circuit was willing over the past survey period of September 1, 2000 through August 31, 2001, to adopt some *new* tax law in cases of first impression: that is, the date-of-death valuation in *McMorris* for determining individual estate

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209. *See id.* at 838-39.
210. *See id.* at 838.
211. *See supra* text accompanying notes 50-51.
212. *See Eberl's Claim*, 249 F.3d at 1003.
213. *Id.*
214. *Id.* at 1003.
215. 196 F.3d 833 (7th Cir. 1999). *See supra* text accompanying notes 198-211.
216. *See supra* text accompanying notes 198-211.

tax liability; and the deductibility of suspended passive activity losses ("PALs") carried forward to an S corporation in *St. Charles*; the Tenth Circuit was less willing to depart from the principle of *stare decisis* and make changes to past holdings. For example, the Tenth Circuit's refusal in *Eberl's Claim* to join the bandwagon established by other circuits in adopting the "independent investor test," as a "new" test for determining the reasonableness of executive salaries.

Therefore, attorneys practicing within the Tenth Circuit's jurisdiction would be well advised to embrace the court's past decisions and not expect a change in tax law, unless the case presents a topic of first impression and the Tenth Circuit is required to rely on its own discretion, rather than just rules of statutory construction, to arrive at its decision.

Darby Hildreth

REFINING THE TENTH CIRCUIT'S STANCE ON EMPLOYEE RIGHTS: THE ADA, FREE SPEECH IN THE WORKPLACE, AND THE FAIR LABOR STANDARDS ACT

INTRODUCTION

Employment law is an area in which many lawyers and non-lawyers alike have experience. After all, most adults have either been employed or employ others. The issue underlying many employment cases seems to be the struggle to balance the employee's right to be treated fairly and with dignity in the workplace, and the employer's need to maintain an efficient, profitable business. This tension has formed a large and diverse body of caselaw ranging from topics such as wages to sexual harassment.

This article focuses on United States Court of Appeals for the Tenth Circuit decisions in employment law from September, 2000 through August, 2001. Employment law encompasses many different topics, and it is not possible to discuss all the cases decided in the Tenth Circuit in this writing. Therefore, this paper examines some of the more significant cases decided in three common areas of employment law. Part I discusses the American Disabilities Act's requirement for reasonable accommodation. Part II discusses free speech rights in the workplace, and Part III examines the Fair Labor Standards Act.

I. ADA- REASONABLE ACCOMMODATION

A. *Background*

The Americans with Disabilities Act of 1990[1] ("Act" or "ADA") provides that private employers may not discriminate against qualified individuals with disabilities and must accommodate workers who qualify for accommodation.[2] As part of this mandate, some courts, including the Tenth Circuit, have held that the Act requires employers to consider reassignment into other available positions when a disabled employee cannot perform the functions of his position.[3] Until now, however, neither the Act nor the Tenth Circuit have provided guidance as to the time frame during which the employer must consider reassignment.[4]

The "EEOC [Equal Employment Opportunity Commission] guidelines and previous case law show that a 'reasonable accommodation' may include reassigning the disabled employee to a different, vacant

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1. 42 U.S.C. §§ 12101, *et seq.* (2001).
2. *See* Christopher J. Murray & John E. Murray, *Enabling the Disabled: Reassignment and the ADA*, 83 MARQUETTE L. REV. 721, 722 (2000).
3. *See* Murray & Murray, *supra* note 2, at 722 (citing 42 U.S.C. § 12111(9)(B) (2001)).
4. *See* Murray & Murray, *supra* note 2, at 731.

position for which he is qualified."[5] The Tenth Circuit in *Smith v. Midland Brake, Inc.*,[6] set forth the criteria for determining an employer's accommodation requirements if the employee has requested reassignment to a vacant position.[7] In *Smith*, the court held that "[i]f no reasonable accommodation can keep the employee in his or her existing job, then the reasonable accommodation may require assignment to a vacant position so long as the employee is qualified for the job and it does not impose an undue burden on the employer."[8] In order to withstand a motion for summary judgment by the employer, the employee must be able to show the following:

> (1) The employee is disabled within the meaning of the ADA and has made any resulting limitations from his or her disability known to the employer;
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> (2) The preferred option of accommodation within the employee's existing job cannot reasonably be accomplished;
>
> (3) The employee requested the employer reasonably to accommodate his or her disability by reassignment to a vacant position, which the employee may identify at the outset or which the employee may request the employer identify through an interactive process, in which the employee in good faith was willing to, or did, cooperate;
>
> (4) The employee was qualified, with or without reasonable accommodation, to perform one or more appropriate vacant jobs within the company that the employee must, at the time of summary judgment proceeding, specifically identify and show were available within the company at or about the time the request for reassignment was made; and
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> (5) The employee suffered injury because the employer did not offer to reassign the employee to any appropriate vacant position.[9]

Some critics have argued that this rule is unclear because it does not tell an employer how long he or she must seek a position for which the

5. *Tenth Circuit Opines on ADA 'Reasonable Accommodations,'* UTAH EMP. L. LETTER (Wood Crapo, L.L.C.), June 2001, at 4.

6. 180 F.3d 1154 (10th Cir. 1999).

7. *See* Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999).

8. *Smith*, 180 F.3d at 1169.

9. *Id.* at 1179.

employee is qualified as a reasonable accommodation.[10] Note that the fourth factor only states the employee must show a position was available "at or about the time" of the request for reassignment.[11] The *Smith* court specified only that the term "vacant position . . . includes positions that the employer reasonably anticipates will become vacant in the fairly immediate future."[12] In *Boykin v. ATC/VanCom,*[13] the Tenth Circuit attempted to narrow the timeframe within which employers must reassign an employee to a vacant position.[14]

B. *Boykin v. ATC/VanCom*[15],

Fred L. Boykin ("Boykin") brought suit in Denver County District Court against his former employer, ATC/VanCom of Colorado, L.P. ("VanCom"), claiming that VanCom violated certain sections of the Americans with Disabilities Act ("ADA").[16] After VanCom removed the case to federal court, Boykin appealed the ruling of the federal court granting VanCom summary judgment.[17] The Tenth Circuit affirmed the ruling of the district court.[18]

1. Facts

VanCom hired Boykin as a part-time bus driver in 1997.[19] Boykin suffered from transient ischemic attacks ("TIA"), also known as mini-strokes.[20] While working for VanCom, Boykin suffered three TIAs, one occurring while Boykin was driving a VanCom bus.[21] As a result of Boykin's attack while driving the bus, VanCom required Boykin to undergo an examination by a doctor hired by VanCom.[22] The physician revoked the medical certification Boykin needed for commercial driving for one year, which would be reinstated if Boykin did not suffer any TIAs during that year and was then cleared by a neurologist at the end of the year.[23]

Boykin asked VanCom to accommodate his disability by reassigning him to a dispatch operator or data-entry position.[24] VanCom responded that neither position was available and offered Boykin a bus

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10. *See, e.g., Reassignment Obligation Doesn't Last Forever,* WYO. EMP. L. LETTER (Holland & Hart), May 2001, at 7.
11. *Smith,* 180 F.3d at 1179.
12. *Id.* at 1175.
13. 247 F.3d 1061 (10th Cir. 2001).
14. *See Boykin,* 247 F.3d at 1063.
15. *Id.*
16. *See id.*
17. *See id.*
18. *Id.* at 1066.
19. *See id.* at 1062.
20. *See Boykin,* 247 F.3d at 1062.
21. *See id.*
22. *See id.*
23. *See id.*
24. *See id.*

cleaner position.[25] Boykin could not accept the position VanCom offered because it conflicted with his schedule as a full-time college student.[26] Boykin was subsequently terminated.[27]

Six months later, new positions became available at VanCom because of a contract into which VanCom had entered with the Regional Transportation District (RTD).[28] The positions included an opening for a dispatch operator.[29] VanCom notified Boykin of the available positions but added that Boykin would need to apply for the position.[30] Boykin did apply and was interviewed, but was not hired.[31]

Boykin sued VanCom for failing to comply with the ADA, contending that VanCom should have assigned him to the dispatch operator position when it became available instead of requiring him to apply for the position along with other candidates.[32] Boykin also alleged that under the ADA, VanCom was required to place him in the position as a reasonable accommodation of Boykin's disability even though he was terminated six months before the position became available.[33] Further, Boykin asserted that VanCom did not comply with the ADA when it offered the bus cleaner position to Boykin because VanCom knew that the position posed a schedule conflict with his school schedule.[34] Finally, Boykin claimed that VanCom violated the ADA by failing to "enter into the good-faith interactive process required by the ADA."[35]

The district court granted VanCom's motion for summary judgment on the basis that VanCom did comply with the ADA in offering Boykin the bus cleaner position.[36] In addition, the court ruled that VanCom was not required to offer Boykin the dispatch operator "position six months after Boykin's termination."[37]

2. Decision

The Tenth Circuit addressed Boykin's claim that VanCom violated the ADA by failing "to offer Mr. Boykin a reasonable accommodation for the period during which he was disabled from driving a passenger

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25. *See id.*
26. *See Boykin*, 247 F.3d at 1062
27. *See id.*
28. *See id.* at *1063.*
29. *See id.*
30. *See id.*
31. *See id.*
32. *See Boykin*, 247 F.3d at 1063.
33. *See id.*
34. *See id.*
35. *Id.*
36. *See id.*
37. *Id.*

bus."[38] Boykin argued that VanCom should have placed him on indefinite leave until a suitable position became available, because VanCom had knowledge that positions would become available due to the pending contract with RTD.[39] The court did not accept this argument because: (1) six months is not a reasonable amount of time within which an employer must reassign an employee; and (2) VanCom was not required to accommodate Boykin's personal schedule conflict with the bus cleaner position, as the failure to accommodate constituted "discrimination on other bases" not covered by the ADA.[40]

The court first discussed Boykin's contention that VanCom should have placed him in a position after six months.[41] The court found that, under the ADA, a reasonable accommodation by an employer "may include reassignment to a vacant position for which the employee is qualified."[42] This reassignment might also include positions that are not vacant at the present time, but "also includes positions that the employer reasonably anticipates will become vacant in the fairly immediate future."[43]

The court held that "[e]mployers should reassign an employee to a position if it becomes 'vacant within a reasonable amount of time.'"[44] To determine a reasonable amount of time, the court must decide on a "case-by-case basis and [it] is to be determined in light of the totality of the circumstances."[45] Here, the court held that VanCom did not violate the ADA by failing to reassign Boykin six months after he was terminated, nor was VanCom required to place Boykin on indefinite leave for an "excessive amount of time" until a position became available.[46] However, the court wrote that an employer is obligated to reassign an employee at 37 days.[47]

Second, the court discussed Boykin's argument that when VanCom offered him the bus cleaner position, it violated the ADA because VanCom knew that the job conflicted with his school schedule.[48] The court wrote that "the ADA forbids discrimination against a qualified individual because of the disability, not 'discrimination on other bases.'"[49] Further, the court held that "the ADA 'does not require an employer to make accommodation for an impairment that is not a disability within the mean-

38. *Boykin*, 247 F.3d at 1064.

39. *Id.*

40. *Id* at 1065 (quoting Buckley v. Consol Edison Co., 155 F.3d 150, 156 (2d Cir. 1998)).

41. *Id.* at 1064.

42. *Id.*

43. *Id.* (quoting Smith v. Midland Brake, Inc., 180 F.3d 1154, 1175 (10th Cir. 1999)).

44. *Boykin*, 247 F.3d. at 1065 (quoting Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2d Cir. 1998)).

45. *Id.*at 1064 (quoting 29 C.F.R. pt. 1630, App. § 1630.2(o) (2000)).

46. *Id.* at 1065.

47. *See id.* (citing Monette v. Elec. Data Sys. Corp., 90 F.3d 1173, 1187 (6th Cir. 1996)).

48. *Id.* at 1065.

49. *Id.* (quoting Buckley v. Consol. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2d Cir. 1998).

ing of the Act or that does not result from such a disability.'"[50] In sum, even though Boykin's TIA fell within the meaning of the ADA, VanCom did not have to accommodate his schedule when considering possible reassignment.

C. *Other Circuits*

1. Sixth Circuit

In *Monette v. Elec. Data Sys. Corp.*[51] the Sixth Circuit established that an employer must reassign a disabled employee to a vacant position that will become available in a short amount of time.[52]

Monette was a customer service representative for the defendant, Electronic Data Systems Corporation.[53] He was injured at work when some heavy equipment fell on him.[54] After returning to work from medical leave related to his disability, Monette was placed on unpaid medical leave for thirty-seven days until a position could be located.[55] After that time, the defendant terminated Monette, concluding that it could not reassign Monette to any other positions within the company.[56] Monette sued the defendant pursuant to the ADA and provisions of the Michigan Handicappers' Civil Rights Act.[57] Monette proposed that he be placed on indefinite unpaid medical leave until a position became available.[58]

The Sixth Circuit held that the defendant was not required to place a disabled employee on indefinite unpaid medical leave until a vacant position arose.[59] However, the Court stated in dicta that "[i]f, perhaps, an employer knows that a position for which the disabled applicant is qualified will become vacant in a short period of time, the employer may be required to offer the position to the employee."[60]

The Sixth Circuit further found in *Hoskins v. Oakland County Sheriff's Dept*[61] that an employer was required to reassign an employee if a position became available "within a reasonable amount of time," but the

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50. *Id.* at 1066 (quoting Buckley v. Consol. Edison Co. of N.Y., Inc., 155 F.3d 150, 156 (2d Cir. 1998); *cf.* 29 C.F.R. pt. 1630, App. § 1630.9 (2000)).
51. 90 F.3d 1173 (6th Cir. 1996).
52. *See Monette*, 90 F.3d at 1173.
53. *See id.* at 1176.
54. *See id.*
55. *See id.*
56. *See id.*
57. *See id.*
58. *See Monette*, 90 F.3d at 1187.
59. *Id.*
60. *Id.*
61. Hoskins v. Oakland County Sheriff's Dept., 227 F.3d 719 (6th Cir. 2000).

particular employer in that case was not required to assign an employee to a position one year after the employee's disability was disclosed.[62]

2. Eighth Circuit

In *Cravens v. Blue Cross and Blue Shield of Kansas City*,[63] the Eighth Circuit followed the rule articulated in *Monette* by stating that a reasonable accommodation can include reassigning the disabled employee to a vacant position.[64] This vacant position may include not only vacant positions at the time of the reassignment request, but also those that will become available "in a short period of time."[65]

D. *Analysis*

The importance of *Boykin* comes from its narrowing of the timeframe during which employers must consider reassigning a disabled employee to a vacant position if a suitable position is not available at the time of the request.[66] Even though the Tenth Circuit did not provide a bright-line rule and instead opted for a "case-by-case" approach, employees seeking accommodation and employers attempting to accommodate have a clearer picture of what vacant positions must be included in the accommodation search.[67] Now, in the Tenth Circuit, six months is generally too long to require an employer to reassign an employee to a position that has become available.[68] In addition, an employer is not required to place an employee on unpaid medical leave until a vacant position becomes available.[69]

However, *Boykin* illustrates the idea that an employer must also widen the scope of the meaning of "vacant" to include positions that an employer believes may become available in the next few months.[70] If the employer fails to consider a position that may become available in the next six months, the employer may be liable under the ADA for failure to accommodate.[71]

Another important aspect of *Boykin* is that it parallels with the holdings of the Second Circuit when it states that "[t]he ADA does not require an employer to make accommodation for an impairment that is

62. *Hoskins*, 227 F.3d at 729.

63. 214 F.3d 1011 (8th Cir. 2000).

64. *Cravens*, 214 F.3d at 1019 (discussing the decision in Monette v. Elec. Data Sys. Corp. 90 F.3d 1173, 1187 (6th Cir. 1996)).

65. *Id.*

66. *See Boykin v. ATC/VanCom*, 247 F.3d 1061 (10th Cir. 2001).

67. *See Boykin*, 247 F.3d at 1065.

68. *See id.*

69. *Id.*

70. *See Indefinite Leave not Required as ADA Accommodation*, N. M. EMP. L. LETTER (Hinkle, Hensley, Shanor & Martin, LLP), Aug. 2001, at 1.

71. *See* Christopher M. Leh, *Reassignment Six Months After Termination not Required Under ADA*, COLO. EMP. L. LETTER, June 2001, at 1.

not a disability within the meaning of the Act or does not result from such a disability."[72] This principle will defeat an argument, such as that made by Boykin, that an accommodation offered by a company might be unreasonable if it conflicts with the plaintiff's schedule.[73]

II. FREE SPEECH RETALIATION CLAIMS

A. *Background*

Public employees have a limited right to free speech in the workplace.[74] Freedom of speech for public employees has evolved through cases that consider the issue of freedom of public employees to associate, and more specifically, public employees who were required to take loyalty oaths.[75] The Supreme Court wrote that "the right to speak on matters of public concern must be wholly free or eventually be wholly lost."[76] While the loyalty oath cases protected a public employee's right to free association and speech, little guidance was offered by the Supreme Court to employers as to the extent of the employee's freedom of speech.[77]

1. The *Pickering* Balancing Test

It was not until *Pickering v. Board of Education*[78] that the United States Supreme Court set forth criteria to help determine the scope of a public employee's right to free speech.[79] The Supreme Court devised a test in order to strike a "balance between the first amendment rights of public employees and the proper exercise of managerial authority by state employers."[80] As citizens, public employees should be able to comment on matters of public concern, while still allowing the State to efficiently provide services to the people.[81] Thus, an employee can only win his or her case against an employer if his or her speech is shown to regard a matter of public concern.[82]

In *Pickering*, the first factor in the balancing test was to consider the working relationship between the parties.[83] "[A] close working relation-

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72. Boykin v. ATC/VanCom, 247 F.3d 1061, 1066 (10th Cir. 2001) (quoting Buckley v. Consol. Edison Co., 155 F.3d 150, 156 (2nd Cir. 1998)).

73. *See Boykin*, 247 F.3d at 1065-66.

74. Stephen Allred, *Connick v. Myers: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U. L. REV. 429, 429-30 (1984).

75. *See id.* at 433.

76. Wiemann v. Updegraff, 344 U.S. 183, 193 (1952) (Black, J., concurring).

77. Allred, *supra* note 74, at 437.

78. 391 U.S. 563 (1968).

79. *See* Allred, *supra* note 74, at 437.

80. *Id.* at 438.

81. *See id.* at 430.

82. *See* Michael L. Wells, *Section 1983, the First Amendment, and Public Employee Speech: Shaping the Right to Fit the Remedy (And Vice Versa)*, 35 GA. L. REV. 939, 941 (2001).

