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Governmental Drug Testing Programs: Legal and Constitutional Developments

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Summary

Constitutional law on the subject of governmentally mandated drug-testing is primarily an outgrowth of the Fourth Amendment prohibition on unreasonable searches and seizures. Judicial exceptions to traditional requirements of a warrant and individualized suspicion for "administrative" searches have been extended to random drug-testing of public employees, school students, and most recently, state welfare recipients, where the government is able to demonstrate a "special need" beyond the demands of ordinary law enforcement. In the public employment setting, however, special needs analysis has largely been confined to relatively narrow circumstances directly implicating "compelling" public safety, law enforcement, or national security interests of the government. More generalized governmental concerns for the "integrity" or efficient operation of the public workplace have usually not been deemed sufficient to justify interference with the "reasonable expectation of privacy" of workers or other individuals to be tested.

The constitutional parameters of "special needs" analysis is outlined in a series of Supreme Court rulings. In 1989, the U.S. Supreme Court upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents, *Skinner v. Railway Labor Executives Ass'n*, and of U.S. Customs employees seeking promotion to certain "sensitive" jobs involving firearms use, drug interdiction duties, or access to classified information, *National Treasury Employee's Union v. Von Raab*. These decisions established that "compelling" governmental interests in public safety or national security may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or workplace scrutiny to which they are otherwise subject. In *Veronia School District v. Acton*, the Supreme Court first approved of random drug testing procedures – for high school student athletes rather than public employees – a holding that it recently extended to permit random drug testing of students participating in non-athletic extracurricular activities as well. However, the Court distinguished earlier rulings when, in *Chandler v. Miller*, it voided a Georgia law requiring drug testing of candidates for state office because no "special need" substantial enough to warrant suspicionless searches was shown.

Generally, the precedents suggest that substantial constitutional difficulties probably confront any broad-based testing program that is not limited to specific occupational categories or, in other regulatory contexts, to persons for whom the government is able to demonstrate some public safety, national security, or other "compelling" need to test. For this reason, proposals for universal testing as a requirement for drivers' license applicants, welfare recipients, or other beneficiaries of state or federal programs could face formidable constitutional hurdles. The legality of mandatory testing in these other regulatory contexts, however, may depend upon the range of governmental interests that the Court ultimately declares to be "compelling" for Fourth Amendment purposes, and how close the required "nexus" to such interests must be to justify random testing of specific individuals or groups.

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One outgrowth of the nation's "war on drugs" has been a proliferation of governmental initiatives – federal, state, and local - to detect and deter illegal drug use in the workplace, the schools, and by recipients of social welfare and other public benefits. Since the late 1980's, the federal government has conducted "random" drug tests of executive branch employees in "sensitive" job positions, and has implemented similar procedures for public and private employees in transportation and other safety or security-related industries. Aiding these efforts are state and local governmental testing programs for police officers, firefighters, prison guards, teachers, and other personnel with public safety responsibilities.

Beyond employment, states and localities have required other individuals to submit to drug testing, such as welfare recipients and students in the public schools. The Louisiana legislature, for example, has declared a "state of emergency" to exist in that state as the result of the "spiraling increases of abuse of illegal substances by its citizens," and it further found that "such illegal drug abuse presents a clear and present danger to the health, welfare and security of the state, its citizens and government."[1] Accordingly, it directed the Commission on Administration to establish a random drug testing program for anyone receiving funds or "anything of economic value" from the state, state contracts and loans included. And a Michigan program for "suspicionless" drug testing of welfare recipients recently obtained federal circuit court approval.[2] Conceivably, similar requirements could be imposed as a condition to any governmental benefit – to renew a driver's licence, perhaps, or to obtain a hunting permit - but not without raising substantial constitutional question.

Constitutional challenges to "suspicionless" or random governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against "unreasonable" searches and seizures. Generally speaking, government is required by the Fourth Amendment to obtain warrants based on probable cause in order to effectuate constitutional searches and seizure. An exception to ordinary warrant requirements has gradually evolved, however, for cases where a "special need" of the government, not related to criminal law enforcement, is found by the courts to outweigh any "diminished expectation" of privacy invaded by the search.

In 1989, the U.S. Supreme Court upheld post-accident drug and alcohol testing of railway employees after major train accidents or incidents, *Skinner v. Railway*

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[1]La. R.S. 49: 1021.

[2]Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002).

Labor Executives Ass'n,[3] and of U.S. Customs employees seeking promotion to certain "sensitive" jobs involving firearms use, drug interdiction duties, or access to classified information, *National Treasury Employee's Union v. Von Raab*.[4] These rulings make clear that "compelling" governmental interests in public safety or national security may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or workplace scrutiny to which they are otherwise subject. In *Veronia School District v. Acton*,[5] the Supreme Court first approved of random drug testing procedures – for high school student athletes rather than public employees – after it had earlier left standing lower court decisions allowing for suspicionless testing of police officers,[6] transit employees,[7] nuclear power plant employees,[8] Justice Department lawyers who hold top-secret security clearances,[9] and Army civilian drug counselors.[10] *Veronia* was recently extended by the Court to permit random drug testing of students participating in non-athletic extracurricular activities as well.[11] However, the Court distinguished earlier rulings when, in *Chandler v. Miller*,[12] it voided a Georgia law requiring drug testing of candidates for state office because no "special need" substantial enough to warrant suspicionless searches was shown.

There are no federal constitutional limits on the ability of private employers or other entities to conduct what would otherwise be an unreasonable drug test. The Fourth Amendment and other constitutional safeguards apply only to governmental action – federal, state, or local – or private conduct undertaken at the direction of the government. Presently, however, thirty-two states have enacted employment drug or alcohol testing laws prescribing under what conditions and circumstances employees in the private workplace may be tested. These range from "protective laws" banning all random or blanket testing to legislation encouraging employers to test. In California, for example, the state constitution specifies a right to privacy that

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[3]489 U.S. 602 (1989).

[4]489 U.S. 656 (1989).

[5]520 U.S. 305 (1995).

[6]Policemen's Benevolent Association v. Township of Washington, 850 F.2d 133, cert. denied, 490 U.S. 1004 (1989).

[7]United Transportation Union v. Southeastern Pennsylvania Transportation Authority (SEPTA), 863 F.2d 1110 (3d Cir.), cert. denied, 109 S.Ct. 3209 (1989)(approved random urinalysis testing of 2,600 transit "operating engineers" in "safety sensitive" positions over a one-year period, and breathalyzer tests for 5,400 such workers annually).

[8]Alverado v. Washington Public Power Supply Systems and Bechtel Construction, Inc., 111 Wash.2d 424, 759 P.2d 427 (Wash. 1988), cert. denied, 490 U.S. 1004 (1989).

[9]Bell v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), cert. denied 493 U.S. 1056 (1990).

[10]National Federation of Federal Employees v. Cheney, 884 F.2d 603 (D.C. Cir. 1989), cert. denied, 496 U.S. 936 (1990).

[11]Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 122 S.Ct. 2559 (2002).

[12]520 U.S.305 (1997).

applies not only to governmental action, but to private conduct as well. Iowa,[13] Vermont[14] and Rhode Island[15] prohibit all testing without probable cause or reasonable suspicion, while Oklahoma,[16] Minnesota,[17] Maine,[18] and Connecticut[19] permit random testing only of employees in "safety-sensitive" positions. The laws in these states also mandate confirmatory testing, use of certified laboratories, confidentiality of test results and other procedural protections. A few states give workers' compensation premium discounts to employers who adopt drug and alcohol testing programs.[20] In some jurisdictions, an employee may be discharged for a first-time positive test result, while others require the employee be provided the opportunity for treatment first. Even in states with no drug or alcohol testing law, however, collective bargaining agreements may restrict employers' testing options.

After a brief review of federal drug-free workplace programs presently in effect, this report examines the current state of constitutional law on the subject of governmentally mandated drug-testing in employment, for social welfare eligibility, and of students in the public schools.

Federally Mandated Workplace Drug-Testing Programs

The Federal Government by statute or executive order has adopted drug-free workplace requirements applicable to federal executive branch agencies, employment in various federally regulated industries, federal contractors and recipients of federal financial assistance. E.O. 12564, issued on September 15, 1986, requires programs to be established by each department or agency within the executive branch to test for illegal drug use by federal employees in sensitive positions and for voluntary employee drug-testing.[21] A "sensitive" position is one that an agency head designates special sensitive, critical sensitive, or noncritical-sensitive under the Federal Personnel Manual or sensitive under the executive order. It also includes an employee who has been or may be granted access to classified information, individuals serving under Presidential appointments, law enforcement officers, and other positions that the agency head determines "involve law enforcement, national security, the protection of life and property, public health or safety, or other functions

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[13]Iowa Code § 730.5 et seq.

[14]Vt. Stat. Ann. 21 § 511 et seq.

[15]R.I. Gen. Laws §§ 28-6.5-1 and 28-6.5-2.

[16]Okla. Stat. § 551.

[17]Minn. Stat. §§ 181.951 et seq.

[18]Me. Rev. Stat. 26 §§ 681 et seq.

[19]Conn. Gen Stat. §§ 31-51 et seq.

[20]E.g. Ala. Code §§ 25-5-330 et seq.; S.C. Code §§ 44107-10 et seq.; Tenn. Code Ann. §§ 50-9-103 et seq.; and Wash. Rev. Code §§ 49.82.010 et seq.

[21]51 Fed. Reg. 32889 (Sept. 17, 1986).

requiring a high degree of trust or confidence." In addition, an executive branch employee may be tested based on "reasonable suspicion" of illegal drug use, during an authorized investigation of an accident or unsafe practice, or to follow-up counseling or rehabilitation for illegal drug use through an employee assistance program. Applicants for employment may also be tested. Technical standards to govern specimen collection, scientific analysis, laboratory certification, medical review of positive test results, and access to records are set forth in guidelines promulgated by the Department of Health and Human Services.[22]

Private employers obtaining federal contracts or grants must also take specified steps to maintain a drug-free workplace. The Drug-Free Workplace Act of 1988[23] covers all entities receiving contract awards of $25,000 or more, all contracts awarded to individuals, and all recipients of federal grants, regardless of grant amount. Specifically, contractors and grantees must certify to the contracting or grantmaking agency that they will provide a drug-free workplace by publishing a statement prohibiting unlawful manufacture, distribution, possession, or use of a controlled substance in the workplace, and specifying actions that will be taken against offending employees. Also mandated are drug-free awareness programs to inform employees of the dangers of workplace drug abuse and of available drug counseling, rehabilitation, and employee assistance programs. Employees are to be required, as a condition of employment, to report any criminal conviction for drug-related activity in the workplace and the employer, in turn, must notify the contracting or granting agency and impose appropriate sanctions upon convicted employees. Federal contracts or grants could be terminated or suspended in cases where the employer fails to make a "good faith" effort to maintain a drug-free workplace. The Act, however, does not mandate, or even mention, testing employees for illegal drug use.[24]

The Drug-Free Workplace Act of 1998 is the small business counterpart to the 1988 Act described above. The 1998 Act established a demonstration project of grants and financial incentives to encourage development of drug-free workplace programs small business employers. It augmented the earlier law by requiring such programs to include a written policy prohibiting certain substances in the workplace, two hours of substance abuse training for employees, additional training for employees who are parents, employee assistance programs, and employee drug testing. The 1998 Act mandates that small business employers administer drug tests through a laboratory approved by HHS, and that positive results be confirmed and reviewed by a medical review officer. Because the 1988 Act makes no explicit reference to drug testing, the new law marks the first time that Congress has authorized federal funding for drug testing programs in private workplaces.

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[22]See CRS Report 98-681 GOV, Drug Testing in the Federal Workforce: Current Status (updated regularly).

[23]41 U.S.C. §§701 *et seq.*

[24]More detailed information on how federal contractors and grantees must comply with the provisions of the Drug-free Workplace Act may be found in implementing rules issued by the Office of Management and Budget at 54 Fed. Reg. 4946 (Jan. 31, 1989).

While the Department of Defense is obligated to implement the provisions of the 1988 Drug-Free Workplace Act, the agency has special requirements concerning certain contracts issued after October 31, 1988, as implemented through its Federal Acquisition Regulations Supplement. All contracts involving access to classified information, and any other domestic contract the agency's contracting officer determines appropriate for reasons of national security or health and safety must include a provision obligating the contractor to establish a program for testing employees in "sensitive positions" for the use of illegal drugs as part of the contractor's duty to maintain a drug-free workplace. The extent of, and criteria for, such testing are to be determined by the contractor, based on the nature of the work being performed, the employee's duties, the efficient use of contractor resources, and the risks to health, safety, or national security that could result from poor employee performance.

The Civil Space Employee Testing Act of 1991[25] requires the establishment of a program to test for use of alcohol and controlled substances by employees of the National Aeronautics and Space Administration (NASA) whose duties include responsibility for safety-sensitive, security, or national security functions. NASA also must issue regulations which require the establishment of a similar testing program by NASA contractors for alcohol and controlled substance use by their employees having such responsibilities. Both of these required testing programs must provide for pre-employment, reasonable suspicion, random, and post-accident testing, and they may also include periodic recurring testing if warranted. Furthermore, the testing procedures must incorporate the Department of HHS mandatory testing and recordkeeping procedures applicable to federal workplace drug-testing programs under E.O. 12564.

Mandatory drug and alcohol testing regulations apply to transportation workers whose jobs have safety and security implications. The Omnibus Transportation Employee Testing Act of 1991[26] requires substance abuse testing, both for alcohol and unlawful drugs, by numerous employers under the jurisdiction of the Department of Transportation. Covered employees in safety sensitive positions generally include commercial truckers, air carrier flight and support personnel, railroad employees, and individuals employed by commercial marine vessels, mass transit systems, and pipeline facilities transporting hazardous liquids. Each DOT operating agency maintains its own list of positions considered safety-sensitive. Five types of drug-testing are authorized by the Act: preemployment, reasonable suspicion, random, post-accident, and periodic recurring. Employees who test positive for drug or alcohol use may be subject to disqualification for dismissal from employment. As part of their substance abuse testing program, employers must also establish drug treatment and prevention programs for their employees.

Early in the 106th Congress, a clause was added to Rule I, Section 13 of the House Rules making the Speaker of the House, in consultation with the minority leader, responsible for developing a drug testing program that follows the executive branch model. Specifically, the program "may provide" for the testing of any

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[25]42 U.S.C. § 2473c.

[26]P.L. 102-143, Title V, 105 Stat. 952 (1991).

member, officer, or employee of the House, and "otherwise shall be comparable in scope to the system for drug testing in the executive branch pursuant to Executive Order 12564." On February 3, 1999, the Committee on House Administration approved resolution 106-1-2 permitting Members and committees at their own discretion to implement drug testing programs for themselves and their staffs. House officers (the chief administrative officer, clerk of the House, sergeant at arms) and inspector general were directed to develop a drug testing plan for employees under their jurisdiction.[27]

Personal Privacy versus the Public Interest

The constitutional focus of governmental drug-testing litigation – whether in the employment, public education, or other administrative context – has been the Fourth Amendment, which protects the "right of the people" to be free from "unreasonable searches and seizures" by the government. This constitutional stricture applies to all governmental action – federal, state, and local – by its own force or through the Due Process Clause of the Fourteenth Amendment.[28] Thus, while private actors are not directly affected, the actions of government as employer are subject to Fourth Amendment scrutiny.[29] Governmental conduct will generally be found to constitute a "search" for Fourth Amendment purposes where it infringes "an expectation of privacy that society is prepared to consider reasonable."[30] If a search or seizure has occurred, the court must then determine whether the government's action was reasonable under the circumstances.