83. *See* Allred, *supra* note 74, at 438.

ship between the employee and the managers who are the subjects of the employee's criticism could tip the balance in favor of the employer's right to limit free speech."[84] Second, the Court examined whether the speech had a detrimental effect on the employer.[85] Specifically, this factor looked at whether the "public agency could continue to accomplish its mission in light of the employee's statements on a matter of public concern."[86] The third factor was the employee's relationship to the issue and the nature of the issue that was the subject of the employee's speech.[87] If the employee had expertise related to the issue, the speech was more likely to be protected because the employee made a "valuable contribution to public understanding" of the issue.[88]

2. Matters of Public Concern

It then became important to distinguish what exactly was "a matter of public concern."[89] In *Connick v. Myers*,[90] the United States Supreme Court held that if the employee's speech did not constitute a matter of public concern, the speech was not protected, and no balancing test was needed.[91] Also in *Connick*, the Supreme Court held that the expressive activities of an Assistant District Attorney who circulated a questionnaire about office morale and management practices did not touch upon a matter of public concern.[92] "Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of the speech, and that speech must relate to some matter of political, social, or other concern to the community."[93] After *Connick*, "[w]hen the employee's speech is about narrow issues relating to the internal management of the agency, lower courts tend to characterize it as a personal grievance or as part of performing the job itself, rather than as involving a matter of public concern."[94]

The Tenth Circuit uses a modified *Pickering/Connick* test in order to evaluate a party's First Amendment retaliation claim.[95] First, the court examines "whether the employee's speech involves a matter of public concern."[96] If the speech does involve a matter of public concern, then

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84. *Id.* at 439.
85. *See id.*
86. *Id.*
87. *See id.* at 440.
88. *Id.*
89. *See* Allred, *supra* note 74, at 438.
90. 461 U.S. 138 (1983).
91. *See* Allred, *supra* note 74, at 432.
92. *See id.* at 431-32.
93. Buazard v. Meridith, 172 F.3d 546, 548 (8th Cir. 1999) (quoting Connick v. Myers, 461 U.S. 138, 146-47 (1983).
94. Wells, *supra* note 82, at 953.
95. *See* Dill v. City of Edmund, 155 F.3d 1193, 1201 (10th Cir. 1998).
96. Finn v. New Mexico, 249 F.3d 1241, 1247 (10th Cir. 2001) (quoting Dill v. City of Edmund, 155 F.3d 1193, 1201 (10th Cir. 1998).

the court must balance "the employee's interest in commenting upon matters of public concern 'against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[97] Third, if the balancing test favors the employee, the employee must then demonstrate "that the speech was a 'substantial factor or a motivating factor in the detrimental employment decision.'"[98] Finally, if the speech is proven to be a factor, then the employer may show that "it would have taken the same action against the employee" despite the occurrence of the protected speech.[99]

The Tenth Circuit used the hybrid *Pickering/Connick* analysis in the following two cases discussed below: *Finn v. New Mexico*,[100] and *Ballard v. Muskogee Regional Medical Center*.[101]

B. *Finn v. New Mexico*[102]

1. Facts

John Finn had been an employee of the New Mexico State Highway and Transportation Department ("Department") beginning in 1974.[103] In 1995, a new administration announced the reorganization of the department, which resulted in Finn's demotion and transfer to a different division.[104] Finn argued this decision was illegal because the Department acted without the approval of the New Mexico State Personnel Office.[105]

Once Finn was officially notified that he would be demoted and transferred to another division within the department, he began sending Intra-Department Correspondence ("IDC") memorandums to the new upper management.[106] The first IDC contained assertions by Finn that the management was abusing its power and "attempting to 'crucify'" Finn.[107] After this first correspondence, Finn left for medical reasons, and upon his return to work he was notified that he was again demoted.[108]

Finn then sent an IDC to the new upper management along with over thirty-five other agencies and individuals, criticizing the reorganization of the Department.[109] This IDC contained statements that the "De-

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97. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1201).
98. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1202).
99. *Finn*, 249 F.3d at 1247 (quoting *Dill*, 155 F.3d at 1202).
100. *Id.*
101. 238 F.3d 1250 (10th Cir. 2001).
102. 249 F.3d 1241 (10th Cir. 2001).
103. *See Finn*, 249 F.3d at 1244.
104. *See id.*
105. *See id.*
106. *See id.* at 1244-45.
107. *Id.* at 1245.
108. *See id.*
109. *See Finn*, 249 F.3d at 1245.

partment's use of the phrase 'Equal Opportunity Employer' was a 'sick joke.'"[110] Finn also claimed that the department reorganization was the result of favoritism, and that Roybal, the new Deputy Secretary, was unqualified for his position.[111] Finn added personal attacks against Roybal as well.[112]

During the next two weeks, Finn sent two more IDCs with similar content.[113] Finn was then given notice that disciplinary action could ensue if he did not cease his acts which were considered to be "detract[ing] from . . . maintaining a positive work environment."[114] Finn disregarded the warning and sent another IDC to several individuals and agencies that made, among other things, statements accusing Roybal of engaging in an adulterous affair with a married employee, and promoting the employee after the employee's marriage ended.[115] Finn was terminated after this IDC.[116]

Finn then filed suit in the district court, alleging that the defendants infringed upon his right of free speech.[117] The defendants filed a motion for summary judgment, arguing that Finn's speech was unprotected by the First Amendment because it "was not a matter of public concern and that defendants' interest in regulating such speech outweighed plaintiff's interest in engaging in the speech."[118] Rahn, an individual defendant, also filed a motion for summary judgment on the basis that he had qualified immunity against Finn's claims.[119] The district court denied both motions and Rahn appealed to the Tenth Circuit.[120]

2. Decision

The Tenth Circuit affirmed the district court's ruling.[121] The court assessed Finn's First Amendment retaliation claim using the four-part test applied in Dill v. City of Edmond, another Tenth Circuit case.[122] The court concluded that only the first two parts of the test needed to be addressed in that case.[123] First, to determine whether a government employee's speech is protected, the court had to decide "whether the em-

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110. *Id.*
111. *See id.*
112. *See id.*
113. *See id.*
114. *Id.* at 1246.
115. *See Finn*, 249 F.3d at 1246.
116. *See id.*
117. *See id.*
118. *Id.*
119. *See id.*
120. *See id.*
121. *Finn*, 249 F.3d at 1249.
122. *See id.* at 1247. *See also* Dill v. City of Edmond, 155 F.3d 1193, 1201-02 (10th Cir. 1998).
123. *See Finn*, 249 F.3d at 1247.

ployee has spoken 'as a citizen upon matters of public concern' or merely 'as an employee upon matters only of personal interest.'"[124]

> While speech pertaining to internal personnel disputes and working conditions ordinarily will not involve public concern, "speech that seeks to expose improper operations of the government or questions the integrity of governmental officials clearly concerns the vital public interests." In making this determination, we consider the "content, form and context of a given statement, as revealed by the whole record."[125]

The main issue was that while portions of Finn's speech did constitute matters of public concern, much of the content of the IDCs was of personal interest to Finn.[126] The defendants argued on appeal that the district court erred when it failed to consider the speech in its entirety and instead made its decision by "picking and choosing" certain parts of the speech as protected.[127] The Tenth Circuit rejected this argument, holding that Finn satisfied the first part of the test, because limited portions of Finn's speech did "touch on matters of public concern."[128] However, the court noted that a mere "tidbit" of speech that touched on matters of public concern would limit the employee's interest in the speech.[129] In sum, enough of Finn's speech touched upon matters of public concern to protect it.[130]

Next, the court applied the second part of the *Pickering* analysis.[131] This is a balancing inquiry, weighing the "employee's interest in commenting upon matters of public concern 'against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'"[132] To evaluate the employer's interest, the court considered "whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise."[133] Because the court did not find any evidence that the speech caused disruption, there was no state

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124. *Id.* (quoting Connick v. Myers, 461 U.S. 138, 147 (1983)).

125. *Finn*, 249 F.3d at 1247 (quoting Conaway v. Smith, 853 F.2d 789, 797 (10th Cir. 1988)); Connick v. Myers, 461 U.S. 138, 147-48 (1983).

126. *See Finn*, 249 F.3d at 1247-48.

127. *Id.* at 1248.

128. *Id.*

129. *Id.* at 1249.

130. *Id.* at 1248.

131. *Id.* at 1249.

132. *Finn*, 249 F.3d at 1248. (quoting Dill v. City of Edmond, 155 F.3d 1193, 1201 (10th Cir. 1998)).

133. *Id.* at 1249. (quoting Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

interest to prohibit Finn's speech, and thus the First Amendment protected the speech.[134]

Overall, the court has reached many different outcomes using the same standard. For example, here, the court found Finn's speech to be protected by the First Amendment, whereas in the case of *Ballard v. Muskogee Reg'l Med. Ctr.*,[135] the court found that the First Amendment afforded no such protection.

C. *Ballard v. Muskogee Regional Medical Center*[136]

1. Facts

Ballard was employed as a psychological technician at the Muskogee Regional Medical Center ("Medical Center") and sued after she was terminated.[137] Ballard alleged that she was wrongfully terminated after she notified the County Health Department that a patient was in poor condition.[138] The Medical Center argued that Ballard's work performance was the reason for her termination.[139] The Medical Center explained that Ballard had encouraged "a known suicidal patient to jump out of a window," and misrepresented herself as a nurse.[140]

The jury had found that Ballard was wrongfully terminated on the basis of free speech retaliation, but also that she would have been terminated for reasons other than her speech.[141]

2. Decision

The Tenth Circuit reversed the district court's holding, ruling that a jury cannot award damages for the plaintiff if the jury also finds that the defendant had legitimate grounds upon which to terminate the plaintiff.[142] Using the *Pickering* analysis, the court held that the employer's liability was relieved if it could show that it terminated the employee for reasons other than the exercise of speech.[143] Thus, the employer satisfied the fourth part of the test, despite the lower court's ruling that the other reasons did not "negate the constitutional violation which occurred, and according to the Civil Rights Act of 1991, ... merely affects the Plaintiff's damages."[144] In conclusion, the court found that there were other

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134. *See id.*
135. 238 F.3d 1250 (10th Cir. 2001).
136. 238 F.3d 1250 (10th Cir. 2001)
137. *See Ballard*, 238 F.3d at 1252.
138. *See id.*
139. *See id.*
140. *Id.*
141. *See id.*
142. *See id.* at 1253.
143. *See Ballard*, 238 F.3d at 1253.
144. *Id.*

substantial reasons for the Plaintiff's termination, which negated any argument that she was terminated because of her speech.[145]

D. *Other Circuits*

1. Seventh Circuit

The Seventh Circuit reached a different outcome using the *Pickering/Connick* analysis. For example, in *Khuans v. Sch. Dist.*,[146] Khuans, a schoolteacher, was terminated after speaking to the principal about her problems with a fellow employee.[147] Khuans told the school's principal that the other employee often could not be found at school during the school day, and that she had problems communicating with the employee.[148] After complaining, the Assistant Administrator informed Khuans that she would be replaced.[149] The district court denied the superintendent's claim of immunity, and he appealed to the Seventh Circuit.[150]

The Seventh Circuit rejected Khuans' claim of retaliation because even though she did speak upon matters of public concern, she also spoke about matters that were not relevant to the public.[151] For instance, while Khuans informed school officials that the employee failed to follow mandates pursuant to the Individuals with Disabilities Education Act, the court characterized Khuans' comments about the employee's inability to communicate as not a matter of public concern.[152] The Court further wrote that the district court erred when it held that there was a constitutional violation because "one item of speech was protected."[153] Because Khuans' speech was more private than public, it was not protected by the First Amendment.[154]

Further, the court held that even if Khuans' speech was a matter of public concern, the speech must be weighed against the "actual and potential disruption caused by her remarks."[155] The court opined that Khuans' speech was shown to be disruptive by interfering with staff relationships, challenging authority, and causing meetings to be held which

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145. *Id.*
146. 123 F.3d 1010 (7th Cir. 1997).
147. *See Khuans*, 123 F.3d at 1012.
148. *See id.*
149. *See id.*
150. *See id.* at 1013.
151. *See id.* at 1016-17.
152. *See id.*
153. *Khuans*, 123 F.3d at 1017.
154. *See id.*
155. *Id.*

were not part of the daily operations of the school.[156] In light of these factors, Khuans' speech was not protected.[157]

2. Eighth Circuit

The Eighth Circuit, in *Buazard v. Meridith,*[158] used the *Pickering* analysis, and held that a police officer's speech about personnel issues was not protected.[159] The court in *Buazard* held that "when a public employee's speech is purely job-related, that speech will not be deemed a matter of public concern."[160] This is distinguishable from *Finn* in that under the *Buazard* holding, Finn's speech about management practices would not have been a matter of public concern, and thus not protected.

E. *Analysis*

Finn and other cases cited above illustrate the diverse outcomes reached through use of the same test. The Seventh and Eighth Circuits place the line between protected and unprotected speech in different places.[161] The Tenth Circuit's holding in *Finn* seems to be more favorable to employees because it protects speech that other circuits would not; namely, speech that is job-related.[162] In addition, the Tenth Circuit overlooked the fact that much of Finn's speech was directed toward individual supervisors, and not public issues.[163] Comparing *Finn* with the cases cited from other circuits, *Finn* markedly departs from the usual outcome of First Amendment speech retaliation cases brought by public employees.[164] Finn's speech was inflammatory and personal as compared with the speech denied protection in *Khuans*, yet Finn's speech was given First Amendment protection by the Tenth Circuit.[165] Further, both employees spoke about matters of private and public concern, but the speech that was protected by the Tenth Circuit was delivered in a way that seemed less disruptive to the workplace.[166]

The vast difference in outcomes is illustrative of the wide discretion of the lower court judges in applying the *Pickering/Connick* test.[167] The *Pickering* progeny use three values to decide legal outcomes of a variety of fact patterns: (1) efficiency of government services; (2) allowing em-

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156. *See id.*
157. *See id.* at 1018.
158. 172 F.3d 546, 548 (8th Cir. 1999).
159. *See Buazard*, 172 F.3d at 548.
160. *Id.*
161. *See Khuans*, 123 F.3d 1017-18; *Buazard*, 172 F.3d at 548.
162. *See Finn*, 249 F.3d at 1249.
163. *See id.*
164. *Compare* Finn v. New Mexico, 249 F.3d 249 F.3d 1241 (10th Cir. 2001), *with* Khuans v. Sch. Dist., 123 F.3d 1010 (7th Cir. 1997), *and* Buazard v. Meridith, 172 F.3d 546 (8th Cir. 1999).
165. *See Finn*, 249 F.3d.at 1245-46; *See also Khuans*, 123 F.3d at 1012-13.
166. *See Finn*, 249 F.3d at 1249.
167. *See* Wells, *supra* note 82, at 960-61.

ployees to speak on matters of public concern; and (3) government's diminished interest in the speech if its relation to the workplace is low.[168] Even though the values are the same, courts focus on different parts of the analysis to decide whether the speech should be protected; some focus on aspects such as the "internal-external" aspect of the person's speech, while other courts place more emphasis on whether the speech was disruptive to the workplace.[169]

Such diversity in the area of public employee speech cases mirrors the sentiments by writers on the topic. Those that encourage public employee speech protection feel that the courts have not gone far enough to guard employees from retaliation, noting that courts should not focus on disruption or the "virtue of obedience."[170] Others assert that limiting the First Amendment speech rights of public employees fosters efficiency and a harmonious workplace.[171]

The wide range of outcomes and opinions concerning public employee speech protection may signal that a narrower test or standard is more desirable. On the other hand, the flexible *Pickering/Connick* analysis may be well suited to meet the needs of both management and employees in different government workplaces.

III. FAIR LABOR STANDARDS ACT

A. *Background*

The Fair Labor Standards Act ("FLSA") requires employers to pay any qualified employee under the FLSA minimum wage for the hours the employee worked, and must generally pay overtime for hours worked over forty hours per week.[172] Therefore, the definition of "work" becomes key to the issue of on-call time because if the definition of work only includes the time spent responding to the call, an employee will not be compensated for any time spent on-call and restricted from engaging in personal activities.[173] Compensation for on-call time is becoming a more prominent issue in the courts due to the tendency of employers to use employees more efficiently through the use of on-call time.[174]

The United States Supreme Court resolved a conflict in the lower courts in 1944 when it decided two cases on the same day: *Armour & Co. v. Wantock*,[175] and *Skidmore v. Swift & Co.*,[176] In these cases, fire-

168. *See id.* at 991.
169. *See id.* at 965-67.
170. *See id.* at 942.
171. *See id.*
172. *See* Pabst v. Okla. Gas & Elec. Co., 228 F.3d 1128, 1132 (10th Cir. 2000).
173. *See* Eric Phillips, *On-Call Time Under the Fair Labor Standards Act*, 95 MICH. L. REV. 2633, 2634 (1997).
174. *See* Phillips, *supra* note 173, at 2647.
175. 323 U.S. 126 (1944).

fighters sued for compensation for the time they were required to remain at the station, waiting for a call, yet were idle while waiting.[177] The Supreme Court held in both cases that the plaintiffs were entitled to compensation.[178] Framing the issue as whether the employee's "time is spent predominantly for the employer's benefit or for the employee's," the Supreme Court opined that the answer depended on "all the circumstances of the case."[179] The Court wrote that such circumstances as the "agreement between the parties, the nature and extent of the restrictions, [and] the relationship between the services rendered and the on-call time" should be examined.[180]

In the Tenth Circuit, most decisions have held that on-call time was not compensable. In *Norton v. Worthen Van Service, Inc.*,[181] the Tenth Circuit held that van drivers were not eligible for compensation for on-call time because the employees had opportunities in between calls to engage in personal activities, such as exercise, do laundry, visit friends, and go to restaurants.[182] Therefore, the restriction on personal activities was not enough to be considered predominantly for the employer's benefit.[183] Similarly, in *Armitage v. City of Emporia*,[184] the Tenth Circuit decided that an employee who is "merely required to leave word at his home or with company officials where he may be reached is not working while on call."[185]

However, the Tenth Circuit held that on-call time was compensable in *Renfro v. City of Emporia*.[186] Firefighters for the city were not required to remain on the station premises while on call but were required to report back to the station within twenty minutes of receiving a callback.[187] In addition, the firefighters received a large number of calls while on call.[188] The firefighters argued that the restrictions were so severe that the employees could not be with their children alone without a caretaker on call, could not go to dinner or a movie, could not work on their cars, nor participate in activities with groups of people for fear that they would be called.[189] The court held that the callbacks were so frequent that the fire-

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176. 323 U.S. 134 (1944).

177. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 135-36 (1944); *Armour v. Wantock*, 323 U.S. 126, 127 (1944).

178. *See Skidmore*, 323 U.S. at 140; *Armour*, 323 U.S. at 134.

179. *Armour*, 323 U.S. at 133.

180. Andrews v. Town of Skiatook, 123 F.3d 1327, 1330 (10th Cir. 1997) (citing *Skidmore*, 323 U.S. 134).

181. 839 F.2d 653 (10th Cir. 1988).

182. *See Norton*, 839 F.2d at 655-56.

183. *See id.* at 656.

184. 982 F.2d 430 (10th Cir. 1992).

185. *Armitage*, 982 F.2d at 432.

186. 948 F.2d 1529 (10th Cir. 1991).

187. *See Renfro*, 948 F.2d at 1531.

188. *See id.* at 1532.

189. *See id.*

fighter was not able to use the on-call time "for his own benefit."[190] This case is one of the rare cases holding for the employee in on-call compensation disputes.[191]

B. *Tenth Circuit Decisions*

1. *Pabst v. Okla. Gas & Elec. Co.*[192]

a. Facts

Kathy Pabst, James Gilley, and Steve Barton were employed at Oklahoma Gas & Electric Company ("OG&E") as Electronic Technicians.[193] Their duties consisted of "monitor[ing] automated heat, fire, and security systems" in OG&E buildings.[194]

The plaintiffs were required to be on call from 4:30 p.m. until 7:30 a.m. and twenty-four hours a day on weekends.[195] If one of the plaintiffs received a call, they were to respond within ten minutes.[196] This was until 1996, when the response time was changed to fifteen minutes.[197] If the plaintiffs failed to respond to the call within the allotted time, it was grounds for discipline.[198] The plaintiffs were required to carry a pager to receive calls.[199] These pagers were not effective all the time, so the plaintiffs had to stay at home to receive calls either on their home telephones or via their laptop computers.[200] The plaintiffs received around three to five calls a night, not including calls for other issues.[201] On average, a response took forty-five minutes.[202]

The plaintiffs claimed they were instructed by their supervisor only to report on-call time during which they responded to an alarm.[203] The plaintiffs were paid one hour for each call answered, and two hours if the plaintiffs had to go to an OG&E facility to correct the problem.[204] The plaintiffs did not report all of the calls answered, nor did they report as overtime the remainder of the time on call.[205]

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190. *Id.* at 1538.
191. *See id.*
192. 228 F.3d 1128 (10th Cir. 2000).
193. *See Pabst*, 228 F.3d at 1131.
194. *Id.*
195. *See id.*
196. *See id.*
197. *See id.*
198. *See id.*
199. *See Pabst*, 228 F.3d at 1131.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*
205. *See Pabst*, 228 F.3d at 1131.