Historically, the Court has applied various constitutional tests of reasonableness depending on the nature of the search and the underlying governmental purpose. The most demanding test is reserved for searches prompted by the normal needs of criminal law enforcement. Based on the literal text of the Fourth Amendment, and to safeguard individual interests in personal privacy, probable cause supported by a warrant is the usual constitutional prerequisite for a criminal search.[31] Even in circumstances where warrantless searches are permitted, they ordinarily "must be based on 'probable cause' to believe that a violation of the law has occurred."[32] Nevertheless, the Supreme Court has determined that neither a warrant nor probable cause are invariably required and has approved of, or let stand, "suspicionless"

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[27]See RS20689, Drug Testing in the House of Representatives: Background, Legislation and Policy, (CRS Rept updated regularly).

[28]Mapp v. Ohio, 367 U.S. 643 (1961).

[29]O'Connor v. Ortega, 480 U.S. 709 (1987).

[30]United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[31]"[O]ne governing principle, justified by history and by current experience, has been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

[32]New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

searches--sobriety checkpoints,[33] border searches,[34] polygraph examinations,[35] metal detector screening[36]--in some circumstances.

The Fourth Amendment protects against both civil and criminal investigatory processes, though the need for protection against government intrusion decreases if the investigation is entirely unrelated to criminal law enforcement.[37] In such circumstances, a rule less restrictive on the government, based on "reasonable suspicion" of a civil or regulatory law violation, has become the constitutional norm. However, an exception from even this less demanding standard has been recognized for administrative searches by the government to enforce compliance with a regulatory scheme by persons engaged in a "highly regulated industry" on the theory that the very existence of the regulatory program diminishes reasonable expectations of privacy of those involved in the industry.[38] In such situations, a Fourth Amendment standard based on a balancing test has been crafted by the Court. This "special needs" approach appears to confer optimal power on the government to search where "compelling" reason exists and correspondingly less protection to the individual's "diminished expectation of privacy."

Even prior to *Skinner* and *Von Raab* there was virtual unanimity among the federal courts that governmental drug-testing constituted a search that could constitutionally be justified on reasonable suspicion grounds.[39] No similar consensus

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[33]Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

[34]United States v. Martinez-Fuerte, 428 U.S. 543 (1976)(upholding suspicionless searches that occur at fixed checkpoints near the border).

[35]See Stehney v. Perry, 101 F.3d 925 (3d Cir. 1996)(rejecting a claim that a polygraph test violates the Fourth Amendment).

[36]See, e.g. United States v. Vigil, 989 F.2d 337 (9th Cir), cert. denied, 510 U.S. 873 (1993).

[37]South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976)(When police undertake "routine administrative caretaking functions" like inventory searches, particularly when they are not a subterfuge for criminal investigations, "[t]he probable-cause approach" and its concomitant requirement of a warrant are not very "helpful."); Wyman v. James, 400 U.S. 309, 317-325 (1971)(Visits by government officials to the homes of welfare recipients for the purpose of evaluating their eligibility for benefits do not abridge the Fourth Amendment.).

[38]Donovan v. Dewey, 452 U.S. 594, 600 (1981).

[39]The decisions indicate that "[r]easonable suspicion is a lesser standard than probable cause" but that some evidence of actual illicit drug use by an individual employee or employees remains a constitutional prerequisite. "There is a reasonable suspicion when there is some articulable basis for suspecting that the employee is using illegal drugs." Lovvorn v. City of Chattanooga, 846 F.2d 1539 (6th Cir. 1988). Put another way, "there is reasonable suspicion when there is some quantum of individualized suspicion as opposed to an inarticulate hunch," and this may be "based on statements made by other employees and tips from informants. Even probable cause can be based on informants' tips when the totality of the circumstances indicates a fair probability of accuracy." E.g., Smith v. White, 666 F. Supp. 1085 (E.D.Tenn. 1987). Some differences in judicial viewpoint may remain, however, as to whether the evidence must necessarily relate to individual as opposed to

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prevailed, however, as to the constitutional propriety of mandatory testing in other circumstances and, particularly, where random testing is imposed as a deterrent to illegal drug use by public employees or for some other governmental objective unrelated to criminal law enforcement. Although not random testing cases, the special needs analysis of *Skinner* and *Von Raab* was subsequently applied by the lower federal courts to justify suspicionless, random testing provided that the requisite nexus between an employees' duties and public safety or other compelling governmental need was demonstrated, an approach consistent with *Acton*.

Workplace Drug Testing and the U.S. Supreme Court

As noted, the U.S. Supreme Court has ruled on Fourth Amendment issues raised by workplace drug testing procedures on three occasions. *Skinner v. Railway Labor Executives Ass'n*[40] upheld post-accident drug and alcohol testing of railway employees involved in major train accidents and incidents, while a program of one-time testing of U.S. Customs employees who apply for promotion to "sensitive jobs" involving carriage of firearms and drug interdiction duties was approved in *National Treasury Employee's Union v. Von Raab*.[41] Although random testing was not involved, these decisions together establish that "compelling" governmental interests in public safety or national security may, in appropriate circumstances, override the constitutional objections of employees who have a "diminished expectation of privacy" due to the nature of duties they perform or workplace scrutiny to which they are otherwise subjected. *Chandler v. Miller*[42], on the other hand, voided a Georgia law requiring drug testing of candidates for state office because no "special need" substantial enough to warrant suspicionless searches was shown. Random testing procedures applied to student athletes and participants in extracurricular public school activities have also been approved by the Court in cases discussed in a subsequent section of this report.

In *Skinner*, a panel of the Ninth Circuit had voided on Fourth Amendment grounds Federal Railroad Administration regulations requiring breath, blood, and

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[39](...continued)
more generalized illegal drug use within the public employee group as a whole. Compare, e.g., Wrightsell v. Chicago, 678 F. Supp. 727 (N.D. Ill. 1988)("Reasonable suspicion does not require actual observed behavior," but it "must be individualized" and "cannot be directed against an entire group.") and Penny v. Kennedy, 915 F.2d 1065 (6th Cir. 1990)(". . .for a mandatory drug test of police officers to be reasonable, there must be some evidence of a significant, department-wide drug problem or there must be individualized suspicion.").

[40]Supra n. 3.

[41]Supra n. 4.

[42]Supra n. 12.

urine tests of railroad workers who are involved in train accidents.[43] A federal district court had accepted the government's argument that public safety interests served by the rules outweighed any possible intrusion on privacy rights asserted by the contesting labor unions. However, because the post-accident drug and alcohol testing procedure applied to all covered employees without regard to "reasonable suspicion that a test will reveal evidence of current drug or alcohol impairment," a divided appeals court panel struck down the regulation. In so doing, it refused to find that rail employees enjoy a "diminished expectation of privacy" due to the "heavily regulated" nature of the railroad industry or that the program fit any of the traditional judicial exceptions to Fourth Amendment principles.

In reversing, the Supreme Court first held that the entire testing regulation, even portions applicable to certain employee rule infractions that were merely permissive rather than mandatory upon the railroads, carried sufficient government "encouragement, endorsement, and participation" to implicate the Fourth Amendment considerations. On the merits, Justice Kennedy wrote for the majority that because "the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable," FRA testing for drugs and alcohol was a "search" that had to satisfy constitutional standards of reasonableness. The "special needs" of railroad safety, however, made traditional Fourth Amendment requirements of a warrant and probable cause applicable to normal law enforcement "impracticable" in this context. Nor was "individualized suspicion" deemed by the majority to be a "constitutional floor" where the intrusion on privacy interests are "minimal" and an "important governmental interest" is at stake. According to Justice Kennedy, covered rail employees had "expectations of privacy" as to their own "physical condition" that were "diminished" by "their participation in an industry that is regulated pervasively to ensure safety." In these circumstances, the majority held, it was "reasonable" to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.

Justice Kennedy also rejected another line of attack against the challenged tests which proceeds from the generally accepted scientific and judicial view that standard test protocols are capable indicators only of prior drug use but are not a measure of current job impairment or drug influence. Because of this fact, a number of lower federal courts had voided the EMIT screen and confirmatory GC\MS for not being reasonably related to legitimate governmental interests in assuring employee fitness

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[43]The regulation at issue in Skinner calls for drug and alcohol testing of all covered employees involved in various events, including: major train accidents (involving a fatality, release of hazardous material with either evacuation or injury, or $1,000,000 damage to railroad property); impact accidents (involving a reportable injury or damage to railroad property of $6,300); and fatal accidents (involving fatality of an on-duty railroad employee). 49 C.F.R. §219.201 (2001). The FRA regulations require that blood and urine samples be taken from all crew members of a train involved in such an accident or incident as soon a possible afterwards. Blood samples are to be taken at independent medical facilities by qualified professionals or technicians. 49 C.F.R. §219.203 (2001). Refusal to provide a sample results in a nine-month period of disqualification. 49 C.F.R. §219.213 (2001).

or competence.[44] In *Skinner*, however, the majority found the information provided by the tests to be a valid investigative tool which "may allow the [FRA] to reach an informed judgment as to how a particular accident occurred." In addition, opposition on these grounds "failed to recognize that the FRA regulations are designed not only to discern impairment but also to deter it," and according to the majority, the government "may take all necessary and reasonable regulatory steps to prevent and deter" forbidden drug use by the covered employees.

In the *Von Raab* case, decided the same day as *Skinner*, a Fifth Circuit panel had upheld drug testing of U.S. Customs Service personnel who sought transfer to certain "sensitive" positions, namely, those involving drug interdiction, carrying firearms, or access to classified information, without a requirement of reasonable individualized suspicion. The testing procedure was administered once, when the employee sought transfer to the sensitive position, and the Customs Service gave the qualified applicant five days notice of the test. Thus, the drug test in *Von Raab* was conditioned on the employee's own action in seeking a transfer and no adverse consequence flowed from a later withdrawn transfer application.

In a 5 to 4 ruling, Justice Kennedy again speaking for the majority affirmed the Customs Service policy with respect to the interdiction of illegal drugs and employees required to carry firearms. According to the Court, the government has a "compelling interest" in not promoting drug users to jobs where they could "endanger the integrity of our Nation's borders or the life of the citizenry." That interest outweighs the privacy interests of employees who seek promotions to those jobs, but who enjoy "a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions." Neither the absence of "any perceived drug problem among Customs employees," nor the possibility that "drug users can avoid detection" by temporary abstinence, would defeat the program since deterrence of "highly hazardous conduct" as much as detection was a "substantial" justification and the risk of circumvention was "overstated." However, the Court found the record insufficient to determine whether searches of employees who would handle classified information was reasonable. It was not apparent that individuals in certain positions would actually have access to sensitive information, leading Justice Kennedy to question whether the category was too broad to meet Fourth Amendment requirements.

The High Court rulings in *Skinner* and *Von Raab* established several constitutional propositions potentially relevant to the random testing issue. First, reasonable suspicion was not a constitutional benchmark for all governmental drug testing and, therefore, may not preclude carefully crafted random testing in the public sector. Equally important, the balancing test in those cases, based on the "special needs" of the government for assuring transportation safety and the integrity of the federal drug interdiction effort, may as readily be transposed to other regulatory environments where public employees--or, perhaps, applicants for other governmental benefits--may enjoy a "diminished expectation of privacy." Third, as

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[44]E.g., Jones v. McKenzie, 833 F.2d 335, 340 (D.C.Cir. 1987), vacated and remanded sub nom. Jenkins v. Jones, 490 U.S. 1001 (1989); Railway Labor Executive Ass'n v. Burnley, 839 F.2d 1507 (9th Cir. 1988); Harmon v. Meese, 690 F. Supp. 65 (D.D.C. 1988).

noted above, the Court rejected earlier decisions which had faulted drug testing methodologies due to their inability to detect *present* drug impairment as opposed to simple *past* drug use. Beyond *detection*, it appears the government may have a legitimate interest in *deterring* employee drug use and that drug test evidence may be relevant to "compelling" governmental concerns.

The Court in *Chandler v. Miller*,[45] disapproved a 1990 Georgia statute requiring candidates for Governor, Lieutenant Governor, Attorney General, the state judiciary and legislature, and certain other elective offices, to file a certification that they have tested negatively for illegal drug use. The Eleventh Circuit had denied First, Fourth, and Fourteenth Amendment challenges to the state law and ruled that the "special needs" balancing test of *Von Raab* tipped in favor of Georgia's "substantial" interest in electing drug-free officials. In particular, because the mandated testing could be administered in a physician's office and because candidates for high office "must expect the voters to demand some disclosures about their physical, emotional, and mental fitness for the position," the appellate panel concluded that any limited intrusion on a candidate's privacy was outweighed by the state's "sovereign" interest in determining qualifications for political office.

The Supreme Court reversed by an 8 to 1 margin. Because the majority could find no "special needs" – equivalent to the public safety or drug interdiction imperatives of previous cases – to support the Georgia requirement, the state law was deemed to be outside "the closely guarded category of constitutionally permissible suspicionless searches." Specifically rejected were the state's arguments that the law was justified because the use of illegal drugs calls into question an official's judgment and integrity, that illegal drug usage jeopardizes the discharge of public function, and that it undermines the public trust in elected officials. Important as these interests were, they did not raise vital public safety considerations comparable to *Skinner* and *Von Raab*. Also rebuffed was the state's assertion that the drug testing program was a matter of state sovereignty. In the majority's view, "[h]owever well-meant, the candidate drug test Georgia has devised diminishes personal privacy for a symbol's sake."

Justice O'Connor, who authored the opinion, noted several factors distinguishing the Georgia law from drug-testing requirements of earlier cases. First, there was no "fear or suspicion" of generalized illicit drug usage by state elected officials in the law's background which might pose a "concrete danger demanding departure from the Fourth Amendment's main rule." The majority opinion suggests that while not an invariable constitutional prerequisite, evidence of historical drug abuse by the group targeted for testing might "shore up an assertion of special need for a suspicionless general search program." Secondly, Justice O'Connor was critical of Georgia's certification requirement as a "credible" means to detect or deter drug abuse by public officials. Since the timing of the test was largely controlled by the candidate rather than the state, legal compliance could be achieved by mere temporary abstinence. For Justice Ginsburg, a final "telling difference" between the Georgia case and earlier rulings stemmed from the "relentless scrutiny" to which candidates for public office are subjected – by the press, the public, and their peers

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[45]Supra n. 12.

– as compared to persons working in less exposed work environments. Any drug abuse by public officials was far more likely to be detected in the ordinary course of events, making suspicionless testing less necessary than in the case of safety-sensitive positions beyond the public view.

Chief Justice Rehnquist cast the sole dissenting vote. In his view, it was "only by distorting" the Court's prior drug-testing jurisprudence that the majority "is able to reach the result it does." He argued that rampant drug use in the United States was a legitimate basis for Georgia's attempt to take steps to prevent drug users from gaining political office. "Surely," he urged, "the state need not wait for a drug addict, or one inclined to use drugs illegally, to run for or actually become governor before it installs a prophylactic mechanism."