The plaintiffs argued that the on-call procedure significantly interfered with their personal lives.[206] The plaintiffs claimed that the calls at night substantially interrupted their sleep.[207] In addition, the plaintiffs were seldom able to leave their homes while on call because of the fear that they might miss an alarm.[208]

The district court found that all the on-call time was compensable under the Fair Labor Standards Act ("FLSA").[209] Accordingly, the court awarded the plaintiffs compensation for fifteen hours per weekday and twenty-four hours each Saturday and Sunday, minus any hours already paid by the company.[210]

b. Decision

OG&E appealed the judgment against them for prejudgment interest, damages and liability.[211] The plaintiffs appealed the ruling of the district court denying the plaintiffs' claim of liquidated damages based on the district court's finding of no willful violation.[212] The Tenth Circuit reviewed the FLSA requirement that an employer pay "a minimum wage for each hour it 'employs' an employee, as well as an overtime premium for hours in excess of forty per week."[213] The court then framed the issue as whether "on-call time is 'work' for purposes of the statute."[214] To determine whether on-call time can be classified as work, the court used the *Armour/Skidmore* inquiry of whether the "on-call time is spent predominantly for the benefit of the employer or the employee."[215] The court said that this issue could also be put in terms of whether the "employee is 'engaged to wait' or 'waiting to be engaged.'"[216] The court's analysis into whether the plaintiff's on-call time was compensable included such criteria as: "number of calls, required response time, and ability to engage in personal pursuits while on call."[217] This assessment is "highly individualized and fact-based."[218]

Here, the court held that the plaintiffs' on-call time was compensable, comparing the plaintiff's situation with that of *Renfro v. City of Emporia*,[219] which was the only case cited by the court that compensated the

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206. *See id.*
207. *See id.*
208. *See id.*
209. *See id.*
210. *See id.* at 1131-32.
211. *See Pabst*, 228 F.3d at 1132.
212. *See id.*
213. *Id.* (citing the definition of "employ" in 29 U.S.C. § 203(g) (2001) as "to suffer or permit to work").
214. *Id.*
215. *Id* (citing *Armour*, 323 U.S. at 133).
216. *Id.* at 1132 (quoting *Skidmore*, 323 U.S. at 137).
217. *Pabst*, 228 F.3d at 1132.
218. *Id.*
219. 948 F.2d. 410 (10th Cir. 1991).

employees for their on-call time.[220] Relevant to their determination was the fact that even though the plaintiffs were not required to return to an OG&E building for every call, the frequency of calls made the plaintiffs' situation particularly burdensome.[221]

The court rejected OG&E's argument that the plaintiffs' time spent doing personal activities should be subtracted from the on-call time compensated.[222] This decision was based upon the test of whether the time spent on call was predominantly spent "for the employer's benefit or for the employee's."[223]

C. *Other Circuits*

The analysis is the same in all circuits surveyed.[224] There is not much departure from the United States Supreme Court decisions *Armour* and *Skidmore*.[225] The primary analysis centers on whether the employee's time was spent predominantly for the employer or employee.[226] Even though the courts use the same analysis, the outcome can be vastly different. Some courts rule that on-call time should not be compensated despite long periods of time where the employee is on call, or short response times.[227]

1. Fifth Circuit

The Fifth Circuit uses the same test as the Tenth Circuit. In *Bright v. Houston Northwest Medical Center Survivor, Inc.*,[228] the Fifth Circuit held that an employee's on-call time was not compensable when he was required to respond within twenty minutes of a call.[229] The court found that the employee's on-call time could be spent going shopping, going to restaurants, and watching television.[230] This ruling was despite the fact

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220. *See Renfro*, 228 F.3d at 1134.

221. *See id.* at 1135.

222. *See id.*

223. *Id.*

224. *See* Bright v. Houston N.W. Med. Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (holding that an employee's on-call time was not compensable when he was required to respond within twenty minutes of a call); Dingtes v. Sacred Heart St. Mary's Hosp., Inc., 164 F.3d 1056 (7th Cir. 1999) (focusing on the argument that the time spent on call could be devoted to ordinary private activities); Cross v. Arkansas Forestry Comm'n, 938 F.2d 912 (8th Cir. 1991) (holding that the Commission's on-call policy imposed significant restrictions upon the employees' ability to pursue personal activities).

225. *See* Armour & Co. v. Wantock, 323 U.S. 126 (1994); Skidmore v. Swift & Co., 323 U.S. 134 (1944).

226. *See Armour*, 323 U.S. at 133.

227. *See* Bright v. Houston Northwest Med. Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (employee on-call for one year with no break); Dinges v. Sacred Heart St. Mary's Hosp., Inc. 164 F.3d 1056 (7th Cir. 1999) (employees were required to respond to call within seven minutes).

228. *Bright*, 934 F.2d at 672.

229. *Id.* at 672.

230. *See id.* at 673.

that Bright was on-call for an entire year with no reprieve.[231] "We do not deny the obvious truth that the long continued aspect of Bright's on-call status made his job highly undesirable and arguably somewhat oppressive. . . . But the FLSA's overtime provisions are more narrowly focused than being simply directed at requiring extra compensation for oppressive or confining conditions for employment."[232] The Fifth Circuit wrote that the "critical issue" in on-call compensation cases is "whether the employee can use the [on-call] time effectively for his or her own purposes."[233] Here, Bright was not restricted to the workplace or his home, but was able to travel anywhere within twenty minutes of the hospital because the hospital contacted him through use of a beeper.[234]

2. Seventh Circuit

Similarly, in *Dinges v. Sacred Heart St. Mary's Hosp., Inc.*, the Seventh Circuit recently held that on-call time for Emergency Medical Technicians is not compensable.[235] The court's analysis focused on the defendant hospital's argument that the time spent on call could be "devoted to ordinary private activities."[236] The court held that because the employees' actual chance of being called to work while on call was less than fifty percent, the required seven-minute response time was not conclusive that the employees were restricted in their personal activity.[237] In addition, the court held that in close cases, the court would look to the agreement of the parties because the FLSA "encouraged parties to structure a mutually beneficial arrangement."[238] By giving deference to the parties' agreement, the court assumes that both employees and management benefit.[239]

3. Eighth Circuit

The Eighth Circuit analysis is also similar to the Tenth Circuit. The Eighth Circuit determines whether the employee's time is primarily used for personal activities to decide whether on-call time is compensable.[240] In *Cross v. Arkansas Forestry Comm'n*,[241] the plaintiffs were employed by the Arkansas Forestry Commission ("Commission"), and were on-call twenty-four hours per day, seven days per week.[242] The Commission did

231. *See id.* at 678.
232. *Id.*
233. *Id.* at 677.
234. *See Bright*, 934 F.2d at 678.
235. *See* Dinges v. Sacred Heart St. Mary's Hosp., Inc., 164 F.3d 1056 (7th Cir. 1999).
236. Vivian Illana Orlando, *Selected Recent Court Decisions*, 25 AM. J. L. & MED. 171, 172 (1999).
237. *See id.*
238. *Id.*
239. *See id.* at 172-173.
240. *See* Cross v. Arkansas Forestry Comm'n, 938 F.2d 912, 916-17 (8th Cir. 1991).
241. 938 F.2d 912 (8th Cir. 1991).
242. *See Cross*, 938 F.2d at 914.

not compensate the employees for any time on-call, arguing that the FLSA exempted employees engaged in "fire protection activities," and as such the overtime hours were calculated over a twenty-eight day time period rather than a standard week.[243] The employees argued that the on-call policy restricted the employees from using their time for personal activities.[244] The Eight Circuit agreed, holding that the Commission's on-call policy imposed significant restrictions upon the employees' ability to pursue personal activities.[245] The court cited that the employees' ability to travel was limited, and they must monitor their radios for transmissions, which restricted the employees to an area of thirty-five to fifty miles.[246] Further, the employees' ability to attend musical or sporting events, church, or other events that cost much money was hindered due to the constant requirement to monitor their radios and the possibility of having to leave the event to respond to a call.[247] Thus the court held that the employees were engaged to wait because the on-call conditions were so restrictive that the employees could not use their time for personal activities.[248]

D. *Analysis*

Some scholars argue that on-call cases are different from "waiting time" cases like *Armour* and *Skidmore* because even though the employee may enjoy more time away from work, the burden on the employee may be greater due to the employer placing the employee on-call for more time as a result of the increased time away from work.[249] For example, some employers, as in *Cross* and *Bright,* place employees on-call for all time spent away from the workplace.[250]

The analysis of the courts appears to focus on the hindrance of the on-call situation on the employee's personal activities.[251] A key aspect in determining the burden on the employee is how many calls the on-call employee receives on average and the length of the call.[252] Therefore, the greater number of calls a person receives, the more likely it is that the on-call time will be deemed compensable. Another factor in determining the intrusion into the employee's personal life is the response time re-

243. *Id.*
244. *See id.* at 915-16.
245. *See id.* at 916.
246. *See id.* at 916-17.
247. *See id.* at 917.
248. *See Cross,* 938 F.2d at 917.
249. Phillips, *supra* note 173, at 2639.
250. *See id.*
251. *See* Pabst v. Okla. Gas & Elec. Co., 228 F3d 1128, 1131 (10th Cir. 2000).
252. *See* Phillips, *supra* note 173, at 2641-43.

quired by the employer.[253] Some scholars argue that very short response times should be enough to compel compensation for on-call time.[254]

The benefit to the employer is often overlooked in a court's analysis of an on-call time issue, even though courts cite it as part of the analysis.[255] Courts do not consider the cost efficiency of placing employees on-call for much of the employee's time spent away from work in order to gain employee time without compensation. One scholar argues that courts should compare the employer's benefit of on-call work against regular time at work.[256] Here, the employer knows that placing an employee on-call instead of requiring an employee to remain at work at all times keeps the requirement of paying employees at a minimum.[257] "If the [on-call] employee did not have to respond, then the employer either would have to go without the service or would have to pay somebody at least the minimum wage to be present at the place of employment."[258] The use of beepers and cell-phones are keeping employers increasingly in touch with their employees and this time may sometimes require compensation.

What makes *Pabst* stand out is that it is one of the few Tenth Circuit cases that awarded compensation to those employees who claimed their on-call time should be compensable.[259] It joins the *Renfro* line of decisions departing from the typical Tenth Circuit practice of denying such claims.[260]

CONCLUSION

In 2001, the Tenth Circuit decided these important cases in three areas of employment law. The Tenth Circuit refined the meaning of "reasonable accommodation" in two ADA cases, decided whether to protect free speech in the workplace, and revisited the issue of on-call time under the Fair Labor Standards Act. The three areas of law discussed in this article show the diversity of issues within the field of employment law. Surely the courts have not refined these topics to their fullest extent, and therefore, we can expect more from the Tenth Circuit in the future on these and other employment law issues.

Gretchen Fuss

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253. *Id.* at 2643.
254. *See id.*
255. *See Pabst*, 228 F.3d at 1132.
256. *See* Phillips, *supra* note 173, at 2646.
257. *See id.* at 2646.
258. *Id.*
259. *See Pabst*, 228 F.3d at 1133-34.
260. *See id.*

THE DEATH OF A DOCTRINE: THE TENTH CIRCUIT COURT OF APPEALS AND RANDOM SUSPICIONLESS URINE DRUG TESTS ERODING THE "SPECIAL NEEDS DOCTRINE."

INTRODUCTION

Drug use has infiltrated almost all aspects of modern life.[1] Along with its increase in use, the inherent dangers surrounding the drug culture have also escalated. These inherent safety concerns include robberies, assaults, discipline problems, and violence. The employment sector and school sector are not immune to these problems, where absence, injuries, and work tardiness are affected by drug use.[2] The question that arises for almost all employers or school superintendents is how to control or contain the drug use and its dangers. Governments, employers, and school superintendents have tried many techniques, including zero tolerance policies, lectures on the evils of drugs, other presentations, and increasing police presence.[3] In recent years, another technique surfaced in an effort to try to combat drug use: random urine drug screens.[4] In the employment sector, the screens come in three forms: (1) pre-employment drug screens; (2) post accident drug screens; and (3) random drug screens. In the school setting, many tests happen during sports physicals, as a disciplinary method, or randomly to a group of students.

Individuals and groups have challenged these drug tests as an unconstitutional search under the protections of the Fourth Amendment, both in the Supreme Court and in the Tenth Circuit Court of Appeals.[5] Although only one Supreme Court case concerning random suspicionless drug testing has held the policy as unconstitutional,[6] almost the exact opposite result has happened in the Tenth Circuit Court of Appeals.[7] Drastically different results have been reached among the circuit courts using similar logic and the same tests.[8]

Part one of this article discusses the general background of Fourth Amendment law limited to the decreased requirement of probable cause in administrative searches and the judicially created "special needs" doctrine that eliminates a warrant requirement under certain circumstances. Part two discusses cases from both the Supreme Court and the

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1. *See* Alex J. Barker, *Vernonia School District 47J v. Action: Defining the Constitutional Scope of Random Suspicionless Drug Testing in Interscholastic Athletics and Beyond*, 5 WIDENER J. PUB. L. 445, 446 (1996).
2. *Id.*
3. *See* Vernonia Sch. Dist. 47J v. Action, 115 S. Ct. 2386 (1995).
4. *See* Alex Barker, *supra* note 1, at 446.
5. *See* discussion *infra* Part II.
6. *See* discussion *infra* note 199 and accompanying text.
7. *See* discussion *infra* Part III.
8. *See* discussion *infra* part III.

Tenth Circuit concerning random suspicionless drug testing. Part three discusses the inconsistencies in the reasoning the Tenth Circuit has used to hold the policies unconstitutional; determining that the special needs doctrine has been effectively eliminated in the Tenth Circuit. Part four concludes that only drug testing based on individualized suspicion, akin to the decreased probable cause for administrative searches, will pass constitutional muster in the Tenth Circuit.

I. SEARCH AND SEIZURE BACKGROUND

A. *General Warrant Requirement*

This section presents a brief contextual overview surrounding the debate about the constitutionality of random suspicionless drug testing protocols. The Fourth Amendment to the United States Constitution states: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause . . . ."[9] The Fourth Amendment only protects individuals from governmental intrusion, not from private party actions.[10] A court must address three questions when analyzing a claimed violation of the Fourth Amendment: (1) was there government action; (2) did the activity amount to a search; and (3) was the search reasonable.[11] If there was no governmental action, the Constitution does not apply.[12] If the activity was not a search, the Fourth Amendment does not apply.[13] And if the search was reasonable, the search was not unconstitutional.[14]

1. Defining a Search and Reasonableness

If a court determines that the activity is a search, a rebuttable presumption exists that a warrantless search is unreasonable, unless there is an exception to the warrant requirement.[15] Consequently, defining what actions constitute a search is very important to the outcome of the case.

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9. *See* U.S. CONST. amend. IV.

10. *See* Katz v. United States, 389 U.S. 347, 350 (1967) ("[The Fourth Amendment] protects individual privacy against certain kinds of governmental intrusion, but the protections go further, and often have nothing to do with privacy at all.").

11. *See* Amanda E. Bishop, *Students, Urinalysis & Extracurricular activities: How Vernonia's Aftermath is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 233-34 (2000).

12. *See* Rachel L. Diehl, *Constitutional Law – Search and Seizure – Random, Warrantless, and Suspicionless Searches of Student Athletes Through Urinalysis Drug Testing by Public School Officials Does Not Violate Fourth Amendment – Vernonia Sch. Dist. V. Action, 115 S. Ct 2386 (1995)*, 27 SETON HALL L. REV. 230, 230-31 n.6 (1996) (describing the "state action doctrine").

13. *Id.*

14. *See* Bishop, *supra* note 11, at 233-34.

15. *See* United States v. Munoz-Guerra, 788 F.2d 295, 297 (5th Cir. 1986) (Warrantless searches are per se unreasonable unless they fall within a carefully defined exception to the warrant requirement.).

In *Katz v. United States*,[16] the Supreme Court described the balancing test that courts should use to determine whether or not a search took place.[17] The test weighs the individual's reasonable expectation of privacy from governmental intrusion against the government's interest in controlling the activity.[18]

To determine the level of the expectation of privacy, courts look to actions by the individual displaying a subjective belief of an expectation of privacy.[19] If the individual lacks a subjective expectation of privacy, the inquiry ends and the activity does not amount to a search.[20] If the individual displays a subjective expectation of privacy, then the court must determine whether a reasonable law-abiding person would expect privacy in the same situation.[21]

After confirming a reasonable expectation of privacy, courts determine the rationale of the specific governmental action.[22] Courts consider many factors: the need or interest for governmental intrusion, the rationale behind the action, the actions of the individual governmental actor, and other possible methods the government could have employed.[23]

After determining the expectation of privacy and the governmental interest, the court employs a balancing test to determine the extent of the invasion of the expected privacy to determine if the activity should be defined as a search.[24] The court balances the intrusiveness of the action against whether or not the area deserves protection from government intrusion.[25]

If the court considers the governmental activity a search, it is presumptively unreasonable without a warrant established on probable cause.[26] This presumption can be overcome by any of the numerous exceptions to the warrant requirement.[27] Essential to the discussion of urine drug testing are two exceptions, the administrative search exception and the special needs doctrine.[28] Both of these exceptions are discussed later in this article.

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16. 389 U.S. 347 (1967).

17. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring)

18. *See Katz*, 389 U.S. at 361.

19. *See* Note, *Protecting Privacy Under the Fourth Amendment*, 91 YALE L.J. 313, 317 (1981) (concluding that a more objective definition of privacy is needed for an effective yet fair application of the Fourth Amendment in the privacy context).

20. *See id.* at 327.

21. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

22. *See id.* at 362.

23. Keith S. Berets, *The Boiling Frog: Privacy Rights Hang in the Balance in Vernonia School District v. Action*, 1996 WIS. L. REV. 1101, 1101 (1996).

24. *Id.*

25. *See id.* at 1102.

26. *See Munoz-Guerra*, 788 F.2d at 297.

27. *Id.*

28. *See* discussion *infra* Parts II.A, II.B.

2. Probable Cause and Warrant Requirements

As noted above, the Fourth Amendment requires probable cause in order to issue a warrant.[29] For police to obtain a search, seizure, or arrest warrant, they must appear before a neutral judge or magistrate and establish probable cause based on the facts of the case.[30] Probable cause does not require proof beyond a reasonable doubt, the level of proof required at a criminal trial; rather, it only requires evidence of probability of wrongdoing.[31] In addition, proof of probable cause allows use of evidence not normally admissible at trial, including hearsay and prior bad acts.[32] Because probable cause represents a probability rather than an absolute, a good faith exception exists for warrants issued on faulty probable cause.[33]

Probable cause to search differs from probable cause to seize or probable cause to arrest.[34] Probable cause to search requires evidence that the items the police seek relate to the criminal activity.[35] Furthermore, these items must be in the place the police intend to search.[36] Probable cause to seize only requires evidence that the items the police seek to seize relate to the criminal activity.[37] Probable cause to arrest requires evidence of a criminal offense and that the individual the police intend to arrest committed that offense.[38]

If no initial ruling on probable cause exists prior to the search, seizure, or arrest, and if a judge rules against probable cause after the fact, and if none of the various exceptions apply, the search, seizure, or arrest violates the Fourth Amendment rights of the individual.[39] The exclusionary rule bars the admittance of evidence gained through an illegal search or seizure and serves as a deterrent to illegal police activity.[40]

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29. *See* U.S. CONST. amend. IV.

30. *See* Peter J. Kocaras, *Proper Appellate Standard of Review for Probable Cause to Issue a Search Warrant*, 42 DEPAUL L. REV. 1413, 1418 (1993).

31. *See* Illinois v. Gates, 462 U.S. 213, 232 (1983) ("[P]robable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts.").

32. *See* Spinelli v. United States, 393 U.S. 410, 412 (1969) ("the constitutional requirements of probable cause can be satisfied by hearsay information.") *(overruled on other grounds)*.

33. *See* United States v. Leon, 468 U.S. 897 (1984) (establishing a "good faith" exception to faulty warrants).

34. *See* Frederick Alexander & John L. Amsden, *Scope of the Fourth Amendment*, 75 GEO. L.J. 713, 725 (1987).

35. *See id.*

36. *See id.*

37. *See id.*

38. *Id.*

39. *Id.* at 725.

40. *See* Edward R. Glady, Jr., *The Exclusionary Rule*, 71 GEO. L.J. 434, 435 (1982).