Employee Drug-Testing After *Skinner* and *Von Raab*

Federal courts in the wake of *Skinner* and *Von Raab* have generally approved random or other periodic testing of public employees, or workers in heavily regulated industries, provided that the specific jobs covered are directly related to "compelling" public safety, national security, or drug interdiction functions of the government, and testing is undertaken pursuant to a plan so as to avoid arbitrary application.[46] After *Von Raab*, the Customs Service program was expanded from frontline drug interdiction personnel to include random testing of employees in traditional office environments who had access to databases targeting contraband shipments and inspections. In *NTEU v. U.S. Customs Serv.*,[47] the D.C. Circuit noted that because of its link to drug smuggling, the government had an obvious and compelling interest in preserving the confidentiality of this database which outweighed any privacy expectations of employees, particularly in light of the intense background checks they underwent prior to employment. Similarly, random testing has been permitted of workers in the transportation,[48] hospital,[49] nuclear power, and civilian chemical

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[46]Ford v. Dowd, 931 F.2d 1286 (8th Cir. 1991)(invalidating drug testing of individual police officer in absence of specific plan, whether applied randomly or routinely, and in absence of reasonable suspicion of drug use); Jackson v. Gates, 975 F.2d 648 (9th Cir. 1992)(invalidating drug testing of individual police officer in absence of random testing scheme and in absence or articulable basis for suspecting drug use), cert. denied, 509 U.S. 905 (1993).

[47]27 F.3d 623 (D.C. Cir. 1994); See also NTEU v. Hallet, 756 F. Supp. 947 (E.D.N.Y. 1991)(applicants for Customs Service positions with top secret, secret, and confidential security clearances; NTEU v. Hallet, 776 F. Supp. 680 (E.D.N.Y. 1991)(random testing of employees directly involved in law enforcement; those with access to or who handle illegal drugs; those who operate forklifts or motor vehicles; those who carry firearms; chemists who had access to illegal drugs and student trainees under their supervision).

[48]Cronin v. Federal Aviation Administration, 73 F.3d 1126 (D.C. Cir. 1996)(FAA regulations on drug and alcohol testing by air carriers); United Food & Commercial Workers Int'l Union, Local 558 v. Foster Poultry Farms, 74 F.3d 169 (9th Cir. 1995)(drug-testing program for truck drivers);Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990)(upholding the testing of airline workers), cert. denied, 498 U.S. 1083 (1991); Railroad Labor Executive

(continued...)

weapons[50] industries, and of all federal correctional officers of the Bureau of Prisons,[51] due to the gravity of risk to be averted by the governmental program.

A generalized desire for workplace "integrity," however, has usually been found insufficient to warrant random or other routine testing of governmental employees in the absence of individualized suspicion. In *Romaguera v. Gegenheimer*,[52] for example, the federal district court ruled that court clerk employees who do not have unsupervised access to drugs or other criminal evidence are not safety- or security-sensitive workers and therefore cannot be subjected to random drug testing. The clerk of court had defended the testing policy by arguing that targeted employees held positions of public trust and were role models for the public. Romaguera's duties included swearing in witnesses and taking court's minutes in civil cases, and she had no access to the evidence vault or narcotics. Her position was included on the testing list because a civil minute's clerk could be present in a courtroom where narcotics were displayed as evidence. Random testing was deemed unreasonable for employees in plaintiff's position since "[i]f the reasons offered were sufficient, then suspicionless drug testing would be permissible for all public employees, regardless of position or pre-employment scrutiny. Based upon the jurisprudence of this important subject thus far, the Supreme Court has not yet sanctioned such a policy, and indeed, appears to be cautioning against it." Similarly, the court found it "difficult to justify" random testing of mortgage and conveyance clerks, juvenile court employees, docket clerks, and new suits counter clerks because they worked in traditional office environment and were closely supervised. However, random testing was deemed reasonable for computer operators, who could do significant damage to the entire clerk's operation, and for supervisory personnel.

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[48](...continued)
Ass'n v. Skinner, 934 F.2d 1096 (9th Cir. 1991)(upholding random testing program in the railroad industry); International Bhd. of Teamsters v. Department of Transportation, 932 F.2d 1292 (9th Cir. 1991)(random testing of commercial vehicle operators); Transport Workers' Union v. Southeaster Pa. Transp. Auth., 884 F.2d 709 (3d Cir. 1989)(random drug testing of mass transit employees). But see Rutherford v. City of Albequerque, 77 F.3d 1258 (10th Cir. 1996)(Dismissal of city dump truck driver upon return from medical leave based on positive result of unannounced drug test violates the Fourth Amendment).

[49]Kemp v. Claiborne County Hospital, 763 F.2d 1362 (S.D.Miss. 1991)(scrub technician in surgery was in safety sensitive position that justified drug-testing).

[50]Thomson v. Marsh, 884 F.2d 113 (4th Cir. 1989)(per curiam)(upholding random testing for civilian chemical weapons employees).

[51]American Fed'n of Gov't Employees v. Roberts, 9 F.3d 1464 (9th Cir. 1993)(upholding random and reasonable suspicion drug testing of all federal correctional officers by the Bureau of Prisons). An injunction against random testing of employees who work outside of the prison and who do not have information regarding the witness protection program was left in place by the court. See also AFGE v. Barr, 794 F. Supp. 1466 (N.D.Cal 1992)(upholding random testing of prison employees who worked in primary enforcement positions with access to firearms, licensed physicians and dentists with regular patient contact, and employees with direct contact with inmates; testing of all other employees only on the basis of reasonable suspicion of on-duty drug use or impairment).

[52]1996 WL 229836 (E.D.La. 1996)(unreported decision).

Like the *Romaguera* decision, most courts have resisted suspicionless testing procedures as applied to administrative or office personnel who do not pose a threat to public safety or national security. Among programs that have been voided for "overbreadth" are a plan by the Justice Department to test all criminal prosecutors and employees with access to grand jury proceedings;[53] random testing of employees of the Department of Health and Human Services who served as messengers and mail clerks even though they drove automobiles as part of their employment;[54] post-accident testing of Office of Personnel Management employees who drive motor vehicles;[55] U.S. Coast Guard drug testing regulations requiring random screening of all private employees aboard commercial vessels;[56] and mandatory USDA testing of quarantine inspectors and computer specialists;[57] and post-accident testing of any teacher, aide, or clerical workers injured on the job.[58] What emerges is a pattern of case-by-case judicial decisionmaking as to the "reasonableness" of testing in the circumstances presented. Consequently, broad-based testing programs that fail to account for distinctions among employees in terms of the public safety or national security sensitivity of their duties are most likely in constitutional jeopardy.

National Security

Courts have upheld random testing programs that were designed to protect sensitive information. In the Justice Department case, *Harmon v. Thornburgh*,[59] the U.S. Court of Appeals for the District of Columbia partially dissolved a federal

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[53]Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989), cert. denied sub nom. Bell v. Thornburgh, 493 U.S. 1056 (1990).

[54]American Federation of Gov't Employees v. Sullivan, 787 F. Supp. 225 (D.D.C. 1991).

[55]Connelly v. Newman, 753 F. Supp. 293 (N.D. Cal. 1990)(absence of "historical drug problem" and lack of "significant risk" to the public undermined governmental interest in testing OPM drivers).

[56]Transportation Institute v. U.S. Coast Guard, 727 F.Supp. 648 (D.D.C.1990)("broadly drawn" federal requirement that "all" private employees aboard private commercial vessels be randomly tested unjustified by the "immediacy or gravity of the potential safety threat" involved. Coast Guard must reformulate narrower rules for random testing of employees whose "duties" are "directly" tied to safety.).

[57]NTEU v. Yeutter, 733 F.Supp. 403, 409-13 (D.D.C.)(random testing of Department of Agriculture animal inspectors and computer specialist permanently enjoined because government lacked constitutionally sufficient interest in testing these workers), remanded on other grounds, 918 F.2d 968 (D.C.Cir. 1990).

[58] United Teachers of New Orleans v. Orleans Parish School Board, 142 F.3d 853 (5th Cir. 1998) (policy overinclusive since testing required without "any suggestion that a triggering injury was caused by any misstep of the employee to be tested"). But see Knox County Education Association v. Knox County Board of Education, 158 F.3d 361 (6th Cir.), cert. denied, 528 U.S. 812 (1999)(suspicionless testing of public school teachers upon appointment or transfer furthers government's special need to assure sobriety of employee who act in loco parentis in safety-sensitive positions in highly regulated industry, and is therefore reasonable search).