B. *Relevant Exceptions to the Warrant Requirement for Suspicionless Urine Drug Tests*

1. Administrative Search's Relaxed Probable Cause

Administrative searches are conducted by administrative agencies, whose actions rise to the level of the definition of a search in *Katz*.[41] These searches typically originate as non-criminal in nature, but the fruits of the search can be used in a criminal trial.[42] In themselves, administrative searches are not outside of the warrant requirement.[43] However, the Supreme Court has relaxed the probable cause standard in administrative searches to a point well below the level required to establish probable cause in the criminal context.[44]

The leading case, *Camara v. Municipal Ct. of the City and County of San Francisco*,[45] established this relaxed standard.[46]

a. Facts

Municipal building inspectors were going from house to house conducting inspections of apartments for building code violations that could pose safety concerns, including residential occupancy in areas forbidden by permit.[47] An individual refused the inspector entry into his residence.[48] After repeatedly refusing subsequent searches, he was fined and criminally punished for his refusal to abide by the building inspector's requests to search pursuant to the inspector's authority under the housing code.[49] The individual filed a writ of prohibition based on a violation of his Fourth Amendment rights.[50]

The City argued that the inspections were narrowly tailored for the least possible demand on individuals.[51] The City also argued that at all times the inspectors acted reasonably, satisfying the reasonableness requirement of the Fourth Amendment.[52] The City argued that a warrant requirement was an impossible obstacle in these particular inspections

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41. *See* Sunil H. Mansukhani, *School Searches after New Jersey v. T.L.O.: Are There any Limits?*, 34 U. LOUISVILLE J. FAM. L. 345, 352 (1996).
42. *Id.*
43. *Id* at 353.
44. *See id.*
45. 387 U.S. 523 (1967).
46. Camara v. Municipal Ct. of the City and County of San Francisco, 387 U.S. 523, 535 (1967).
47. *Camara*, 387 U.S. at 526.
48. *Id.*
49. *Id.* at 527.
50. *Id.*
51. *Id.* at 531.
52. *Id.*

because they were inspecting large areas based on legislative assessment of various factors.[53]

b. Analysis

Initially, the Court ruled that it was overruling previous precedent,[54] which held that regulatory searches that are essentially civil, limited in scope, and not exercised under unreasonable conditions were constitutionally valid.[55] The Court ruled that routine inspections for health and safety were not as intrusive as a search by a policeman, but that the Fourth Amendment's protections still applied.[56] Part of the ruling relied on the fact that criminal charges could come from the civil inspection, including code violations and criminal penalties for non-compliance with the search.[57] Secondly, the individual had no way of knowing if the inspector's demands to search were valid, and to what extent the search had been administratively authorized.[58] This meant that there was a large amount of government discretion, the type of discretion the Fourth Amendment was meant to curtail.[59]

The Court next considered the argument that public safety justified the search under the reasonableness requirement even absent a warrant.[60] The Court dismissed this argument, stating that the question is whether the authority to search should be supported by a warrant, not whether the public interest justifies the search.[61] In addition, the warrant requirement should be concerned with whether obtaining a warrant would frustrate the purpose behind the search.[62]

After concluding that the Fourth Amendment bound the search in question, the Court next looked to the level of suspicion required in order for the government to obtain a warrant, probable cause or something less.[63] This was in turn an analysis of reasonableness, balancing the governmental interest and the privacy intrusion.[64]

The Court held that the agency would have to get a warrant, but not a warrant based on the probable cause standard traditionally used in law enforcement.[65] Officials would not have to "show the same kind of proof

53. *Camara*, 387 U.S. at 532.
54. *Id.* at 528.
55. *See* Frank v. Maryland, 359 U.S. 360 (1959).
56. *Camara*, 387 U.S. at 530.
57. *Id.* at 531.
58. *Id.* at 532.
59. *Id.*
60. *Id.* at 533.
61. *Id.*
62. *Camara*, 387 U.S. at 533.
63. *Id.* at 534.
64. *Id.* at 534-35.
65. *Id.* at 532-33.

to a magistrate to obtain a warrant as one must who would search for the fruits or instrumentalities of crime."[66] The Court concluded that the ultimate standard was reasonableness,[67] balancing the governmental interest that allegedly justifies the intrusion with the scope of the intrusion on individual's privacy.[68] This relaxed standard of probable cause also applied to the determination of reasonableness of warrantless searches, thus providing both a relaxed definition of probable cause to get a warrant, and relaxing the standard of reasonableness applied to warrantless searches.[69]

c. Holding

Administrative searches are typically broad, suspicionless searches, searching broader areas than a typical criminal, for example the building code compliance in a block, and this type of search has a decreased standard of probable cause – the standard of reasonableness.[70]

2. Special Needs Doctrine as an Exception to Warrant Requirement

New Jersey v. T.L.O.[71] has been cited as the birth of the "special needs" doctrine.[72] The Supreme Court established an exception to the warrant requirement when there is a special need beyond that of law enforcement that justified warrantless searches.[73] The special needs analysis balances the legitimate expectation of privacy with the interest of the government to establish an exception to the warrant requirement.[74]

a. Facts

A high school teacher found a 14-year-old student smoking on school property, which violated local school rules.[75] The teacher took the student to the vice principal, and the student denied ever smoking.[76] Then the vice principal opened the student's purse and discovered a pack of cigarettes and some cigarette rolling paper.[77] This prompted him to search her purse more thoroughly.[78] His search revealed substantial evidence that the student was involved in dealing marijuana to other stu-

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66. *Id.* at 538.
67. *Id.*
68. *Camara*, 387 U.S. at 538.
69. *Id.* at 539.
70. *Id.* at 539.
71. 469 U.S. 325 (1985).
72. *See* Michael S. Vaughn & Rolando V. del Carmen, *"Special Needs" in Criminal Justice: An evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L.J. 203, 209 (Spring 1993).
73. New Jersey v. T.L.O., 469 U.S. 325, 347 (1985).
74. *See* Vaughn, *supra* note 72, at 209.
75. *T.L.O.*, 469 U.S. at 328.
76. *Id.*
77. *Id.*
78. *Id.*

dents.[79] At no time did the school obtain a warrant for the search.[80] Criminal delinquent charges were filed against the student and she moved to suppress the evidence found in her purse as violating the Fourth Amendment.[81]

b. Analysis

Initially, the Court determined that school officials had to comport with the Constitution,[82] and in particular the Fourth Amendment,[83] and that the actions of the school principal or administrators were government action.[84] In addition, it was beyond dispute that the opening and removing the contents of the purse was a search because of the high expectation of privacy in a closed purse.[85] The case then turned to the question of the reasonableness of the warrantless search.[86]

The Court ruled that students had an expectation of privacy and had not waived their right to privacy by being on school property.[87] However, the Court stated that school officials had a legitimate need to maintain an atmosphere promoting learning and this required easing the restrictions of search and seizure law applying to law enforcement.[88]

The Court concluded that school officials did not need to obtain warrants to search for drugs because of the particular circumstances of the school environment,[89] and that relaxed standards applied to probable cause for administrative searches.[90] The Court only required an establishment of individualized suspicion, suspicion that the individual has violated a school rule or the law.[91] Since there was reasonable individualized suspicion, the school official did not have to obtain a warrant to make the search reasonable.[92]

The constitutionality of the search of a student, the Court ruled, should depend simply on the reasonableness of the search, considering the totality of the circumstances.[93] This includes whether the search was

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79. *Id.*
80. *Id.* at 328-29.
81. *T.L.O.*, 469 U.S. at 329.
82. *Id.* at 333.
83. *Id.*
84. *Id.*
85. *Id.* at 337-38.
86. *Id.* at 337.
87. *T.L.O.*, 469 U.S at 334.
88. *Id.* at 341.
89. *Id.* at 343.
90. *Id.* at 340.
91. *Id.* at 341.
92. *Id.* at 343.
93. *T.L.O.*, 469 U.S at 341.

justified at its inception,[94] and whether the search relates in scope to the justification for the search.[95]

The Court defined justification at the inception as reasonable grounds to suspect that the search would reveal evidence that the student had violated either the law or the school rules.[96] This individualized suspicion was a relaxed standard compared to probable cause.[97]

Justice Blackmun stated, "Only in those exceptional circumstances in which 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."[98] Accordingly, many credit this as the birth of the "special needs doctrine."[99]

c. Holding

A search of a student's purse was constitutional because there was a special need, beyond law enforcement, that justified the warrantless search as reasonable.[100]

II. SUSPICIONLESS DRUG TESTS IN THE COURTS

A. *The Supreme Court's Approach to Suspicionless Drug Testing*

1. Skinner v. Railway Labor Executives[101]

The first case in which the Supreme Court addressed random suspicionless urine drug testing of employees was *Skinner v. Railway Labor Executives' Association.*[102] *Skinner* established the precedent that urine collection for drug testing was a search and demanded the protections of the Fourth Amendment.[103] It also began the development of the "special needs" doctrine as it applied to drug tests, beyond the search of purses in *T.L.O.*[104]

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94. *Id.* at 341-42.
95. *Id.* at 342.
96. *Id.*
97. *Id.* at 333.
98. *See id.* at 351-52.
99. *See* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 B.Y.U. EDUC. & L.J. 71, 75 (1999).
100. *T.L.O.*, 469 U.S. at 347-48.
101. 489 U.S. 602 (1989).
102. *See* Skinner v. Railway Labor Executives, 489 U.S. 602 (1989).
103. *Skinner*, 489 U.S. at 617.
104. *Id.* at 619.

a. Facts

Labor union representatives brought an action challenging random suspicionless drug testing done by the Federal Railroad Administration ("FRA").[105] The FRA promulgated a rule requiring that after certain types of railroad accidents, employees had to consent to either blood or urine drug and alcohol testing.[106] In addition, another rule authorized, but did not require, urine or breath alcohol and drug tests after individuals violated certain safety rules.[107]

Testing was completed by an outside agency using "state of the art equipment and techniques."[108] Both blood and urine were collected after major accidents.[109] Employees were notified of the test results and given an opportunity to respond.[110] Urine and breath tests could also be conducted after accidents when there was reasonable individualized suspicion, or where certain rules were violated.[111]

The FRA pointed to numerous accidents caused by drug or alcohol impairment of employees, and described the type of workers covered under the rules as safety sensitive.[112] In addition, they stated that the reason for the testing was deterrence from drug and alcohol use during work and that test results would not be divulged to criminal authorities without the employee's consent.[113]

The labor union countered that the collection of blood, urine, or breath constituted a violation of the Fourth Amendment and employees' right to be free from governmental intrusion.[114] In addition, they argued that the policy was not an effective deterrent and therefore did not adequately fulfill its stated purpose.[115]

b. Analysis

The Court first had to decide whether there was state action implicating the protections of the Fourth Amendment.[116] The FRA argued that because an outside private company collected and tested the urine or blood, there was no state action.[117] Consequently, because private actors

105. *Id.* at 612.
106. *Id.* at 606.
107. *Id.*
108. *Id.* at 610.
109. *Skinner*, 489 U.S. at 609.
110. *Id.* at 610.
111. *Id.* at 611.
112. *Id.* at 607.
113. *Id.* at 620-21 n.5.
114. *Id.* at 612.
115. *Skinner*, 489 U.S. at 630 (inferred for Court's discussion of deterrent effect of policy).
116. *Id.* at 614.
117. *Id.* at 615.

are not bound by the Constitution, there could not be a violation of the Constitution.[118]

The Court rejected this argument.[119] They applied the state action doctrine,[120] stating that private party action can amount to state action under certain situations.[121] Because the FRA was a governmental agency, and required the tests, and the private medical company acted on behalf of the governmental agency, state action existed.[122]

The next question the Court had to answer was whether collecting and testing urine amounted to a search that should be protected under the Fourth Amendment.[123] In previous decisions, the Court had stated that the collection of blood using a surgical technique (using a needle to withdraw blood from a person's body) was a search under the Fourth Amendment,[124] but the Court had not previously decided on the collection of urine using non-surgical techniques.[125] The Court determined that there was a very high expectation of privacy in bodily functions,[126] and the collection of such violated that expectation.[127] In addition, the Court stated that this expectation was reasonable.[128] Balancing this with the government's interest, the Court concluded that the collection of urine for urine drug tests was a search within the protections of the Fourth Amendment.[129]

The Court also considered whether the search was reasonable without a warrant based on probable cause or individualized suspicion.[130] The Court applied the special needs doctrine, developed in *T.L.O.*, to conclude that the FRA did not need a warrant.[131] The search was beyond normal law enforcement and justified a departure from the usual warrant and probable cause requirements because: (1) a warrant would do little to further the protections of the Fourth Amendment;[132] (2) the burden of obtaining a warrant was likely to frustrate the purpose behind the search;[133] and (3) the FRA had little occasion to become familiar with the

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118. *Id.* at 614.
119. *Id.* at 615.
120. *See* Diehl, *supra* note 12, at 230-31 n.6 (1996) (describing the "state action doctrine").
121. *Skinner*, 489 U.S. at 616.
122. *Id.*
123. *Id.* at 617.
124. *Id.* at 616. *See also* Schmerber v. California, 384 U.S. 757, 767-68 (1966) (holding blood collection as a search).
125. *Skinner*, 489 U.S. at 617.
126. *Id.*
127. *Id.* at 617.
128. *Id.* (*quoting* National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987)).
129. *Id.*
130. *Id.* at 621.
131. *Skinner*, 489 U.S. at 620.
132. *Id.* at 622.
133. *Id.* at 623.

subtle nuances of Fourth Amendment jurisprudence.[134] In addition, the special need for safety while operating trains was demonstrated by the dramatic figures that the FRA provided.[135]

The Court then balanced governmental interest with the privacy intrusion to determine reasonableness and justification for the suspicionless search.[136] Because of the number of accidents detailed by the FRA, and the safety sensitive nature of the position of the railroad workers, the government's interest was compelling.[137] In addition, because the railroad workers worked in a highly regulated industry, they had a decreased expectation of privacy.[138] The Court held that the balance decidedly tipped in favor of the FRA conducting drug testing without a warrant.[139]

c. Holding

Urine alcohol and drug tests are searches within the Fourth Amendment's reasonableness requirement.[140] It is reasonable to conduct such tests for drug use in the absence of a warrant or individualized suspicion of a particular employee because of the "special needs" balancing in favor of the FRA.[141] Consequently, the alcohol and drug tests contemplated by the FRA's regulations are reasonable within the meaning of the Fourth Amendment.[142]

2. National Treasury Employees Union v. Von Raab[143]

In a companion case decided the same day as *Skinner*, the Court upheld another suspicionless drug test without any showing of a drug problem or the concrete showing of danger that had been emphasized in *Skinner*.[144]

a. Facts

The United States Custom Service implemented a random suspicionless drug testing policy.[145] The policy covered three categories of employees: (1) those who had direct involvement in drug interdiction or

134. *Id.* at 623.
135. *Id.* at 630.
136. *Id.* at 626-30.
137. *Skinner*, 489 U.S. at 633.
138. *Id.* at 627.
139. *Id.* at 633.
140. *Id.* at 617.
141. *Id.* at 633.
142. *Id.* at 633.
143. 489 U.S. 656 (1989).
144. National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).
145. *Von Raab*, 489 U.S. at 660.

enforcement; (2) those who carried firearms; and (3) those who handled classified information.[146]

Testing was strictly completed with a same sex individual standing outside a closed bathroom stall, dye in the toilet to assure water is not put in the sample, listening for normal sounds of urination, measuring the temperature of the sample, and sealing the sample.[147] Analysis of the urine was done confidentially, and results were not released to anyone outside of the agency without the individual's consent, including law enforcement personnel.[148]

The Custom Service stated that there were no known significant drug problems to date,[149] but that the positions were very safety sensitive,[150] highly susceptible to illegal influence,[151] and employees could be dangerous to the public if the employees used drugs because they carried firearms and were the first line of defense in drug trafficking for the United States.[152] In addition, there was minimal, if any, day to day supervision that would enable the Service to establish individualized suspicion.[153]

b. Analysis

The Court noted that this case had been decided on the same day as *Skinner*, and as such, they quickly concluded that there was government action and that it did amount to a search.[154] The Court also noted that it was not disputed that this testing policy was not for law enforcement purposes and thus possibly fell within the special needs doctrine.[155] The Court then looked to exceptions for the warrant requirement to determine the reasonableness of the search.[156]

The Court concluded that the Customs agents were probably more familiar with Fourth Amendment jurisprudence,[157] as opposed to the FRA in *Skinner*, but that a warrant requirement in the instant case would divert valuable resources away from the Service's primary mission.[158] Secondly, a warrant requirement would do little to increase the protections required by the Fourth Amendment's reasonableness requirement.[159]

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146. *Id.* at 660-61.
147. *Id.* at 661.
148. *Id.* at 661-62.
149. *Id.* at 660, 673.
150. *Id.* at 660-61.
151. *Von Raab*, 489 U.S. at 661.
152. *Id.* at 670-71.
153. *Id.* at 674.
154. *Id.* at 665.
155. *Id.* at 665-66.
156. *Id.* at 666.
157. *Von Raab*, 489 U.S. at 666.
158. *Id.* at 666-67.
159. *Id.* at 667.

The Court briefly referred to the point that the testing was not random, per se, because the employees knew when the testing would occur, who was covered, and there was no discretion on the part of the agency in who was tested.[160] This increased the government's interest and decreased the individual's expectation of privacy.[161]

The Court extolled the virtues of the testing program's stated purposes, and how important it was to have drug free agents doing the valuable job of the Custom Service.[162] This indicated a very important governmental interest.[163] In addition, there was great public interest in instituting effective measures to prevent individuals who carry firearms from using drugs.[164]

In contrast to these interests was the employee's expectation of privacy.[165] The Court noted that occasionally there were reasonable searches in the workplace where in other contexts it would not be considered reasonable, and that this lowered the individual's expectation of privacy in the workplace.[166] The Court concluded that agents could not reasonably expect to keep the Service from gaining personal information that bears directly on job fitness, and urine drug tests provided this type of information.[167] Finally, the employees had notice about the tests decreasing their expectation of privacy.[168] Consequently, the individuals' privacy interest did not outweigh the governmental interest.[169]

Next, the Court looked to the scope of the drug testing protocol.[170] They concluded that despite evidence that there was a minimal drug problem at the Service, the deterrent effect was very important.[171] The Court concluded that American workplaces were not immune from "one of the most serious problems confronting our society today," drug abuse.[172] Therefore, the Service did not have to establish a real special need; the deterrent effect and the possibility of harm to the public were sufficient.[173]

Consequently, *Von Raab* did not require the same showing as required in *Skinner*, that there was a drug problem causing accidents and

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160. *Id.*
161. *Id.*
162. *Id.* at 668-70.
163. *Von Raab*, 489 U.S. at 670.
164. *Id.* at 670-71.
165. *Id.* at 671.
166. *Id.*
167. *Id.* at 672
168. *Id.* at 672, fn. 2.
169. *Von Raab*, 489 U.S. at 672.
170. *Id.* at 674.
171. *Id.*
172. *Id.* at 674.
173. *Id.* at 674-75.

serious injuries, but instead merely that there was a possible serious public harm.[174]

c. Holding

Suspicionless testing of Custom Service agents who carried firearms or who were directly involved in drug enforcement was reasonable within the Fourth Amendment and did not require a warrant, probable cause, or individualized suspicion, because of the application of the special needs doctrine.[175] In light of this holding, the remainder of the case was remanded to the lower court to determine if individuals who were in contact with confidential communications were also in a position that required the application of the special needs doctrine.[176]

3. *Vernonia School District 471 v. Acton*[177]

Several years later, the Court again had an opportunity to evaluate random suspicionless urine drug testing, this time in the context of schools, and again upheld the policy as constitutional.[178]

a. Facts

Vernonia School District 47J (the "District") required random urine drug testing for all students involved in after school athletics.[179] Urine samples were tested for a variety of drugs, including stimulants, cocaine, and THC.[180] Other drugs, including alcohol and LSD, could be tested for on request, but the identity of the student did not determine which tests were conducted.[181] School officials rigidly conducted the tests, with the administrator outside of the stall while the person being tested was inside the stall.[182] The specimen was sent to an outside agency for anonymous testing.[183] Results were mailed only to the superintendent and not divulged to the police.[184]

The District detailed how drugs had created disciplinary problems, and that other efforts, including special classes, guest speakers, the presence of drug sniffing dogs, and various other presentations, had not stemmed the drug problem.[185] The District's showing had the same pur-

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174. *See id.*
175. *Von Raab*, 489 U.S. at 677.
176. *Id.* at 678 (The district court held that the testing of employees who had access to top secret information was reasonable. *See* 756 F.Supp. 947 (E.D.La. 1991)).
177. 515 U.S. 646 (1995).
178. Vernonia Sch. Dist. 471 v. Acton, 515 U.S. 646, 664-65 (1995).
179. *Vernonia*, 515 U.S. at 648.
180. *Id.* at 650.
181. *Id.* at 651.
182. *Id.* at 650.
183. *Id.*
184. *Id.* at 651.
185. *Vernonia*, 515 U.S. at 649.

pose as the showing used by the FRA in *Skinner*, to establish a special need.