[59]Supra n. 51.

district court order that had enjoined the department's random testing of employees with top secret security clearances. However, it refused to disturb the district judge's ruling that criminal prosecutors and employees with access to grand jury proceedings could not be randomly tested. Circuit Judge Wald reasoned that protection of sensitive information--one of the governmental interests cited in *Von Raab*--justified the Department's need to test employees with top secret clearances, but not all federal employees involved in grand jury proceedings. The court elaborated:

> Whatever 'truly sensitive' information includes, we agree that it encompasses top secret national security information. . . .We do not believe, however, that the government's interest in preserving all its secrets can justify the testing of all federal prosecutors or of all employees with access to grand jury proceedings. We recognize that every employee within the three categories will have access to information which he is duty-bound not to divulge. But whatever the precise contours of 'truly sensitive' information intended by the *Von Raab* Court, we believe that the term cannot include all information which is confidential or closed to public view. A very wide range of government employees – including clerks, typists, or messengers – will potentially have access to information of this sort.

Thornburgh concluded that "federal employment alone is not a sufficient predicate for mandatory urinalysis,"[60] and that, even in conjunction with other asserted governmental interests, concern for "integrity" in government and of the federal workforce was not sufficiently compelling to justify testing all departmental employees.[61] Random testing of "sensitive" employees at the Agriculture[62] and Interior[63] Departments, and within the Executive Office of the President, have also been the subject of injunction orders issued by the D.C. district court.

Following *Thornburgh*, a federal district court allowed random testing of personnel in the Executive Office of the President who held "top secret" security clearances but ruled that various factors were relevant to whether office colleagues cleared for "secret" information could be tested. Those factors included the person's actual access to documents classified as secret, the general subject matter of the information, and the feasibility of individual suspicion testing to detect drug usage. On appeal, the D.C. Circuit reversed, holding that random testing of employees with "secret" security clearances was permissible notwithstanding the frequency of exposure to secret document or closeness of supervision. The majority in *Hartness v. Bush*[64] could find no constitutional distinction between secret clearance which involves "serious damage to national security" and top secret clearance involving

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[60]Id. at 490; see also National Fed'n of Fed. Employees v. Cheney, infra n. 65.

[61]878 F.2d at 490-91, see also id. at 498 (Silberman, J., concurring)(government's "powerful interest in preventing drug use" does not justify testing all Justice Department lawyers).

[62]National Treasury Employees Union v. Lyng, 706 F. Supp. 934 (D.D.C. 1988).

[63]Bangert v. Hodel, 705 F. Supp. 643 (D.D.C. 1989).

[64]919 F.2d 170 (D.C.Cir. 1990), rev'g 751 F. Supp. 1 (D.D.C. 1990).

"exceptionally grave damage to national security." Both employees had the same level of expectation of privacy, and the governmental interest in detecting illegal drug usage was equivalent.

In a sequel to *Hartness*, a federal district court held that the White House cannot require its staff to undergo random drug testing where the employees do not "have access to 'sensitive' information or have unique or special access to the President or Vice President," such as would pose a risk or threat to them. Specifically, in *Stigile v. Clinton*,[65] the district court found the White House could not mandate the testing of two career economists with the Office of Management and Budget solely on the grounds that they held twenty-four hour access passes to the Old Executive Office Building (OEOB), or that they were subject to background checks. Significant, for the court, was the fact that several other groups not subject to testing requirements--including 600 interns, contractors and private sector maintenance staff, the foreign and domestic press through the White House Press Room--had the same or even closer access to the Oval Office than the OEOB. Therefore, any threat to the President or Vice President that the two staff members posed by virtue of holding security passes to the OEOB was no greater than that created by other persons--in and outside the OEOB--who were subject to testing and with whom the President or Vice President may come into contact.

The U.S. Court of Appeals for the D.C. Circuit reversed this ruling.[66] In a unanimous decision, the appellate panel found that the employee's right to be free from random drug testing was outweighed not only by the government's need to protect the President, but also by the government's need to assure the public that it is protecting the President. "The public interest the government is seeking to protect is undoubtedly of the utmost importance. Few events debilitate the nation more than the assassination of the President." The court noted the link between the risk posed by a drug-using OEOB permanent passholder and the potential harm to the President or the Vice President was direct and immediate. It likened the situation to that of an employee with access to top-secret information, where "a single incident could be disastrous." To highlight this direct connection, the opinion observes:

> It is possible that a drug-using OEOB passholder could be blackmailed into using his access to the building to assist in an attack on the President. Given the importance of protecting the President's safety, this is all that is required to make this particular search reasonable. It therefore does not violate the Fourth Amendment.

The employees argued that they should not be tested because interns and other non-permanent passholders with access to the OEOB were not tested. But such visitors could only enter the OEOB on a temporary basis, the court noted, while permanent passholders could stay inside for indefinite periods, making them a more valuable point of access for blackmailers.

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[65] 932 F. Supp. 365 (D.D.C. 1996), rev'd 110 F.3d 801 D.C.Cir. 1997), cert. denied, 522 U.S. 1147 (1998).

[66] Id.

Public Safety

The government's "compelling" interest in public safety may also justify suspicionless random testing in certain circumstances. However, several lower courts have found that an agency's program "cast too wide a net" in defining categories of persons who must be subjected to random testing procedures. *National Federation of Federal Employees (NFFE) v. Cheney*,[67] considered a program that tested civilian employees in the Department of the Army. The random testing of 2,800 civilian employees who fly and service Army aircraft and 3,700 civilians employed as police and security guards at Army facilities was upheld. The D.C. Circuit, however, found the classification of "employees working with nuclear reactors" to be overly broad and remanded this portion of the case for further factual determinations of the responsibilities of each job category. In addition, the court permitted testing of "direct service" employees, mainly drug counselors, in the Army's alcohol and drug abuse prevention program but rejected program "integrity" as a justification for random testing of all employees in the "chain of custody" of urine samples.

In *American Fed'n of Federal Employees v. Sullivan*,[68] the court had to determine whether it was constitutional to randomly drug test motor vehicle operators who did not carry passengers. As dictated by *Skinner* and *Von Raab*, the court balanced the government's interest in conducting the tests against the individual's privacy expectations. Because the federal agency employees did not carry passengers and did not have access to classified information, the court found that neither the passenger safety rationale nor national security concerns were applicable. Further, the court observed:

> The government's concern here is the safety risk that an impaired government driver might pose to other drivers on the road. While not insubstantial, this is obviously no different than the interest the public and the government have in keeping potentially impaired drivers off the road. If there is a sufficient `special governmental need' to permit warrantless searches. . ., then the federal government could proceed to test any and all drivers on the road.[69]

In view of these findings and observations, the court held that it would be unconstitutional to subject these motor vehicle operators to random drug tests.

National Treasury Employees' Union v. Watkins[70] enjoined the Department of Energy from random testing of certain DOE employees in "critical" positions, including motor vehicle operators and computer specialists involved in security operations, because the district judge found none of the extraordinary public safety, drug interdiction, and security interests highlighted by *Skinner* and *Von Raab*. A

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[67]884 F.2d 603 (D.C.Cir. 1989), cert. denied, 496 U.S. 936 (1990).

[68]787 F. Supp. 255 (D.D.C. 1992).

[69]Id. at 257.

[70]722 F.Supp 776 (D.D.C. 1989).

similar order prevented the random testing of 88 Department of Education data processing employees in *American Federation of Government Employees v. Cavazos*,[71] while testing of 23 other employees, including an armed guard, nine motor vehicle operators, and thirteen employees with access to top secret information was permitted to go forward.

State or local mandatory testing programs for police or correctional personnel, firefighters, and other "public safety" personnel have usually met with at least qualified judicial approval. In *Guiney v. Roach*,[72] the High Court without comment let stand a First Circuit decision upholding random testing of Boston police officers. The case involved a city department rule which required "all sworn and civilian personnel," on a random basis, to submit to urinalysis testing. A federal judge struck down the plan, but on appeal, the First Circuit held that random testing did not offend the Fourth Amendment as applied to officers who carry firearms or who participate in drug interdiction. With respect to other types of employees, the court found the record unclear as to the rationale for including them in the testing program. It remanded the case for further consideration of this point. "Since we can find no relevant distinction between a customs officer and a police officer," the court said, "we hold the police department's drug-testing rule to be constitutional."

The Seventh Circuit in *Taylor v. O'Grady*[73] held that the Cook County Department of Corrections could constitutionally require employees who had regular access to the inmate population, reasonable opportunity to smuggle drugs into the inmate population, or access to firearms to submit to drug testing once a year with no advance warning as to when testing will occur. Although unannounced testing of "contact" employees was held reasonable given the special governmental interest in prison security, the program was unconstitutional as applied to ordinary administrative personnel without inmate contact. "[S]ince those officers with only administrative or clerical duties or otherwise lacking contact with the jail population do not threaten claimed dangers if impaired while on duty, and since the record does not show they are able to smuggle drugs to the prisoners, the Department gains nothing by testing them."[74] Noting that the Supreme Court had remanded *Von Raab* because the classification of employees who handle sensitive information was too broadly drawn, *Taylor* denied that a generalized interest in fostering a law-abiding and drug-free workplace was sufficient to outweigh the privacy expectations of affected employees.

The Sixth Circuit has upheld the mandatory testing of firefighters and police officers, concluding that there is no requirement of individualized suspicion when testing employees whose duties are "fraught with. . .risks of injury to others. . . ."[75] Random or other periodic testing of police and other public safety officers has

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[71]721 F. Supp. 1361 (D.D.C. 1989), aff'd in part and rev'd in part without op. sub. nom., American Fed'n of Gov't Employees v. Sanders, 926 F.2d 1215 (D.C. Cir. 1991).

[72]873 F.2d 1557 (lst Cir.) cert. denied 493 U.S. 963 (1989).

[73]888 F.2d 1189 (7th Cir. 1989).

[74]Id. at 1197.

[75]Penny v. Kennedy, 915 F.2d 1065, 1067 (6th Cir. 1990).

similarly been approved by most state courts to confront the issue. The New Jersey Supreme Court, for example, has approved of random testing of transit police who carry firearms,[76] in effect overruling that court's prior rulings that unannounced drug testing of police officers without reasonable suspicion were unconstitutional.[77] "We are thoroughly convinced that police officers are members of a `highly regulated industry' . . . [and that] the constitutionality of Transit's drug-testing policy is compelled both by the deteriorating conditions of society with respect to drug abuse and subsequent federal decisions."

The Fifth Circuit in *Aubrey v. School Board of Lafayette Parish*[78] reversed the grant of summary judgment in favor of a local school board, holding that factual issues existed as to whether a custodian was a "safety-sensitive" position that could be randomly tested for illegal drug usage. The district court had determined that the custodian was in a safety-sensitive position because he deals with poisonous solvents, lawn mowers, electricity and gas pilot lights, which could be dangerous to small children. In reversing, the appellate court noted that intrusions on personal privacy that may be unreasonable in some contexts are rendered permissible by the operational realities of the workplace. Valid and compelling public interests must be weighed against the interference with individual liberty. This meant that mandatory testing had to be limited to sensitive positions and hedged with procedural safeguards, such as giving notice to individuals that they may be randomly tested. In this case, however, "no evidence was presented to show which positions are considered safety sensitive and which are not," wrote the court, or "whether the policy at the elementary school would differ from that at a high school." In addition, "[no] evidence was presented to show whether employees in safety-sensitive positions had notice that they would be subject to random drug testing, or what kind of notice they received, or even if Aubrey had received notice." Consequently, the Fifth Circuit reinstated the school custodian's challenge to his employer's random testing policy because the school district did not specify which employees would be covered. Similarly, the testing of a transportation worker who was employed as a maintenance custodian could not be justified, according to a Third Circuit decision, since his responsibilities did not pose a substantial risk of harm to himself or others, nor was the job a pervasively regulated one.[79]

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[76]New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 290 N.J. Super. 406, 675 A.2d 1180 (1996)(random testing of transit police who carry firearms).

[77]See Allen v. County of Passaic, 219 N.J. Super. 352, 530 A.2d 371 (Law Div. 1986); Fraternal Order of Police, Newark Lodge No. 12 v. City of Newark, N.J. Super. 461, 524 A.2d 430 (App. Div. 1987).

[78]92 F.3d 316 (1996).

[79]Bolden v. Southeastern Pa. Transportation Auth., 21 F.3d 29 (3d Cir. 1994). See also 19 Solid Waste Department Mechanics v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998)(despite city's "important safety and health concerns," since regularly scheduled testing of mechanics who repair of city's fleet of diesel trash trucks "would not effectively detect or deter drug use," it was not based on a special governmental need and violated the Fourth Amendment).

Preemployment Drug-Testing

Based on the rationale that applicants for employment do not have the same expectations of privacy as current employees, the courts have often permitted pre-employment testing as a condition of public employment. The *Von Raab* case itself presented preemployment issues since the testing there was required as part of the application process for drug enforcement duty, and the Court shortly thereafter denied review of a Washington State Supreme Court decision upholding preemployment testing of individuals given access to nuclear power plants.[80] Federal appellate decisions since have generally approved preemployment testing rules for public employees or workers in federally regulated industries.

The D.C. Circuit in *Willner v. Thornburgh*,[81] by a 2 to 1 margin, approved a testing plan for attorneys applying for positions with the Antitrust Division of the Department of Justice. Applying the special needs analysis of *Von Raab* and *Skinner*, the majority acknowledged that while applicants have some expectation of privacy, it is far less than incumbent DOJ employees who nevertheless are subject to testing procedures in specified circumstances. In addition, the applicant was found to relinquish whatever privacy interest he has by making disclosures required in the application concerning prior drug usage and by consenting to a thorough FBI background investigation. Further safeguarding the testing procedure from constitutional challenge was the requirement of advance notice of the test date given the applicant and the fact that the test was administered in the privacy of a small room behind a closed door. Judge Henderson dissented from the panel decision for its failure to analyze the "nexus" between the individual's duties and the governmental harm to be averted, as required in *Harmon*, and consequently "sanction[ing] a blanket testing requirement for all federal job applicants." She was also critical of the majority for acknowledging governmental interests beyond those allowed by the Supreme Court – namely, "maintaining public confidence and trust" and "the high cost of hiring and training new employees" – as justification for the preemployment testing procedure.

The same conclusion was reached by the Ninth Circuit regarding DOT mandated testing of truck drivers in *International Brotherhood of Teamsters v. Department of Transportation*.[82] Besides a requirement that motor carriers test all prospective employees they intend to hire, the decision upheld random, periodic, and post-accident testing based on the government's significant public safety concerns which outweighed any privacy interests of applicants and currently employed drivers. The court reasoned that commercial drivers have a significantly reduced expectation of privacy because they have entered a heavily regulated industry that requires periodic physical examinations and urine tests to determine the qualifications of its members. In addition, preemployment testing is not random, but is triggered by the voluntary conduct of applicants who have foreknowledge that drug-testing is

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[80]Alverado v. Washington State Public Power Supply Sys., 759 P.2d 427 (Wash. 1988), cert. denied, 490 U.S. 1004 (1989).

[81]928 F.2d 1185 (D.C. Cir. 1991).

[82]932 F.2d 1292 (9th Cir. 1991).

required. In short, the government's concern for "preempting accidents" was found to "outweigh the minimal intrusion on job applicants privacy, making the conduct of suspicionless, pre-employment testing constitutional."