The District had determined that the athletes were the core of the drug culture, and that drugs negatively affected the athletes' abilities by decreasing motivation, memory, judgment, reaction time, and coordination.[186] Because of these effects, athletes were a threat to themselves and others as injuries were more likely during athletic competitions and practices when athletes were on drugs.[187] As a result, the drug testing program was narrowly tailored to test only athletes, not the entire student body, to affect the core of the drug culture, thus affecting all of the drug culture.[188]

If the superintendent received a positive drug test result, a second test was conducted to confirm the results.[189] If the second test was positive, the parents of the student were notified for a meeting with the principal.[190] During that meeting, the student had the option to enter counseling or to be removed from the athletic team for the current year and the following year.[191] If the second test was negative, the first test was dismissed.[192]

b. Analysis

There was minimal discussion, or real question, about whether the school actions amounted to government action, or whether the action constituted a search.[193] *Skinner* and *T.L.O.* had decidedly answered both of these questions. The only question remaining was the reasonableness of the warrantless search.[194]

The Court held that the student athletes had a much lower expectation of privacy because they were students.[195] In addition, they showered and changed clothes together in the locker room,[196] they were subject to physical exams prior to the start of the season,[197] and they knew that, as students, they had a decreased expectation of privacy because they had to comport with strict regulations for after school athletics.[198]

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186. *Id.*
187. *Id.*
188. *Id.* at 649-50.
189. *Id.* at 651.
190. *Id.*
191. *Vernonia*, 515 U.S. at 651.
192. *Id.* at 651.
193. *Id.* at 652.
194. *Id.* at 652-53.
195. *Id.* at 657.
196. *Id.*
197. *Vernonia*, 515 U.S. at 657.
198. *Id.*

On the other hand, the school had a great interest in controlling the drug problem because the problem was "epidemic,"[199] drug use led to drastic discipline problems,[200] the athletes could hurt themselves or others when playing sports on drugs,[201] and the athletes were role models for other students.[202] The District had established a real need that was beyond normal law enforcement purposes, and accordingly, the Court applied the special needs doctrine.[203]

Next, the Court looked to the intrusiveness of the test and the scope of the drug testing policy.[204] The Court held that the test was relatively unobtrusive.[205] In addition, because the policy only covered athletes who appeared to be role models and the core of the drug culture the Court held that the policy was not overbroad.[206]

Applying the special needs doctrine, the Court balanced the expectation and nature of the privacy interest, the type of intrusion, and the governmental concern.[207] The Court concluded that the governmental purpose severely outweighed the students' expectation of privacy.[208]

c. Holding

Random suspicionless drug testing of students participating in after school athletics as a condition of participation is constitutional and does not violate the Fourth Amendment's protections against unreasonable searches and seizures.[209]

4. Chandler v. Miller[210]

Chandler v. Miller is the most recent application of the special needs doctrine to random suspicionless drug testing policies by the Supreme Court. This case differs from the previous three because it held the drug testing policy unconstitutional.[211] The Court chose not to apply the special needs balancing test because the City had not established the elements of the doctrine.[212]

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199. *Id.* at 649.
200. *Id.*
201. *Id.*
202. *Id.* at 663.
203. *Vernonia*, 515 U.S. at 653.
204. *Id.* at 663.
205. *Id.* at 664-65.
206. *Id.* at 663.
207. *Id.*
208. *Id.*
209. *Vernonia*, 515 U.S. at 665.
210. 520 U.S. 305 (1997).
211. Chandler v. Miller, 520 U.S. 305, 319 (1997).
212. *Chandler*, 520 U.S. at 319.

a. Facts

The Georgia State Legislature passed a law requiring any individual who was running for a high office to submit to and pass a urine drug screen.[213] High office positions consisted of the Governor, Lieutenant Governor, Secretary of State, Attorney General and District Attorneys, School Superintendent, Commissioner of Insurance, Agriculture, and Labor, Justices and Judges, and members of the General Assembly and Public Service Commission.[214]

Results of urine drug screens were to be provided by the candidate 30 days prior to qualifying for nomination or election.[215] The tests were arranged by the candidates and could be taken at a number of medical facilities, including the candidate's private physician.[216] Release of results was in the sole discretion of the candidate, and criminal authorities did not receive positive results.[217] Procedures of the tests were to be regulated by federal statute.[218]

The State argued that it had a significant interest in assuring that candidates were drug free because of the position the candidates could hold, public impression of a drug free government, and that the individuals needed to be clear headed in the performance of their job duties.[219]

Three candidates from the Libertarian party challenged the statute as violating the Fourth Amendment right to be free from unreasonable searches and seizures.[220]

b. Analysis

It was beyond doubt by this point in precedent that there was state action, and that the collection of urine for drug testing constituted a search.[221] So the remaining issue was whether the search was reasonable without a warrant and without individualized suspicion.[222]

Initially, the State argued that the Tenth Amendment allowed them, under their sovereign power, to establish qualifications for holding a state office.[223] However, the Court dismissed this argument, stating that

213. *Id.* at 308.
214. *Id.* at 309-10.
215. *Id.* at 309.
216. *Id.* at 310.
217. *Id.* at 312.
218. *Chandler*, 520 U.S. at 310.
219. *Id.* at 318.
220. *Id.* at 310.
221. *Id.* at 313.
222. *Id.*
223. *Id.* at 317.

sovereign power did not release the requirements of the Fourth Amendment[224] and thus the case turned on the reasonableness of the search.[225]

The Court next looked to the special needs doctrine.[226] After evaluating the precedents of *Skinner*, *Von Raab*, and *Vernonia*, the Court analyzed whether there was a special need demonstrated in the instant case to relax the warrant requirement.[227]

The Court noted that there was no known or demonstrated drug problem for the group being tested.[228] In addition, there was no demonstration that there was a concrete danger demanding the application of relaxed Fourth Amendment jurisprudence.[229] Also, the scope of the statute was not well designed to identify individual drug users.[230] Because the candidates could arrange the test themselves, could only release negative results without disclosing any positive results, and could circumvent the protections by abstaining from drugs, the policy would not work to fulfill its stated purpose.[231]

The Court distinguished the present case from *Von Raab*, where there was a showing of a real need, because the individuals in that case carried weapons and were the front line defense for the United States.[232] In the instant case, there was no similar danger.[233] In addition, the Customs Officers in *Von Raab* were not subject to day-to-day scrutiny, whereas public officials, or candidates, were subject to heavy scrutiny from both their coworkers and the public, which could establish reasonable individualized suspicion.[234]

Consequently, the State had not shown a real need that required loosening the protections of the Fourth Amendment to necessitate that the state could conduct suspicionless, warrantless searches.[235]

c. Holding

As a threshold matter, the special needs doctrine would only apply if a real need or a severe public threat was demonstrated.[236] Because the state had not established a real need, the special needs doctrine did not apply.[237] Random suspicionless urine drug testing of state office candi-

224. *Chandler*, 520 U.S. at 317.
225. *Id.*
226. *Id.* at 318.
227. *Id.* at 321.
228. *Id.* at 318-19.
229. *Id.*
230. *Chandler*, 520 U.S. at 319.
231. *Id.* at 320.
232. *Id.* at 320-21.
233. *Id.* at 321.
234. *Id.*
235. *Id.* at 322.
236. *Chandler*, 520 U.S. at 322.
237. *Id.*

dates was an unconstitutional search under the Fourth Amendment because the state had not shown a special need to allow warrantless searches without suspicion.[238]

B. *Tenth Circuit Court of Appeals Approach to Suspicionless Drug Testing*

1. *Rutherford v. Albuquerque*[239]

Rutherford was one of the first Tenth Circuit Court of Appeals decisions concerning random suspicionless drug testing. This case was prior to *Chandler*, and relied heavily on *Skinner*, *Von Raab*, and *Vernonia* to establish the requirements of the special needs doctrine as it applied to random suspicionless drug testing.[240]

a. Facts

Rutherford, the plaintiff, had been on physical layoff status as a bus driver[241] from a work related back injury and a heart attack.[242] During his absence, the City had initiated a drug testing policy that provided for drug testing as a prerequisite to obtaining a city operator's permit, and/or as a condition of beginning employment with the City.[243]

Rutherford was unaware of this policy when he was cleared to go back to work.[244] He went back to work with the City as a truck driver for the public works department, a position that requires a city operator's permit.[245] Rutherford's city operator's permit had not expired from his previous job.[246]

When he arrived for work, the City sent him to the employee health center for a drug test.[247] The drug test was positive for marijuana, and Rutherford admitted to smoking marijuana.[248] As a result of the positive test, the admission, and other no tolerance policies, the city terminated his employment.[249] He brought this action claiming a violation of his Fourth Amendment right to be free from unreasonable searches and seizures.[250]

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238. *Id.* at 323.
239. 77 F.3d 1258 (1996).
240. Rutherford v. Albuquerque, 77 F.3d 1258, 1259 (1996).
241. *Rutherford*, 77 F.3d at 1259.
242. *Id.*
243. *Id.*
244. *Id.* at 1261.
245. *Id.* at 1259.
246. *Id.*
247. *Rutherford*, 77 F.3d at 1259.
248. *Id.*
249. *Id.*
250. *Id.*

b. Analysis

First, the Tenth Circuit quickly concluded that there was state action, as the government acting as an employer is bound by the constitution,[251] and that the collection of urine was a search that implicated the protections of the Fourth Amendment.[252] Then, without considerable discussion, the court assumed the position of the City that Rutherford's position was safety sensitive.[253] Consequently, the court looked to the special needs doctrine to determine if it applied, possibly making the search reasonable in the instant case.[254]

The Tenth Circuit determined that the nature of the intrusiveness of the testing procedure was not in line with the testing procedures in *Skinner* and *Von Raab*.[255] The court concluded that the testing procedure at issue was much more intrusive because the plaintiff was unaware of the procedure and had no warning or advance notice.[256] Intrusiveness was magnified because Rutherford was not in an industry heavily regulated for safety purposes, such as the railroad workers in *Skinner*.[257] The court seemed to overlook the size of the vehicle and danger of it on the road.[258] Finally, the court noted that the government's interest to ensure safety was decidedly low in the instant case.[259]

Furthermore, because Rutherford had not been at work in over a year, the test was not a reflection of his activities at work, actions that would increase the government's interest.[260] Because there was no notice, and there were no public safety concerns akin to *Von Raab*, Rutherford had a high expectation of privacy that was violated by the test.[261]

Another distinguishing factor that the court noted was a wide exercise of discretion by city officials in testing Rutherford.[262] He was not a new employee and he maintained his operator's license for the City.[263] Consequently, he was tested based on significant official discretion, not under the rules of the City.[264] The court emphasized that this discretion was lacking in both *Skinner* and *Von Raab*.[265]

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251. *Id.* at 1260.
252. *Id.*
253. *Rutherford*, 77 F.3d at 1261.
254. *Id.* at 1261.
255. *Id.*
256. *Id.* at 1262.
257. *Id.*
258. *See* International Broth. of Teamsters v. Dept. of Transp., 932 F.2d 1292, 1304 (9th Cir. 1991) (discussing safety sensitive position of heavy truck drivers).
259. *Rutherford*, 77 F.3d at 1262.
260. *Id.* at 1263.
261. *Id.*
262. *Id.* at 1261.
263. *Id.* at 1259.
264. *Id.* at 1261.
265. *Rutherford*, 77 F.3d at 1261.

After distinguishing Supreme Court precedent, the court applied the special needs balancing test.[266] When the court balanced the interest of the government and the level of intrusiveness, under the special needs doctrine, the scales tipped decidedly for the individual.[267]

c. Holding

Rutherford's expectation of privacy outweighed the governmental interest under the special needs doctrine.[268] Consequently the City had violated his constitutional right to be free from unreasonable searches because the City had not established probable cause or individualized suspicion.[269]

2. *19 Solid Waste Mechanics v. Albuquerque*[270]

19 Solid Waste Mechanics was decided after *Chandler*, and the decision relied heavily on the analysis of *Chandler* to hold that a random suspicionless testing policy did not warrant the application of the special needs doctrine because the policy did nothing to deter behavior.[271]

a. Facts

City mechanics commenced this action to claiming random suspicionless drug testing of city employees was unconstitutional.[272] Testing policy required urine drug testing for all employees whose jobs required a commercial driver's license to be conducted when they renewed their licenses.[273] Another policy required mechanics who worked on city vehicles to have a commercial driver's license, which brought the employees under the drug testing policy.[274]

The City asserted that the mechanics were safety sensitive personnel because the performance of their jobs could put others at risk, as they worked on the brakes, steering, and other safety issues with city vehicles.[275] Then the City asserted that the special needs doctrine applied, and that under previous Supreme Court precedent, governmental interest outweighed privacy intrusion.[276]

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266. *Id.* at 1262.
267. *Id.* at 1263.
268. *Id.*
269. *Id.*
270. 156 F.3d 1068 (1998).
271. 19 Solid Waste Mechanics v. Albuquerque, 156 F.3d 1069, 1074 (1998).
272. *19 Solid Waste Mechanics*, 156 F.3d at 1070.
273. *Id.* at 1071.
274. *Id.*
275. *Id.* at 1074.
276. *Id.* at 1071.

b. Analysis

The Tenth Circuit first concluded that there was state action by a government employer, and that collecting urine for drug testing was a search within the confines of the Fourth Amendment.[277] The remaining questions were the reasonableness of the search and the application of the special needs doctrine.[278]

Prior to completing the balancing test of the special needs doctrine, the court ruled that the government was required to establish a special need based on precedent in *Chandler*.[279] There were two issues to determine if the government had shown a special need.[280] First, did the government provide evidence of a real need that warranted the application of the special needs doctrine?[281] Types of evidence accepted by the court were the government showing that the testing program was adopted in response to a documented drug problem or showing that the group being tested would pose a danger or threat to the public.[282] Second, was the testing policy reasonably related to the goals of detection and deterrence outside of law enforcement purposes allowing relaxation of the warrant requirement?[283]

If either of these factors is not established, the special needs doctrine would not apply, and there would have to be another exception to the warrant and probable cause requirement to make the search reasonable.[284]

The court concluded that the City had failed to satisfy the second factor, the deterrent effect, for the application of the special needs doctrine.[285] The policy lacked a capacity to address drug problems in the workplace because the drivers would know when the test was coming and could prepare for it, and tests were given very infrequently – only once every four years.[286] For the Tenth Circuit, advance notice and frequency were fatal to the policy.[287] This sharply contrasts with the holding of *Rutherford* a few years earlier where the court ruled that no advance notice was fatal to a random suspicionless drug testing policy.[288]

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277. *Id.* at 1072.
278. *19 Solid Waste Mechanics*, 156 F.3d at 1072.
279. *Id.*
280. *Id.* at 1073.
281. *Id.*
282. *Id.*
283. *Id.* at 1073.
284. *19 Solid Waste Mechanics*, 156 F.3d at 1073.
285. *Id.* at 1074.
286. *Id.*
287. *Id.*
288. *Rutherford*, 77 F.3d at 1263.

The court noted that the rationale for the program – safety – was legitimate, despite not having documented evidence of the problem.[289] Therefore, the government had great interest in performing the drug tests to assure safety.[290] The court did not require that this be shown by documented evidence, but merely accepted it as fact.[291] The court stated that the mechanics held a safety sensitive position and that safety was clearly a concern, even without documentation.[292] This satisfied the first factor for the application of the special needs doctrine.[293]

Consequently, because the City had not established a special need, the special needs doctrine could not be applied.[294]

c. Holding

Random urine drug testing of city employees unconstitutionally violated the Fourth Amendment's protections against unreasonable searches and seizures because the government had not established a special need.[295]

3. *Earls v. Board of Education*[296]

Earls is the most recent of the Tenth Circuit Court of Appeals decisions concerning random suspicionless drug testing. This case differs from the previous Tenth Circuit cases discussed because it is in the context of a school, not employment. The court applied the precedent of *Vernonia* in conjunction with *19 Solid Waste Mechanics*, to hold that the special needs doctrine did not apply because there was no real need shown and the policy was both over and under broad.[297]

a. Facts

The school district implemented a random urine drug-testing program for all students involved in extracurricular competitive activities to help combat drug use at the schools.[298] Activities covered under the policy included athletics (like *Vernonia*), but also included student choir, band, color guard, Future Farmers of America, Future Homemakers of America, academic team, debate team, cheerleading, and pom pom.[299]

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289. *19 Solid Waste Mechanics*, 156 F.3d at 1074.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 1074-75.
295. *19 Solid Waste Mechanics*, 156 F.3d at 1074-75.
296. 242 F.3d 1264 (10th Cir. 2001).
297. Earls v. Bd. Of Educ. Of Tecumseh Public Sch. No. 92, 242 F.3d 1264, 1278 (10th Cir. 2001).
298. *Earls*, 242 F.3d at 1266.
299. *Id.* at 1267.

Each student participating had to agree to the testing or she was not allowed to participate.[300]

Procedures of the test were almost identical to the intrusiveness of the test in *Vernonia*.[301] Tests only detected amphetamines, marijuana, cocaine, opiates, barbiturates, and benzodiazepines, without testing for alcohol and nicotine.[302] Urine was collected behind closed stall doors (similar to *Vernonia*), but in groups of two or three students.[303]

There was no mention of what happened to students with a positive result, as opposed to *Vernonia* where a second test was completed. Results were put in a confidential file separate from the students' academic record, and would only be released to school officials who had a need to know test results, and would not be given to the police.[304]

The District spent little time establishing the drug problems within their specific district, and did not demonstrate that the policy was geared toward the core of the drug culture.[305]

Parents, on behalf of their children, brought suit claiming a violation of the Fourth Amendment.[306]

b. Analysis

The Tenth Circuit determined that *Vernonia* compelled the decision that there was state action and that those actions constituted a search.[307] In addition, *Vernonia* compelled the application of the special needs doctrine. [308] Although the court held that it was applying *Vernonia*, not *19 Solid Waste Mechanics*, and holding that the school had established a special need;[309] their decision rested heavily on a lack of deterrence because of the lack of a documented problem, very similar to the analysis in *19 Solid Waste Mechanics*.[310]

The court examined the privacy interest of the students and the level of intrusion on that interest.[311] The court concluded that the students tested had a decreased expectation of privacy compared to other students and adults, but departed from *Vernonia* by stating that the students in the instant case did not have as low an expectation of privacy as the students

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300. *Id.* at 1268.
301. *Id.* at 1276.
302. *Id.* at 1267.
303. *Id.*
304. *Earls*, 242 F.3d at 1268.
305. *Id.* at 1270.
306. *Id.* at 1268.
307. *Id.* at 1270.
308. *Id.*
309. *Id.* at 1270 n.4.
310. *Earls*, 242 F.3d at 1272.
311. *Id.* at 1275.

in *Vernonia*.[312] The court rejected arguments that the students' voluntary participation in the activities decreased their expectation of privacy and that all the included programs required communal undress and occasional out of town trips decreasing the expectation of privacy.[313] It did state, however, that students who participated in after school activities did have a lower expectation of privacy than other students.[314]

Then the court looked at the governmental interest and what the government had established concerning the factors for the application of the special needs doctrine.[315] The court concluded that the school had not shown a sufficient drug problem that the drug testing policy would combat.[316] It reviewed the history of the testing results and concluded that a large, epidemic drug problem did not exist in the District as shown in *Vernonia*.[317] In addition, the policy was not an effective deterrent because it was both over and under broad; it tested students who did not have a safety issue, and tested too few students within the District.[318]

Thus, the factors for the application of the special needs doctrine, a real need and deterrence, were not satisfied.[319] Without these elements, the expectation of privacy, no matter how slight, outweighed the interests of the government.[320]

c. Holding

Random suspicionless urine drug testing policy, as a precursor to participation in any competitive after school activity, was unconstitutional and constituted an unreasonable search because the special needs doctrine did not apply.[321]

The United States Supreme Court has granted a writ of certiorari for *Earls* but the decision had not been issued at the time this article was written.[322]

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312. *Id.* at 1275-76.
313. *Id.*
314. *Id.* at 1276.
315. *Id.* at 1276-77.
316. *Earls*, 242 F.3d at 1277.
317. *Id.* at 1272-75.
318. *Id.* at 1277.
319. *Id.* at 1278.
320. *Id.* at 1277.
321. *Id.* at 1279.
322. Bd. of Edu. of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 509, 2001 WL 1046942 (2001). Oral arguments were heard on March 19, 2002. *See* Linda Greenhouse, *Court Weighs Expanded Drug Testing for Students*, DENVER POST, March 20, 2002, at A5.

III. THE DEMISE OF THE SPECIAL NEEDS DOCTRINE IN THE TENTH CIRCUIT

A. *Only Reasonable Suspicion Drug Tests Survive*

The Tenth Circuit has upheld urine drug testing policies only twice in the past, and in both of these cases, the court held that there was individualized suspicion, which allowed a warrantless search.[323]

1. Saaverda v. Albuquerque[324]

a. Facts

Saaverda was a firefighter and emergency technician for the City of Albuquerque.[325] In 1991, Saaverda suffered physical and emotional problems to an extent that he self-referred himself to the city's employee health center.[326] When he was at the center, he provided a urine sample.[327] When tested, the sample was proved to be solely water.[328] A second urine test was completed, and this one tested positive for drugs.[329] After a pre-termination hearing, he was released from employment due to the positive drug test.[330] Saaverda then sought judicial review of his termination arguing, among other challenges, that his Fourth Amendment rights were violated by the random suspicionless drug test.[331]

The City argued that it was not random, nor suspicionless, but that they had reasonable suspicion because of earlier threats he had made, explosive fighting in public, and the initial urine test being water.[332]

b. Analysis

The court very briefly went over the special needs doctrine, and then dismissed that justification.[333] The court believed that the City did have reasonable suspicion, and if they had reasonable suspicion, they need not apply the special needs doctrine.[334] Independent of the special needs doctrine, reasonable suspicion in a non-law enforcement context provided an exception from the warrant requirement.[335]

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323. *See* discussion *infra* Part III.A.
324. 73 F.3d 1525 (10th Cir. 1996).
325. Saaverda v. Albuquerque, 73 F.3d 1525, 1527 (10th Cir. 1996).
326. *Saaverda*, 73 F.3d at 1528.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.*
331. *Id.* at 1528.
332. *Saaverda*, 73 F.3d at 1528.
333. *Id.* at 1532.
334. *Id.*
335. *Id.*

The court agreed with the City that reasonable suspicion had been justified by Saaverda's previous actions prior to the drug test, and the fact that he gave a sample of water for his first urine test.[336]

As a result, there was no need to apply the special needs doctrine, and the court chose not to, merely answering the constitutionality of a drug testing policy as it applied to Saaverda, not addressing the question of whether random drug testing was constitutional.[337]

c. Holding

Suspicion based drug testing in the instant case was constitutional because there was individualized suspicion.[338]

2. *Benavidez v. Albuquerque*[339]

a. Facts

Benavidez was a field service operator for the City's Public Works Department.[340] He and his supervisor drove to another employees house in a company vehicle.[341] He went into the house to buy drugs while his supervisor waited in the car, drinking beer.[342] Unfortunately for Benavidez, it was a drug bust.[343] Both he and his supervisor were detained, but not arrested.[344]

When they were released, the police notified their supervisor and explained that they had been questioned during a drug raid and that Benavidez stated that he was there to purchase cocaine.[345] The City then questioned Benavidez and his supervisor at length, but no drug test was conducted because they did not appear to be impaired by alcohol consumption.[346] However, 36 hours later, they were tested.[347] Benavidez tested negative, but his supervisor tested positive.[348]

Both were terminated.[349] Both filed suit claiming, among other things, a violation of the Fourth Amendment rights against unreasonable search and seizure.[350]

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336. *Id.* at 1531.
337. *Id.* at 1532.
338. *Saaverda*, 73 F.3d at 1532.
339. 101 F.3d 620 (10th Cir. 1996).
340. Benavidez v. Albuquerque, 101 F.3d 620, 622 (10th Cir. 1996).
341. *Benavidez*, 101 F.3d at 622.
342. *Id.*
343. *Id.*
344. *Id.* at 623.
345. *Id.*
346. *Id.*
347. *Benavidez*, 101 F.3d at 623.
348. *Id.*
349. *Id.*

b. Analysis

The court addressed the special needs doctrine, but dismissed it as not applicable.[351] The court looked to whether the City had a reasonable suspicion and an individualized suspicion.[352] Based on the amount of information and its reliability, having come from the police, the information the City received about their drug involvements constituted reasonable suspicion.[353] There did not have to be direct observation that an employee's ability to perform their job was impaired.[354]

The City established reasonable suspicion, so the special needs doctrine did not apply.[355] The court refused to inquire further into the drug testing policy of the City, especially the level of suspicion needed by administrative order, because administrative order violations would not give rise to a § 1983 claim, which was the jurisdiction claimed by the plaintiffs.[356]

c. Holding

There was reasonable suspicion to make a warrantless search reasonable under the Fourth Amendment.[357] There was no need to analyze the special needs doctrine.[358]

B. *No Suspicionless Drug Tests Have Survived Special Needs Analysis*

No case concerning suspicionless drug testing policies presented to the Tenth Circuit has survived their "special needs" analysis. Each of the three cases outlined above that have addressed the issue has invalidated the policy on three different grounds: lack of notice, lack of deterrence because of notice, and lack of proof of a real problem of drug use at a particular school district.[359] In each of these cases, the court strayed its precedent and the United States Supreme Court.

1. Lack of Notice

The *Rutherford* court emphasized that Rutherford had no notice of the drug testing policy, and that increased his expectation of privacy making the test over intrusive.[360] Since that decision, both the Supreme Court and the Tenth Circuit have essentially overruled *Rutherford*, with-

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350. *Id.*
351. *Id.* at 624.
352. *Id.*
353. *Benavidez*, 101 F.3d at 624.
354. *Id.* at 625.
355. *Id.* at 624.
356. *Id.* at 625.
357. *Id.* at 624.
358. *Id.*
359. *See* discussion *supra* Part II.B.
360. *Rutherford*, 77 F.3d at 1262.

out expressly doing so, by holding that advance notice is fatal to the deterrence of the testing policy.[361] Relying on the fact that individuals could give a false sample, or a clean sample, if they knew when the test was going to occur, the Tenth Circuit in *19 Solid Waste Mechanics* struck down the policy because it could not effectively deter or ferret out a drug problem.[362] The Court in *Chandler* invalidated a policy on similar grounds.[363]

However, *Rutherford* still stands as law, having not been overruled.[364] Thus, in the Tenth Circuit, notice can be fatal to a testing policy, either because it reduces the deterrent factor or because it elevates the intrusiveness of the test.

2. Societal Drug Problems Are Not Real

In striking down the urine drug testing policy, the *Earls* court found another way to invalidate the special needs doctrine, and in doing so ignored precedent by both the Supreme Court and the Tenth Circuit. In *Earls*, there was minimum notice, the students knew about the testing policy, but not when they were going to be tested.[365] This appears to be just enough notice, the midline between *Rutherford's* lack of notice and *19 Solid Waste Mechanics* too much advance notice. Consequently, it was a good deterrent.

The Tenth Circuit revisited the first factor for application of special needs doctrine, the establishment a real need through documented evidence.[366] Unfortunately for the school, the government attorneys had not proven any significant drug problem. Inherent in the court's rationale was that if the school could not prove it, there must not be a drug problem. If there was no drug problem, then there was no real need, and the special needs doctrine did not apply.

Fatal to the court's reasoning, and presumably what the school was relying on, was that in *19 Solid Waste Mechanics*, *Rutherford*, and all of the previous Supreme Court cases, drug problems were stated to be major social problems, one that court often assumed needed to be dealt with.[367] *19 Solid Waste Mechanics* went almost as far as to say no proof of drug problems was needed to satisfy the real need of the special needs doctrine.[368] Consequently, despite prior statements by the court that drug problems were a major societal safety problem that needed to be con-

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361. *See id.*

362. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

363. *Chandler*, 520 U.S. at 320.

364. *See* Rutherford v. Albuquerque, 77 F.3d 1258 (1996).

365. *Earls*, 242 F.3d at 1267.

366. *Id.* at 1272. *But see id.* at 1270 n.4.

367. *See 19 Solid Waste Mechanics*, 156 F.3d at 1074; *Chandler*, 520 U.S. at 319; *Von Raab*, 489 U.S. at 674; *T.L.O.*, 469 U.S. at 339,

368. *19 Solid Waste Mechanics*, 156 F.3d at 1074.

trolled, and despite Supreme Court decisions to the same, the court wanted a way to invalidate the policy.

The Tenth Circuit and the Supreme Court had already decided the issue of notice and deterrence; the court needed another "out." The only way the court could dissolve the policy was to eliminate the special needs doctrine by holding that the school did not show a real need. To do this, the court relied on the Supreme Court in *Vernonia* expounding on the major problems drugs had brought to that school as evidence of a major drug problem proved by that District.[369]

3. Net Effects of the Courts Analysis

It appears that the Tenth Circuit strongly opposes any relaxing of the protections of the Fourth Amendment.[370] In fact, the court has only accepted the relaxing of the Fourth Amendment under the special needs doctrine in two circumstances - searches of individuals in prisons with the governmental need of running and operating a prison safely,[371] and searches of homes and persons of parolees by parole officers.[372] It appears that the Tenth Circuit rarely allows suspicionless searches, relying mainly on a minimum benchmark of individualized suspicion for the search to be constitutionally reasonable. This is bolstered by the fact that the only cases concerning urine drug testing to survive the Tenth Circuit have been based on individualized suspicion and no random suspicionless drug testing has been upheld as constitutional.[373]

The Tenth Circuit has chosen a rights-based approach, protecting the rights and liberties of individuals, instead of a more utilitarian approach, providing the greatest good for the greatest number of people. In addition, the Tenth Circuit narrowly limits other exceptions to the warrant requirement for administrative searches.[374] This shows increased protections for individuals' liberties and rights.

In the context of urine drug searches,[375] and other Fourth Amendment contexts,[376] the United States Supreme Court has a more utilitarian

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369. *Earls*, 242 F.3d at 1270-71.

370. *See* discussion *supra* Part III.A.

371. *See* Romo v. Champion, 46 F.3d 1013 (10th Cir. 1995) (applying "special needs doctrine" to warrantless search of visitors to prisons).

372. *See* United States v. White, 244 F.3d 1199 (10th Cir. 2001) (applying "special needs doctrine" to waive warrant requirement for probation officer to search probationer's home).

373. *See* discussion *supra* Part IV.

374. *See* Jennifer D. Sheehan, *Limiting the Closely Regulated Business Exception to the Warrant Requirement: V-1 Oil Co. v. Wyoming, Department of Environmental Quality, 902 F.2d 1482 (10th Cir. 1990)*, 39 WASH. U.J. URB. & CONTEMP. L. 277, 286-88 (1991) (discussing Tenth Circuit limits on administrative searches to closely regulated industries with stringent authorizing statutes).

375. *See* Kenneth C. Betts, *Fourth Amendment – Suspicionless Urinalysis Testing: A Constitutionally "Reasonable" Weapon in the Nations War on Drugs? National Treasury Union v.*

jurisprudence, relaxing the protections offered to the individual for the benefit of society. This is exemplified by the Supreme Court repeatedly carving out exception after exception to the warrant requirement for the protection and safety of the public at large.[377]

Since the decision of *Vernonia*, the circuits have split on the constitutionality of similar urine drug testing policies of students. The Seventh Circuit has held virtually all policy as constitutional, relying almost solely on the holding in *Vernonia*.[378] The split in the circuits makes this a prime time for the United States Supreme Court to try to clear up the issue, especially the requirements for the application of the special needs doctrine. Presumably, the Supreme Court granted the writ of certiorari for *Earls* to address this split.

Until the Supreme Court affirmatively sets the guidelines for the applicability requirements of the special needs doctrine, and gives more guidance for the balancing weight to be given to each factor in the special needs balancing test, the Tenth Circuit should be more consistent with the philosophy of utilitarianism expressed by the Supreme Court. In order to do this, the Tenth Circuit could adjust the balancing test by giving more weight during the balancing to society's needs and more weight to protecting the people from the dangers of drug use and addiction. This should bring the courts decisions more consistent with the expressed philosophy of the United States Supreme Court.

Although there are factual differences in any case, and courts have ruled that Fourth Amendment challenges should be done on a case-by-case basis,[379] the Tenth Circuit should not skirt the importance of precedent. The court should lower students' expectation of privacy and lower the expectation of privacy of individuals employed in highly regulated industries. In recognizing the importance of the government's purpose, as the court did in *19 Solid Waste Mechanics*, and recognizing the decreased expectations of privacy, as the court did in *Earls*, the court should have the same balancing results as the Supreme Court. The court should not look to any factor possible to strike down the policies, espe-

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Von Raab, 109 S. Ct. 1384 (1989), 80 J. CRIM. L. & CRIMINOLOGY 1018, 1051 (1990) (discussing United States Supreme Court's relaxing of individual protections for drug testing).

376. *See* Robin K. Magee, *The Myth of the Good Cop and the Inadequacy of Fourth Amendment Remedies for Black Men: Contrasting Presumptions of Innocence and Guilt*, 23 CAP. U. L. REV. 151, 163-65 (1994) (describing the Court's adoption of a utilitarian rationale for the exclusionary rule instead of a rights-based or judicial integrity rationale).

377. *See* Myron Schreck, *The Fourth Amendment in the Public Schools: Issues for the 1990s and Beyond*, 25 URB. LAW. 117, 118-19 (1993) (discussing various cases carving out exceptions to the warrant and probable cause requirements).

378. *See* Jennifer Smiley, *Rethinking the "Special Needs" Doctrine: Suspicionless Drug Testing of High School Students and Narrowing of the Fourth Amendment Protections*, 95 NW. U.L. REV. 811, 827 (2001).

.[379] *See Vernonia*, 515 U.S. at 665.

cially if prior decisions, either in the Tenth Circuit or the United States Supreme Court, have eliminated or lessened the importance of that factor.

IV. CONCLUSION

The Tenth Circuit Court of Appeals has made its stance on random urine drug testing very clear.[380] The court will capitalize on any opportunity to protect individuals from what the court considers an unreasonable search and seizure. The court has found these policies to be unconstitutional for a wide variety of sometimes conflicting reasons – because there was no notice, too much notice, no special need shown, no significant deterrent effect, or an over or under broad policy.[381] In sum the special needs doctrine will probably not apply, and if it is applied, the balancing test will favor the individual's expectation of privacy.

The court manifests this position by expanding individuals' expectations of privacy which often ignore prior dicta and precedent from both the Tenth Circuit's and the United States Supreme Court's opinions.[382] In doing so, the Tenth Circuit has all but eliminated the constitutional suspicionless search aspect of the special needs doctrine, relying only on the individualized suspicion doctrine as an exception to the warrant requirement.[383] The court does this in a rights-basis effort to hold individualized suspicion as the minimum suspicion level required for a warrantless search.

Matthew A. Pring

380. *See* discussion *supra* Part II.
381. *See* discussion *supra* Part II.
382. *See* discussion *supra* Part III.
383. *See id.*

ADJUDICATION OF UNIVERSAL FUNDING IN THE TELECOMMUNICATIONS SECTOR

INTRODUCTION

The Telecommunications Act of 1996 ("1996 Act")[1] updated and changed the prior articulated goals of the Communications Act of 1934 ("1934 Act").[2] A key provision in the 1996 Act emphasizes the necessity for universal telecommunications service in rural, high-price, and low-population areas, creating a significant impact on telecommunications in the western states.[3] In the 1996 Act, the Federal Communications Commission ("FCC") took responsibility for discounting and even subsidizing telecommunication companies in furtherance of this goal.[4]

The stated purpose of the 1996 Telecommunications Act is, "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[5] In the 1996 Act, universal service is a key component of the stated purpose.[6]

This paper will explain some of the controversies surrounding universal service, focusing on the funding provisions associated with the 1996 Act. Specifically, this paper examines how recent decisions in the Tenth Circuit and Fifth Circuit regarding universal service funding provisions of the 1996 Telecommunications Act will impact future adjudication of universal service funding issues. Thus far, no other circuit has undertaken decisions regarding universal service funding provisions for telecommunications.

Part I provides a background by reviewing current scholarly literature on the topic of universality. Part II examines the Tenth Circuit's decision in *Qwest Corporation v. Federal Communications Commission.*[7] This case raises a question of sufficiency of federal funding for universal access.[8] Part III examines the Fifth Circuit's decision regarding the model used by the FCC to determine federal funding for universal service in *Alenco Communications, Inc. v. Federal Communications Com-*

1. Telecommunications Act of 1996, 47 U.S.C. § 254 (1996).
2. Communications Act of 1934, 47 U.S.C. § 151 *et seq.* (1934).
3. *See* 47 U.S.C. § 254.
4. *See* 47 U.S.C. § 254(c)(3)(d).
5. *Id.* at Preamble.
6. *See id.*
7. 258 F.3d 1191 (2001).
8. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001).

mission.[9] Part IV provides a critical analysis of the materials presented. Finally, Part V provides conclusions and recommendations based on the foregoing materials, and a look towards the effects that the adjudication of these issues will have on future issues of funding for universal telecommunications service.

I. REVIEW OF LITERATURE

President Clinton signed the Telecommunications Act of 1996[10] into law on February 8, 1996.[11] The 1996 Act came into being as a conglomeration of amendments to the Communications Act of 1934.[12] The 1996 Act both enhances and supplements the provisions of the 1934 Act.[13] After decades of amending the Communications Act to deal with emerging technologies e.g., cable, the Internet, cellular communication, digital television, etc., the FCC presented its recommendations to Congress.[14] Congress then passed the 1996 Act adopting new provisions and solidifying amendments to the 1934 Act.[15] Thomas Krattenmaker ascribes the FCC's interest in revising the regulations concerning telecommunication to the increasingly adaptable technology that allows people to communicate with each other more easily, across longer distances, and eliminating barriers to incorporating that technology into the telecommunications marketplace.[16]

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9. Alenco Communications, Inc. v. FCC, 201 F.3d 608 (2000).

10. 47 U.S.C. § 254.

11. Michael I. Myerson, *Ideas of the Marketplace: A Guide to the 1996 Telecommunications Act*, 49 FED. COMM. L.J. 251, 252 (1997).

12. Myerson, *supra* note 11, at 252.

13. *Id.*

14. *Id.*

15. *Id.* "The goal of Congress was to create a legislative change as dramatic as the evolution of the old-fashioned telephone, carrying voices over distant wires, into telecommunications, the transmission of 'information,' including data and video, as well as aural communications." *Id.* at 253. *See also* Thomas G. Krattenmaker, *The Telecommunications Act of 1996*, 49 FED. COMM. L.J. 1, 3 (1996) ("The 1996 Act is a very lengthy and very detailed bill. Formally written as a series of amendments and additions to the Federal Communications Commission's basic charter, the Communications Act of 1934, the committee print of the law is 111 pages long."); Glen O. Robinson, *"The 'New' Communications Act: A Second Opinion,"* 29 CONN. L. REV. 289, 304 (1996) ("The driving force behind the 1996 Act was to legislate the conditions that would permit more competition into telecommunications markets. This was Congress' central ambition, and rightly central; next to it all other parts of the Act pale in importance.").

16. *See id.*

Telecommunications technology is largely regarded as an advancement over smoke signal technology because it can carry more information per second, carry it a greater distance, and provide more security against surreptitious monitoring . . . we are witnessing a convergence of devices accompanied by a plethora of transmission paths. The telecommunications receiver is a radio, computer, television, telephone, VCR, and fax machine all rolled into one.

Id. Krattenmaker suggests that prior to the 1996 Act:

Confronting, and obstructing, these technological developments were (and, to some extent, still are) a series of governmentally imposed entry barriers that sought to force the new and the old

The 1996 Act, in contrast to prior legislation, emphasizes the importance of competition in the telecommunications marketplace.[17] According to Michael Myerson, Professor of Law at the University of Baltimore:

> This law represents a vision of a telecommunications marketplace where the flexibility and innovation of competition replaces the heavy hand of regulation. It is based on the premise that technological changes will permit a flourishing of telecommunications carriers, engaged in head-to-head competition, resulting in a multitude of communications carriers and programmers being made available to the American consumer.[18]

Prior to the 1996 Act, local telephone companies held monopolies over telephone service, but were not allowed to compete in long-distance or in cable markets.[19] The 1996 Act specifically aims to deregulate telecommunications, so as to increase the amount of competition in the telecommunications market, in direct contrast to prior legislation.[20] Prior to the 1996 Act, the FCC effectively separated the various telecommunications components:

> Balkanizing the industry, keeping one industry firmly secured to its own, specified piece of the telecommunications revenue pie, was a natural outcome of regulatory capture. Indeed, the Federal Communications Commission became a cartel-enforcement agency, one that could reliably be called on by incumbents to formulate rules that would make competitive entry economically impossible.[21]

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technologies into a Procrustean bed. These barriers attempted both to confine certain devices to certain limited uses and to limit the transmission paths telecommunications providers might employ. *Id. See also* Angela J. Campbell, *"Universal Service Provisions: The "Ugly Duckling" of the 1996 Act,"* 29 CONN. L. REV. 187, 190 (1996).

> Traditionally, universal service had been concerned with POTs because that was all that was available. In recent years, with the wide variety of new telecommunications services becoming available, it became clear that it was time to re-examine the definition of universal service . . . . The 1996 Act is significant in that it ends the debate over whether universal service needs to be redefined by requiring the FCC to do so.

Id.

17. *See* Myerson, *supra* note 11, at 252.

18. *Id.*

19. *See id.* at 253. For example:

> [A]ll of these assertions were true at the end of 1995 (and some still are): Television stations cannot operate local cable systems; but cable systems must carry television stations. On the other hand, firms sending multiple televisions signals to the home via satellite are effectively prevented from carrying network television stations. Telephone companies cannot offer cable television and cable television companies cannot offer telephony although both run wires for electronic communications in the same houses.

Krattemaker, *supra* note 15, at 7.

20. *See* Myerson, *supra* note 11, at 254.

21. Thomas W. Hazlett, *"Explaining the Telecommunications Act of 1996: Comment on Thomas G. Krattenmaker,"* 29 CONN. L. REV. 217, 221 (1996).

According to the FCC, the 1996 Act will, "remove the outdated barriers that protect monopolies from competition and affirmatively promote efficient competition . . . ."[22] By removing the barriers, "[p]olicy makers believe (or profess to believe) that if the telephony, radio, and television are to merge—or not to merge—that result should be driven by consumers making choices in open markets that express their preferences."[23]

The FCC hopes to implement its goal of market competition, in part, by encouraging universal service for telecommunications patrons.[24] The 1934 Act also encouraged universal service, mandating regulation of electronic communications to make them available to all citizens of the United States.[25]

> Historically, the FCC has had special policies addressing these constituencies' unique telecommunications problems. At a minimum, this language ratifies these efforts. It makes it clear for the future, that "all the people of the United States" referenced in section 1 of the 1934 Communications Act really means all the people and that the FCC should make special efforts to ensure that some Americans are not underserved because of where they live or how much money they make.[26]

The 1996 Act, however, expands on the universal service mandate and includes provisions that will allow the Act to adapt to the ever-changing technological innovations that impact modern telecommunication services.[27]

The FCC included seven principles in the 1996 Telecommunications Act to justify and support universal service.[28] The specific provi-

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22. In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Part II, Order, 61 Fed. Reg. 45,476, 45,479 (Aug. 29, 1996) (to be codified at 47 C.F.R. pts. 1, 20, 51, 90).

23. Krattenmaker, *supra* note 15, at 7. *But see* The Honorable Hullihen Williams Moore, Richard L. Cimerman, John L. Langhauser, Philip McClelland & Mark J. Mathis, "*Local Exchange Service In The Next Century—What Still Must Be Done To Bring Us Where We Want To Be?*", 4 RICH. J.L. & TECH. 5, 8 (1996) ("Effective competition is not around the corner, because there remains a tremendous amount of work to be done, both at the municipal, state, and the federal levels.").

24. The FCC defines universal service as, "an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services." 47 U.S.C. § 254(c)(1).

25. *See* Myerson, *supra* note 11, at 266.

26. Campbell, *supra* note 16, at 196.

27. *See id.*

28. 47 U.S.C. § 254(b)(1)-(7).

(b) Universal Service Principles.—The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

Quality and rates.—Quality services should be available at just, reasonable, and affordable rates.

Access to advanced services.—Access to advanced telecommunications and information services should be provided in all regions of the Nation.

sions that are cogent to this discussion deal with "[a]ccess in rural and high cost areas,"[29] "[e]quitable and nondiscriminatory contributions,"[30] and "[s]pecific and predictable support mechanisms."[31] These are the provisions that cause great difficulty in determining the adequacy of funding for implementing universal service.[32] Professor Myerson raises two important questions that must be considered in order to understand the universal service requirement of the 1996 Act: (1) "what services

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Access in rural and high cost areas.—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

Equitable and nondiscriminatory contributions.—All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

Specific and predictable support mechanisms.—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.

Access to advanced telecommunications services for schools, health care, and libraries.—Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h).

Additional principles.—Such other principles as the Joint Board and the Commission determine are necessary and appropriate for the protection of the public interest, convenience, and necessity and are consistent with this Act.

Id. See also Krattenmaker, *supra* note 15, at 21 (discussing the definition of universal service). Campbell provides a useful explanation of the seven key provisions:

In developing universal service policies, the Joint Board and the FCC are to implement the seven principles articulated in section 254(b). The first three principles address the type and quality of services that should be available to consumers. The next two concern the mechanisms that will be used to support universal service. The sixth principle addresses the special needs of schools, libraries, and health care providers. The final principle permits consideration of any other principles necessary and appropriate for the protection of the public interest, convenience, and necessity.

Campbell, *supra* note 16, at 194.

29. Myerson, *supra* note 11, at 266.

30. *Id.*

31. *Id.*

32. Additionally, Krattenmaker argues that the focus on universal service allows the FCC to maintain control over entities that it claims should now be subject to the competitive conditions of the marketplace:

The conclusion is the continuing conviction that markets for telecommunications services ought to be governmentally managed so that they provide—and to some extent conceal—pro-social cross-subsidies. Baldly stated, nonpredatory competition is not good if it leads to higher residential subscription rates for basic telephone services.

Krattenmaker, *supra* note 15, at 9. Campbell notes that there are difficulties with the funding provisions, but notes:

The Act does not offer any details as to how the support mechanism will work. The NPRM does not either; it merely lists a number of options and asks a series of questions. Until the support mechanisms are developed and tested, it is too early to tell whether they will work as intended. Although the Commission may fail to develop the perfect solution, even a flawed new system will likely be an improvement over the present system.

Campbell, *supra* note 16, at 197. Similarly, Robinson notes that the universal service funding provisions in the 1996 Act sidestep economics in favor of public good policy, "The measure is no longer the measure of network value to telecommunications users, it is a general social welfare measure." Robinson, *supra* note 15, at 325.

must be provided?"[33]; and (2) "how universal must their provision be?"[34] Myerson does not answer the questions he raises; rather, he offers them as touchstones for policymakers to look to when beginning to implement the provisions of the 1996 Act.[35] Krattenmaker too asks, "Whence the money?"[36] The 1996 Act itself leaves the answer to these questions to the broad discretion of the FCC, providing that all telecommunications companies must contribute to the implementation of universal service.[37]

The FCC relies on both state and federal funding to support its universal service initiatives.[38] The FCC formulated a system of contributions by telecommunications companies and subsidies for instituting universal service programs.[39] Geography, income of consumers, and facilities (e.g., schools, healthcare facilities, etc.) are important factors in determining the amount and type of subsidies provided under the 1996 Act.[40] According to Dawson, "The 1996 Act expresses a fundamental commitment to encourage competition in rural and high-cost areas so that customers in these regions will receive the same benefits as their urban counterparts."[41]

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33. Myerson, *supra* note 11, at 267.

34. *Id.*

35. *See id.*

36. Krattenmaker, *supra* note 15, at 21. *See also* Robinson, *supra* note 15, at 323-24.

The value of the network to each subscriber is a function of the number of persons reached by the network; each additional subscriber to the network thus confers benefits to the other network subscribers; to the extent the benefit to the network as a whole--that is to the inframarginal user--is greater than the price that the marginal user is willing to pay to subscribe there is an externality. In such a case it is efficient to charge the inframarginal subscriber for some part of the costs of adding the marginal subscriber to the network.

Id.

37. *See* 47 U.S.C. § 254(4).

38. *See* Emily Dawson, *Universal Service High-Cost Subsidy Reform: Hindering Cable-Telephony and Other Technological Advancements in Rural and Insular Regions*, 53 FED. COMM. L.J. 117, 120 (2000).

The universal service program functions as a cooperative effort between the individual states and the federal government. The individual states may independently develop separate universal service programs as long as the provisions do not conflict with the FCC's general rules governing subsidy allocation and find support in "specific, predictable, and sufficient mechanisms . . . that do not rely on or burden federal universal service support mechanisms."

Id.

39. *See id.*

40. *See* Campbell, *supra* note 16, at 202-03.

The fact that low income and rural consumers are specifically mentioned in the Act gives further impetus to the FCC and states to make sure that people who might otherwise be left behind are included. In effect, the Act gives the federal and state regulatory commissions a mandate to ensure that the disparities between the haves and have-nots are not increased. The special attention paid to schools, libraries and health care providers also promises real benefits for society. Schools are training the next generation of American citizens and workers. Libraries are the traditional source of information in communities. Since schools and libraries are open to everyone, they are good places to begin to tackle the problem of the haves and have-nots.

Id.

41. Dawson, *supra* note 38, at 120.

Subsidies for telecommunications companies come in a variety of forms. One example is the cost-shifting mechanism that shifts a portion of the cost of service for high-cost areas to consumers in low-cost areas.[42] Additionally, the FCC uses forward-looking formulas to calculate the amount of federal support to grant to each company for its universal service activity:

> The new model will enable the FCC to design more efficient networks based upon the geographic location of customers and necessary upgrades in infrastructure. Using this model, the FCC can input cost variables, such as network components, into the system to estimate the forward-looking costs of providing telecommunications services to these high-cost areas. From these data, the FCC will determine in which geographic regions carriers will be eligible to receive subsidies.[43]

Unfortunately, the FCC's subsidy calculations have met with criticism from scholars.[44] One of the arguments raised is that uncertainty in the calculations may not provide an accurate determination of the amount of support necessary to provide universal service.[45] The uncertainty comes from the manner in which the FCC determines whether a carrier is eligible for the subsidies based solely on statewide calculations:

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42. *See id.* "[S]ubsidies support the programs, shifting some of the costs associated with providing service in high-cost areas to customers in lower-cost regions." *See also* Markenzy Lapointe, *Universal Service and the Digital Revolution: Beyond the Telecommunications Act of 1996*, 25 RUTGERS COMPUTER & TECH. L.J. 61, 74 (1999) ("[U]niversal service has been supported through a system of subsidization, which shifted costs from one group of high-cost customers to a low-cost group.").

43. Dawson, *supra* note 38, at 122. Earlier the author explains why rural and insular areas have higher telecommunications costs, "[r]egions that have fewer customers over which to spread fixed costs, and other factors such as less technologically advanced networks and rugged terrain, have inherently higher service costs. The universal service program provides subsidies to high-cost regions to ensure affordable telecommunications services to citizens in these areas." *Id.* at 118.

44. *See id. See also* Krattenmaker, *supra* note 15, at 21-22.

> Universal service is now an explicitly articulated goal of telecommunications regulation. It is to be achieved by levying a proportionate tax on all telecommunications service providers, which should make more visible both the nature and amounts of the cross-subsidies encompassed within the universal service program. . . . Exactly what services will be encompassed within the concept of universal service remains quite unclear, however, because no specific or fixed meaning may be ascribed to the list of items that make up "universal service"; it is an "evolving level" of services to be established "periodically" by the FCC, not just a basic dial tone.

Id.

45. *See* Dawson, *supra* note 38 at 122. *See also* Robinson, *supra* note 15, at 324.

> A more basic problem is determining where the benefit-cost ratio that justifies the subsidy ends. Though conventional economic theory says that the inframarginal subscriber gains from extending the network, no one with any economic sense at all would say that the net gain extends all the way to 100% participation. Although no one has found a means of calculating the cross-over point between benefits to the inframarginal user and the cost of adding marginal users, that point occurs well short of 100%.

Id.

> Therefore, a carrier can only receive high-cost subsidies for services rendered in a particular state if the "carrier's average cost of providing service in [that] state exceeds 135% of [the] national average per line." The problem is that calculating the cost of phone service in rural and high-cost areas is notoriously difficult, and the FCC has even acknowledged this potential uncertainty in the system.[46]

The following cases and analysis will examine these problems in further detail, and illuminate some of the issues that still remain to be resolved.

II. *QWEST CORPORATION V. FEDERAL COMMUNICATIONS COMMISSION*[47]

Qwest, along with other telecommunications companies,[48] brought suit to challenge the FCC's funding for universal service provisions, including "local telephone service and access to emergency, directory-assistance, and long distance services.[49] As discussed above, costs of providing universal service in a rural area are much higher than those for providing the same service in an urban center.[50] To offset these costs "states and the federal government have established policies that support access to basic services in high cost areas."[51] The 1996 Act requires:

> (d) Telecommunications Carrier Contribution—Every telecommunications carrier that provides interstate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service . . . (f) State Authority—A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equal and nondiscriminatory ba-

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46. Dawson, *supra* note 38, at 122.
47. 258 F.3d 1191 (2001).
48. Other parties to the litigation are: AT&T Corp., Rural Telephone Coalition, Vermont Department of Public Service, State of California and the Public Utilities Commission of the State of California, The Maine Public Utilities Commission, Puerto Rico Telephone Company, Inc., WorldCom, Inc., Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Bell Atlantic-West Virginia, Inc., New York Telephone Company, New England Telephone and Telegraph Company, The Wyoming Public Service Commission, and GTE Service Corporation. *Qwest*, 258 F.3d at 1191.
49. *See id.* at 1195.
50. *See id. See also Alenco*, 201 F.3d at 617.

Rural LEC's face special obstacles. The cost of providing telephone service varies with population density, because dispersed populations require longer wires and permit lesser economies in installation, service, and maintenance. Also relevant are geographic characteristics, for climate and certain types of terrain make service calls and repairs more costly. Rural areas where telephone customers are dispersed and terrain is unaccommodating are therefore the most expensive to serve. *Id.*

51. *Qwest*, 258 F.3d at 1195.

> sis, in a manner determined by the State to the preservation and advancement of universal service in that State.[52]

Qwest did not challenge the theory behind universal service.[53] Rather, it questioned two of the universality principles in the 1996 Telecommunications Act that state:

> (3) Access in rural and high cost areas—Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas should have access to telecommunications and information services, that are reasonably comparable to those provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas . . . (5) Specific and predictable support mechanisms—There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service.[54]

The FCC attempted to implement these provisions in a series of FCC Orders.[55] The Orders promulgated the methods the FCC will use to implement its policy directives.[56] This case is a direct challenge to the FCC's Ninth and Tenth Orders.[57]

Before implementing the principles contained in the 1996 Act, the FCC generated several orders and finally decided to follow the guidelines for funding contained in its Ninth Order.[58] The Tenth Circuit explained the funding mechanisms as follows:

> To determine the amount of money that a state may receive, the FCC employs a two-part method. First, using its cost model, it set a benchmark at 135% of the national average cost per line. Second, it computes the average cost per line within a given state. If the statewide average cost exceeds the benchmark, then the FCC provides funding for costs in excess of the benchmark.[59]

In its Tenth Order, the FCC figured out which "input values" it would use in the model and "anticipate[d] updating the model as technology and other conditions change."[60] The Tenth Circuit consolidated the claims of Qwest and the other telecommunications companies.[61] The consolidated claims can be summarized in three basic arguments: (1) the

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52. 47 U.S.C. § 254(c)(3)(d)-(f); *See also Qwest*, 258 F.3d at 1199.

53. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001).

54. 47 U.S.C. § 254(2)(b)(3)-(5).

55. *See* Ninth Report & Order and Eighteenth Order on Reconsideration P 1, FCC 99-306, CC Docket No. 96-45 (Nov. 2, 1999). *See also* Tenth Report and Order, FCC 99-304, CC Docket Nos. 96-45, 97-160 (Nov. 2, 1999).

56. *See id.*

57. *See Qwest*, 258 F.3d at 1196.

58. *See id.* at 1197.

59. *Id.*

60. *Id.* at 1198.

61. *See id.*

FCC should not rely on the states to fund its universal service provisions;[62] (2) the FCC failed to appropriately and explicitly define the reasoning behind the adoption of the 135% benchmark, thereby making their calculations arbitrary and capricious;[63] (3) the funding mechanisms proposed by the FCC are inadequate to support the FCC's universal service vision.[64] These arguments in the consolidated claim deal specifically with the FCC's Ninth Order. Additionally, Qwest's final argument was that the funding model proposed in the FCC's Tenth order violates the Administrative Procedure Act.[65] Each of the arguments put forth by the telecommunications companies in the consolidated claim, and the Tenth Circuit's response to these arguments, will be examined in detail in the following sections.

A. *States' Responsibility for the Funding of Universal Service Provisions*

According to the record, "The FCC acknowledges that the Ninth Order will result in reasonably comparable rates only if the states implement their own universal-service policies."[66] The Tenth Circuit partially based its decision, to reverse and remand this portion of the case for further proceedings, on the FCC's recognition of the necessity of state funding for universal service, and its failure to provide any inducements for the states to implement their own universal service policies, in compliance with the requirements of the 1996 Act.[67]

The Tenth Circuit did not fail to recognize that Congress intended to encourage a partnership between the states and the federal government in order to promote universal service across the United States.[68] Nor did it fail to recognize the FCC's necessary dependence on state support.[69] In reaching its decision, therefore, the Tenth Circuit rejected Qwest's argument that "the FCC must alone support the full costs of universal service."[70] However, the Court did not let the FCC off the hook, stating that, "the FCC may not simply assume that the states will act on their own to preserve and advance universal service. It remains obligated to create

62. *See id.*
63. *See Qwest*, 259 F.3d at 1198.
64. *See id.*
65. Administrative Procedure Act, 5 U.S.C. § 706(2)(A) (2001). *See also Qwest*, 258 F.3d at 1205.
66. *Qwest*, 258 F.3d at 1202-03.
67. *See id.*
68. *See id.* at 1203.

A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

47 U.S.C. §254 (c)(3)(d). *See also* Ninth Order, *supra* note 55, at P 56.

69. *Qwest*, 258 F.3d at 1202-03.
70. *Id.* at 1203-04.

some inducement—a 'carrot' or a 'stick,' . . . for the states to assist in implementing the goals of universal service."[71]

B. *FCC's Failure to Define Key Terms and Justify 135% Benchmark*

1. Defining "Reasonably Comparable" and "Sufficient"

Several of the terms used by the FCC in its discussion of its universal service provisions were at issue in this part of the court's opinion. First, the FCC provides a definition of "reasonably comparable" as, "a fair range of urban/rural rates both within a state's borders, and among states nationwide."[72] The Tenth Circuit found that this definition is too ambiguous to be useful to states attempting to implement universal service, even after further explanation by the FCC.[73] The court rejected the additional definitions as imprecise standards that are no more useful than the original definition.[74]

The second term that the FCC inadequately defined is "sufficient." The Tenth Circuit declared that the FCC asserted that the federal support would be sufficient.[75] The FCC's statement was a conclusion, not explanatory, and it was "inadequate to enable appellate review of the sufficiency of the federal mechanism and, if accepted, would provide only a circular argument in support of the FCC's position."[76]

Once again, in their review of the ambiguous terms, the Tenth Circuit gave the FCC the benefit of the doubt by attempting to figure out if the definitions were "reasonable constructions of the statute."[77] If the

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71. *Id.* at 1204.

72. Ninth Order, *supra* note 55, at P 54.

73. *Qwest*, 259 F.3d at 1201. The court examines the FCC's definition in the best light possible, examining several other definitions for reasonably comparable, before coming to its decision:

At least twice, the FCC has provided what purport[s] to be further definitions of "reasonably comparable":

(1) "Support levels must be sufficient to prevent pressure from high costs and the development of competition from causing unreasonable increases in rates above current, affordable levels."

(2) "Some reasonable level above the national average forward-looking cost per line." [internal cites omitted.]

Id.

74. *See id.*

75. Ninth Order, *supra* note 55, P 56.

76. *Qwest*, 258 F.3d at 1202.

77. *Id. See also* Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., et al., 467 U.S. 837, 842-43 (1984).

When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If, the intent of Congress is clear, that is the end of the matter. . . . If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute. . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Id.

definitions had fallen within a reasonable construction the ambiguity would be admissible; however, the Tenth Circuit found that "deference [to the FCC] is inappropriate" because the definitions are "[w]ithout a 'limiting standard, rationally related to the goals of the Act.'"[78] The court remanded the case, requiring the FCC to more precisely define "reasonably comparable" and "sufficient" in a way that is "reasonably related to the statutory principles."[79]

2. Justifying the 135% Benchmark

In examining whether the FCC sufficiently justified its 135% benchmark as a method of attaining reasonable comparability and sufficient funding for universal service, the court examined the FCC's justifications for choosing that benchmark, and other documents submitted by related parties.[80] Similar to the court's discussion of the definitions, the Tenth Circuit, in its discussion of the 135% benchmark, tried to give deference to the FCC's expertise as an administrative agency stating, "[i]f, however, the FCC's 135% benchmark actually produced urban and rural rates that were reasonably comparable, however those terms are defined, we would likely uphold the mechanism."[81] The FCC attempted to justify its benchmark by discussing the range of percentages from which it had chosen, and that it had chosen the midpoint between appropriate guidelines.[82]

The Tenth Circuit recognized that any determination by the FCC of a benchmark is likely to be at least partially arbitrary, but strongly denounced the FCC for failing to uphold its duty as an expert agency:

> We find these justifications insufficient to support the benchmark. The FCC is not a mediator whose job is to pick the "midpoint" of a range or to come to a "reasonable compromise" among competing positions. As an expert agency, its job is to make rational and informed decisions on the record before it in order to achieve the prin-

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78. *Qwest*, 258 F.3d at 1202 (internal cites omitted). "[T]he [1996] Act requires the FCC to apply *some* limiting standard, rationally related to the goals of the Act." AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366, 388 (1999).

79. *Qwest*, 258 F.3d at 1202.

80. *See id.* at 1202.

81. *Id.* The court reached this argument after determining that instead of actually coming up with a comparison of rural and urban rates, the FCC substituted a comparison of nationwide and statewide averages, even though such empirical data had been presented to it by concerned parties. *Id.*

82. *See id.*

The FCC gave four justifications for setting the benchmark at 135%: (1) It "falls within the range recommended by the Joint Board," 115%-150%; (2) such a level is "consistent with the precedent of the existing support mechanism," which uses a range of 115-160%; (3) that level is "near the midpoint" of the current range; and (4) it is 'reasonable compromise of commenters' proposals.

See also Ninth Order, *supra* note 55, at P 55.

ciples set by Congress. Merely identifying some range and then picking a compromise figure is not rational decision-making.[83]

The court's decision to remand the case for more precise definition, and a better explanation of the benchmark, had ramifications on the rest of the case.[84]

C. *Sufficiency of Funding for Universal Service*

Because the Tenth Circuit determined that the FCC failed to adequately define "reasonably comparable" and "sufficient," and that the FCC did not adequately explain its benchmark, the court concluded that it was unable to "review the rationality of the Ninth Order."[85] The court also stated that, "[b]ecause we remand for further consideration, we need not address at this stage Petitioners' contention that the actual level of funding is too low to be 'sufficient' to support universal service."[86]

D. *Challenges to the Tenth Order*

Qwest's main challenge to the Tenth Order focused on the FCC's choice of computer language used in the computation of cost models.[87] Qwest also challenged several of the subroutines chosen for use by the FCC.[88] Subroutines are a sequence of programming instructions used internally by the computer to perform specific tasks – in this case generating cost models. The Tenth Circuit deferred to the FCC's expertise on the technical aspects of computer programming stating, "[a]bsent the most unusual circumstances, the FCC is far better situated than is this court to decide basic technical specifications. . . . While Qwest takes issue with the choice of Turbo Pascal, it has not convinced us that this choice was so manifestly unreasonable as to be unlawful."[89] Ultimately, in order to find in Qwest's favor on this point, Qwest would have to produce evidence that "the model overall produces such inaccurate results that it cannot form the basis of rational decision-making."[90] The telecommunications corporations use the computer programs at issue to determine rates and calculate costs of providing universal service in rural and high cost areas.[91]

The Tenth Circuit's decision in this case revolved around balancing the FCC's expertise with the arbitrary nature of administrative decision-making. In a well-drawn opinion, the court gave appropriate deference to

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83. *Qwest*, 258 F.3d at 1202.
84. *See id.* at 1204.
85. *Id.* at 1205.
86. *Id.*
87. *Id.*
88. Tenth Order, *supra* note 55, at P 17.
89. *Qwest*, 258 F.3d at 1206.
90. *Id.*
91. *See id.*

the agency's expertise, while still requiring the FCC's decisions to fall within the rational reasoning test.[92] In the final result, the court reversed and remanded the Ninth Order for further proceedings, and affirmed the Tenth Order.[93] Thus, issues of sufficiency of funding remain open at this point. In *Alenco v. FCC*,[94] the Fifth Circuit also examined the issue of sufficiency.[95]

III. *ALENCO COMMUNICATIONS, INC. V. FEDERAL COMMUNICATIONS COMMISSION*[96]

Similar to the challenges raised in *Qwest*, the Petitioners in *Alenco* challenged the definition and explanation of "sufficient."[97] However, these Petitioners, local telephone service providers, challenged the sufficiency requirement on different grounds.[98] Petitioners claim that the FCC orders[99] are, "inconsistent with the statutory requirements of the [1996] Act; arbitrary and capricious in violation of the Administrative Procedure Act; violative of the Takings Clause; and in noncompliance with the Regulatory Flexibility Act."[100]

The FCC's universal service provisions require funding,[101] therefore:

> [t]o meet its historic mandate of universal service, the FCC has established a universal service fund to subsidize high-cost rural LEC's to reduce the rates they must charge to their customers. A LEC is eligible for a subsidy if its operating expenses—its 'loop costs'—are fifteen percent or more above the national average.[102]

The administration of this universal service fund was at issue in this case, especially changes in the administrative procedures that limit subsidies and make funding portable, as well as the use of inflation indices instead of industry averages to adjust the benchmark.[103] Generally the

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92. *See* Qwest Corp. v. FCC, 259 F.3d 1191 (2001).

93. *See id.* at 1207.

94. 201 F.3d 608 (2000).

95. *See* Alenco Communications, Inc. v. FCC, 201 F.3d 608 (2000).

96. 201 F.3d 608 (2000).

97. *See Alenco*, 201 F.3d at 614.

98. *See id.*

99. Report and Order in CC Docket No. 96-45, 12 F.C.C. Rcd 8776 (1997). Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997).

100. *Id.* (internal cites omitted).

101. 47 U.S.C. §254 (c)(3)(d)-(e).

102. *Alenco*, 201 F.3d at 617.

103. *See id.* Petitioners' argue that:

First, they oppose the continued imposition of a cap on growth in fund expenditures, which cap limits total available support to the previous year's level, adjusted for growth in the number of working loops. *Second*, they object to a new cap on the amount of corporate operations expenses that can be included in the loop cost calculation. . . . *Third*, the Order makes the subsidy portable, following the customer who switches service from one LEC to another. Petitioners claim that portability violates the principle of predictable funding. *Fourth*, beginning January 1, 2000, the Order imposes an annual inflation index on the loop cost eligibility benchmark . . . replacing the

Petitioners' arguments against implementation of these standards and the benchmark fall into two categories: (1) a challenge to the FCC's expertise on the subject; and (2) the failure of the FCC Order to provide sufficient funding under the provisions of the 1996 Act.[104] Each of these challenges is examined separately below.

A. *Expertise of the FCC*

In order to determine whether an expert agency's methodology falls within its areas of expertise and discretion, the courts must decide whether Congress made intentional precise statements on the question at issue.[105] If Congress did not, then the court may only reverse the agency's decision if the construction falls outside of a "permissible construction" of the statute, or if it is "arbitrary and capricious."[106] Under a final standard of review, the court must decide if the agency's decision was reasonable and if there is a "rational relationship between the facts found and the choice made."[107] If the decision is within these specific confines, then the court must defer to the agency's expert opinion on the matter presented.[108]

According to the Fifth Circuit, "[w]e note that Congress obviously intended to rely primarily on FCC discretion, and not vigorous judicial review, to ensure satisfaction of the Act's dual mandates."[109] In an earlier decision, the court explained its position on universal service regulation further:

> To be sure, the FCC's reason for adopting this methodology is not just to preserve universal service. Rather, it is also trying to encourage local competition by setting the cost models at the "most efficient" level so that carriers will have the incentive to improve operations. As long as it can reasonably argue that the methodology will

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former approach of recalculating a fresh benchmark periodically, based on updated estimates of industry averages. *Finally*, the Order disallows additional service support when a rural LEC acquires and upgrades another exchange, despite petitioners' claim that such mergers are efficient and should be encouraged.

Id. (italics in original; internal cites omitted).

104. *See id.* at 620.

105. *See Chevron*, 467 U.S. at 842-44.

106. *Alenco*, 201 F.3d at 620.

107. *Id.*

108. *See id.*

109. *Id.*

Universal service is an evolving level of telecommunications services that the Commission shall establish periodically under this section, taking into account advances in telecommunications and information technologies and services. The Joint Board in recommending, and the Commission in establishing, the definition of the services that are supported by Federal universal service support mechanisms shall consider the extent to which such telecommunications services—

are essential to education, public health, or public safety; have, through the operation of market choices by customers, been subscribed to by a substantial majority of residential customers;

are being deployed in public telecommunications networks by telecommunications carriers; and

are consistent with the public interest, convenience, and necessity. 47 U.S.C. § 254(c)(1).

> provide sufficient support for universal service, however, it is free, under the deference we afford it under *Chevron* step-two, to adopt a methodology that serves its other goal of encouraging local competition.[110]

The *Chevron* test requires that when a court reviews the construction of an agency action it must first determine "whether Congress has directly spoken" on the issue,

> [i]f, however the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.[111]

The court found that the petitioners failed to meet the "high evidentiary standard" necessary to show that the FCC's methodology was "arbitrary and capricious."[112]

B. *Petitioners Challenge to Sufficiency*

The Fifth Circuit also examined the Petitioners' challenge to sufficiency and concluded that the Petitioners were mistaken in their interpretation of the sufficiency requirements because they failed to recognize that universal service and local competition are dual goals, not mutually exclusive of one another.[113] Petitioners' arguments focused on the sufficiency of funding for companies providing universal service. However, the court first examined the provisions of the Act itself, stating:

> The Act only promises universal service, and that is a goal that requires sufficient funding of *customers*, not *providers*. So long as there is sufficient and competitively neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well.[114]

The court then began its analysis of the Petitioners' argument regarding the specific funding provisions.[115] The Fifth Circuit concluded

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110. Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 410 (5th Cir. 1999).

111. *Chevron*, 467 U.S. at 843.

112. 5 U.S.C. § 706(2)(A).

113. *See Alenco*, 201 F.3d at 620. "The Act does *not* guarantee all local telephone service providers a sufficient return on investment; quite the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete." *Id.*

114. *Id.*

115. *See id.*

[E]xcessive funding may itself violate the sufficiency requirements of the Act. Because universal service is funded by a general pool subsidized by all telecommunications providers—and thus

that funding caps have been established by the FCC to promote efficiency and to "combat wasteful spending," and as such are not violative of the agency's discretion.[116] The Court stated, "The proposed 115% rule is thus a wholly reasonable exercise of the Commission's legitimate power to combat abusive spending; absent the proposed rule, the regulations provide no incentive to keep costs down."[117]

Petitioners argued that portability of funding, allowing the subsidies to move with the customer when they changed telecommunications providers, violated the "statutory principle of predictability."[118] The Court rejected this argument because predictability is only a principle in the Act, not a specific statutory command. Thus it is within the FCC's expert discretion to "ignore" predictability in implementing the 1996 Act's universal service and sufficiency provisions.[119] Additionally, the Court recognized that sufficiency of funding can be attained regardless of which carrier is serving the customer's needs, thus the Petitioners were not asking for predictability of funding, but trying to exempt themselves from market competition—the second prong of the Act's goals.[120]

The court rejected the Petitioners' final two arguments—regarding changing the calculation of the benchmark by using the inflation and failure to continue funding for telecommunications companies that merge—because both of these areas are within the FCC's discretion as measures instituted to assist in the transition from one funding model to another.[121] The Fifth Circuit rejected the petition for review, as a whole, because:

> . . . [the petitioners] fundamentally misunderstand a primary purpose of the Communications Act—to herald and realize a new era of competition in the market for local telephone service while continuing to pursue the goal of universal service. They therefore confuse the requirement of sufficient support for universal service within a market in which telephone service providers compete for customers . . . with a guarantee of economic success for all providers, a guarantee that conflicts with competition.[122]

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indirectly by the customers—excess subsidization in some cases may detract from universal service by causing rates unnecessarily to rise, thereby pricing some consumers out of the market.
Id.

116. *Alenco*, 201 F.3d at 620.

117. Order, *supra* note 100, PP 283-85, 307.

118. 47 U.S.C. § 254(b)(5).

119. *Texas Office of Pub. Util. Counsel*, 183 F.3d at 411-12.

120. *See Alenco*, 201 F.3d at 622. "The methodology governing subsidy disbursements is plainly stated and made available to LEC's. What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act." *Id.*

121. *See id.* at 622.

122. *Id.* at 625.

In sum, the Fifth Circuit rejected the Petitioners' claims because all of the FCC Orders they challenged fell squarely within the discretion of the FCC as an administrative agency.

IV. CRITICAL EVALUATION

Since 1996, the universal service funding mechanisms contained in the Telecommunications Act,[123] and a variety of FCC orders subsequent to the 1996 Act, have been subject to a variety of criticisms.[124] Most of the criticisms can be categorized as either dealing with the adequacy of funding, or mechanisms for establishing who gets funding, how much funding they receive, and how funding will be distributed.[125]

Thus far it seems as if the courts have been consistent in their rulings, and rightly so. It is true that the 1996 Act advocates the opening of local telephony markets to competition.[126] However, the 1996 Act does not leave telecommunications completely deregulated.[127] To do so would leave a vacuum and cause confusion for both the consumers and the telecommunications corporations because no one would have control over the implementation of the universal service provision of the 1996 Act. The FCC, in the 1996 Act, recognized and responded to 60 years of technological innovation, and provided a mechanism for continuing to monitor and respond to emerging technologies in the telecommunications field.[128] Congress granted universal service an elevated position in the 1996 Act, and by doing so, made great strides to act in the public interest, convenience, and necessity, especially for those in rural, high-cost areas.[129]

The funding provisions contained in the 1996 Act are not legislative perfection. However, both the Tenth Circuit and the Fifth Circuit examined sufficiency requirements, and recognized that the court is not the appropriate body to determine funding provisions for an administrative agency's regulation.[130] The FCC holds an interesting position in the universal service funding debate, in that, the FCC proposed the regulation, wrote the funding provisions, and yet advocates at least partial deregulation of the telecommunications industry.[131] If that seems conflicting, it is.

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123. 47 U.S.C. § 254.

124. *See* Myerson, *supra* note 11. *See also* Krattenmaker, *supra* note 15; and Campbell, *supra* note 16.

125. *See* Dawson, *supra* note 38. *See also* Lapointe, *supra* note 42; Robinson, *supra* note 15; and Myerson, *supra* note 11.

126. 47 U.S.C. § 254.

127. *See id.*

128. *See id.*

129. *See* 47 U.S.C. § 254.

130. *See* Qwest Corp. v. FCC, 258 F.3d 1191 (2001); Alenco Communications, Inc, v. FCC, 201 F.3d 620 (2000).

131. 47 U.S.C. §254. The 1996 Telecommunications Act was the product of FCC proposals, "An Act . . . to promote competition and reduce regulation in order to secure lower prices and higher

Thus, not only was it prudent of the courts to defer to the FCC's expertise in this area, it was absolutely necessary.

This is not to say that the FCC deserves, or that the courts provided absolute discretion in the application of its provisions. The Tenth Circuit left open the issue of whether the funding mechanisms provided sufficient funding for the promulgation of universal service across the United States for two reasons: (1) the FCC failed to adequately define its terms; and (2) it failed to justify its choice of benchmark values.[132] The court gave the FCC the opportunity to use its expertise to redefine its terms before the court stepped in and usurped the FCC's authority.[133] This decision was appropriate because it gave all parties involved the opportunity to continue discussing these issues. Since universal service is an evolving concept, it would be impractical for the courts to close the revolving door to the courthouse, foreclosing the opportunity for parties to obtain judicial review of these issues.

Similarly, the Fifth Circuit, in *Alenco,*[134] completely sidestepped the issue of whether funding for universal service provisions was adequate[135] by placing the burden on the FCC as an expert agency and deferring to its expertise.[136] The choice of benchmarks and calculation of who gets what funding, was justified based on the FCC's discretion, and the court chose not to interfere with the discretionary function of an administrative agency.[137] Sidestepping of the issue, however, does not constitute a flaw in judicial reasoning. The court essentially acknowledged its own limitations in making decisions regarding funding.[138] The court's function is only to oversee the agency to ensure that it does not exceed the authority granted to it by Congress.[139] It is not the court's job to interfere with the inner workings of the FCC or to make factual determinations that will influence the agency's ability to perform its duties.[140]

The sidestepping by the court of key issues in determining sufficiency appropriately leaves the determination of discretionary issues in the hands of the FCC, while retaining the court's ability to resolve these

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quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." Subsequent clarifications and explanations came in the form of FCC orders dealing with administrative details, in this case universal service funding provisions. *See also* Order, *supra* note 99, PP 283-85, 307; and Report and Order in CC Docket No. 96-45, 12 FCC Rcd 8776 (1997). Report and Order in CC Docket Nos. 96-45, 96-262, 94-1, 91-213, 95-72, 13 FCC Rcd 5318 (1997).

132. *See Qwest*, 258 F.3d at 1201-02.

133. *See id.* at 1202.

134. 201 F.3d 620 (2000).

135. *See Alenco*, 201 F.3d at 619-20.

136. *See id.*

137. *See id.* at 620-24.

138. *See id.*

139. *See id.*

140. *See id.*

issues judicially issues if the FCC fails to do so, or oversteps its discretionary boundaries.

V. WHAT COMES NEXT? UNRAISED AND UNRESOLVED FUNDING ISSUES

One issue that was not raised in either *Qwest* or *Alenco* is how technological innovations will effect the universal service provisions. One commentator believes that the new subsidy system, based on geographic location, will create a gap in universal service in direct opposition to what the 1996 Act intended:

> Technological advancements in the telecommunications industry continually challenge universal service and efforts to ensure that all Americans have access to comparable services at competitive prices. Implementing new technology generally reduces costs and provides higher-quality service for customers because updates make systems more efficient; consequently, carriers may pass these savings on to consumers. Technological advances executed in low-cost areas further polarize consumers' telecommunications access, as urban areas receive improved service at lower rates. Meanwhile, service in rural and insular areas deteriorates, creating a situation where the rich get richer, and the poor get poorer.[141]

The next challenge to the funding provisions for universal service will likely examine the equitable distribution of funds. Rather than simply looking at the sufficiency of funds, the courts will next have to look at the manner of distribution. Questions remain as to whether the FCC's funding criteria adequately assign the monies collected from LECs, and whether federal funding will reach the areas most in need of universal service subsidies. This is not a static examination. As new technology emerges, the FCC, or the courts if the FCC fails in its duty to do so, must re-evaluate universal service funding and distribution mechanisms to confirm that the goals of "reasonably comparable service" at "reasonably comparable rates" in "rural, insular, and high cost areas" are being attained, or at least attempted.[142]

In sum, the 1996 Telecommunications Act showcases the FCC's commitment to and Congressional support of universal service.[143] It is the first legislation in the history of telecommunications to definitively express this commitment and as such is a step in the right direction. The FCC has embarked on a journey into uncharted territory with this portion of the 1996 Act, therefore it is under enormous pressure to make sure that all of the provisions work as expected. Invariably, there will be litigation regarding the implementation of these regulations. Therefore it is

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141. Dawson, *supra* note 38, at 123.
142. 47 U.S.C. § 254(b)(3).
143. *See id.*

important for all parties involved i.e., litigators, telecommunications companies, the FCC, and consumers, to remember the spirit of the regulation, and to be vigilant in its administration and adjudication.

It is also important to recognize that conflict between competitors is a necessary component of integrating this legislation into the telecommunications environment. However, this conflict should be channeled into appropriate arenas, so as to further the goals of the 1996 Act. First, limitations on universal service must be recognized. It would be confusing and unrealistic to believe that in a market economy 100% of citizens will ever have universal service. Thus, the FCC, taking into account the research and recommendations of consumer groups, public interest groups, and telecommunications companies, should promulgate realistic goals. These goals should specifically target groups and facilities that have been neglected in the past, while recognizing that doing so will encumber established telecommunications companies. Secondly, the FCC should take heed of the courts' recommendations, in these cases, and provide inducements to the states and incumbent telecommunications companies for promoting universal service in their respective areas. Finally, the courts should continue examining each case and promote universal service by deferring as much as possible to the FCC's discretion.

CONCLUSION

The 1996 Telecommunications Act opened the door for scholars, attorneys, telecommunications companies, and consumers to grapple with the conflicts arising from the emergence of new technology.[144] The cases and articles discussed throughout this paper are the keys to understanding and implementing the universal service funding provisions contained in the 1996 Act.[145] Whether the goal of universal service will ever be achieved remains to be seen. However, the 1996 Act elevated the status of universal service to a level where it can no longer be ignored.

Jennifer Hargroves

144. 47 U.S.C. § 254.
145. *See id.*

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FROM THE EDITOR

As you have most likely noticed by now, this year's Symposium issue has quite an exciting, new look. We decided to revive our "magazine" format - something first tried approximately thirty years ago. Our goal with this issue is to present interesting and informative articles, in a reader-friendly format, on a timely subject: privacy. In the wake of the largest terrorist attack on American soil, and with war looming, privacy concerns abound.

We chose writers from diverse backgrounds: attorneys, a bookstore owner, a privacy activist, and a former governor, just to name a few. You may not agree with everything they have to say, but we think you will find their articles thought provoking and timely. I want to thank each author for writing a superb article - and also thank each author for their patience. The magazine issue took a little longer than our usual law review issues, but we think you will agree that it is well worth the wait.

We hope you enjoy this new format and the articles within.

Sincerely,

Tanya L. Thiessen
Symposium Editor

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