Other state and federal courts have approved preemployment testing of applicants for correction officer,[83] police cadet,[84] and similar safety-sensitive positions but rejected more broadly-based applicant screening programs. For example, the federal district court in *Georgia Ass'n of Educators v. Harris*[85] enjoined preemployment testing of all applicants for state jobs in the State of Georgia because it defied the special needs approach of *Skinner* and *Von Raab*.

> The court finds it difficult to even begin applying that balancing test, however, because defendants have failed to specifically identify any governmental interest that is sufficiently compelling to justify testing *all* job applicants. Moreover, defendants remain oblivious to *Von Raab's* (and indeed, the fourth amendment's) requirement that it connect its interest in testing to the particular job duties of the applicants it wishes to test. Instead, defendants attempt to justify their comprehensive drug testing program based on a generalized governmental interest in maintaining a drug-free workplace. Defendants' position is untenable because neither *Von Raab* nor its progeny recognize such a generalized interest as sufficiently compelling to outweigh an individual's fourth amendment rights.[86]

An appeals court in New Jersey also found that the government's mere desire for a drug-free workplace and general stability and integrity of the workforce would not justify the testing of an applicant for a water meter reader position.[87] Since a sufficient nexus between public safety and the nature of the employment was not shown, neither applicants nor employed meter readers could be tested without individualized reasonable suspicion. The majority rejected the analysis of the dissent which relied on crime control as sufficient justification, concluding that other personnel procedures--the judgment of experienced personnel directors based on job interviews, job history, references, school records, and the like--would equally serve that purpose.

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[83]McKensie v. Jackson, 547 N.Y.S.2d 120 (App. Div. 1989).

[84]O'Connor v. Police Comm'r of Boston, 557 N.E.2d 1146 (1990); Gauthier v. Police Comm'r of Boston, 557 N.E.2d 1374 (1990).

[85]749 F. Supp. 1110 (N.D. Ga. 1990).

[86]Id. at 1114.

[87]O'Keefe v.Passaic Valley Water Comm'n, 624 A.2d 578 (N.J. 1993).

Student Drug Testing in the Public Schools

Several terms ago, in *Veronia School District 47J v. Acton*,[88] the High Court first considered the constitutionality of student drug testing in the public schools. At issue there was a school district program for random drug testing of high school student athletes, which had been implemented in response to a perceived increase in student drug activity. All student athletes and their parents had to sign forms consenting to testing, which occurred at the season's beginning and randomly thereafter on a weekly basis for the season's duration. Students testing a confirmed positive were given the option of participating in a drug assistance program or a suspension from athletics for the current and following season. A 6 to 3 majority of the Court, led by Justice Scalia, upheld the program against Fourth Amendment challenge. Central to the majority's rationale was the "custodial and tutelary" relationship that is created when children are "committed to the temporary custody of the State as school master," in effect "permitting a degree of supervision and control that could not be exercised over free adults." Students had diminished expectations of privacy by virtue of routinely required medical examinations, a factor compounded in the case of student athletes by insurance requirements, minimum academic standards, and the "communal undress" and general lack of privacy in the sports locker rooms. Because "school sports are not for the bashful," student athletes were found to have a lower expectation of privacy than other students.

Balanced against this diminished privacy interest was the nature of the intrusion and importance of the governmental interest at stake. First, the school district had mitigated actual intrusion by implementing urine collection procedures that simulated conditions "nearly identical to those typically encountered in public restrooms"; by analyzing the urine sample only for presence of illegal drugs – not for other medical information, such as disease conditions, diabetes, or pregnancy; and by insuring that positive test results were not turned over to law enforcement officials. School officials unquestionably had an interest in deterring student drug use as part of their "special responsibility of care and direction" toward students. That interest was magnified in *Veronia* by judicial findings that, prior to implementation of the program, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . fueled by drug and alcohol abuse." School officials' interest became "perhaps compelling" in the case of student athletes due to "the risk of physical harm to the drug user or those with whom he is playing his sport." Consequently, the Court dismissed Acton's argument for a less intrusive policy of suspicion-based testing, reasoning that the Fourth Amendment only requires that government officials adopt reasonable policies, not the least intrusive ones available. The majority in *Veronia* cautioned "against the assumption that suspicionless drug-testing will readily pass muster in other constitutional contexts." Justice Ginsburg's brief concurrence also emphasized her understanding that the decision applied only to testing of student athletes, expressly reserving the issue of whether such programs could be constitutionally extended to other segments of the student population. Justice O'Connor's dissent distinguished public employee and student drug testing, arguing that suspicion-based testing would be entirely effective in the high school setting.

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[88]515 U.S. 646 (1995).

A division of opinion soon emerged among the lower courts as to how broadly *Veronia* could be applied to permit "suspicionless" drug testing that included student groups beyond athletes. The question was first confronted by the Seventh and Eighth Circuits in nearly identical cases, *Todd v. Rush County Schools*[89] and *Miller v. Wilkes,*[90] involving random drug testing policies that applied not only to student athletes, but also to students participating in any other extracurricular activity. While no actual or imminent drug problem was identified among the affected student populations in either case, the policies were upheld. The school policy in *Todd* applied not only to participation in extracurricular activities but also to students who drove to and from school, all of whom were subject to random drug testing.[91] In a sequel to *Todd, Joy v. Penn-Harris-Madison School Corp.*,[92] the Seventh Circuit reconsidered a policy mandating random drug testing of students who drive to school, as well as those who participate in extracurricular activities. Conceding that the *Todd* outcome was not compelled by *Veronia*, and that *Todd* was crucial to *Joy,* the court resorted to *stare decisis* as a basis for upholding the policy, finding that *Veronia* allowed the testing of student drivers. Expressing concern, however, that "[t]he danger of slippery slope continues to haunt our jurisprudence,"[93] the appeals court emphasized that it was not sanctioning drug testing of an entire student population, tacitly encouraging the Supreme Court to revisit the issue and provide the lower courts with additional guidance.

Parting company with the *Todd* line of decisions was *Trinadad School District No. 1 v. Lopez*, [94] where the Colorado Supreme Court disapproved of a policy for drug testing all students in extracurricular activities where there was no convincing evidence of higher drug usage rates by students participating in extracurricular activities, or that the reasonable privacy expectations of such students had been so diminished by constraints of the sports culture, or otherwise, as those imposed on student athletes in *Veronia*. Instead of targeting students in formal school activities, the policy in *Willis v. Anderson School Corp.*[95] mandated testing for any student who "possesses or uses tobacco products; is suspended for three or more days for fighting; is habitually truant; or violates any other school rule that results in at least a three-day suspension."[96] Because Indiana law required one-on-one meetings with such students prior to suspension, in effect permitting observation of any suspicious drug-related behavior, the drug testing policy was rejected since the "benefits of deterrence" alone did not warrant departure from traditional "reasonable suspicion" standards.

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[89]133 F.3d 984 (7th Cir.), cert. denied, 525 U.S. 824 (1998).

[90]172 F.3d 574 (8th Cir.), vacated as moot, 172 F.3d 582 (8th Cir. 1999).

[91] In practice, the policy affected nearly the entire student body, with 728 of 950 high school students consenting to random tests in the 1996-97 academic year.

[92]212 F.3d 1052 (7th Cir. 2000).

[93]Id. at 1066.

[94]963 P.2d 1095 (Colo. 1998).

[95]158 F.3d 415 (7th Cir. 1998).

[96]Id at 417.

A conflict among the circuits was created when the Tenth Circuit refused to permit the random testing of students participating in extracurricular activities outside of the sports arena. In 1998 the Tecumseh Public School District adopted a "Student Activities Drug Testing Policy," which required "suspicionless drug testing" of students wishing to participate "in any extracurricular activity." Such activities included Future Farmers of America, Future Homemakers of America, academic teams, band, chorus, cheerleading, and athletics. Any student who refused to submit to random testing for illegal drugs was barred from all such activities, but was not otherwise subject to penalty or academic sanction. Lindsay Earls challenged the district's policy "as a condition" to her membership in the high school's show choir, marching band, and academic team, but did not protest the policy as applied to student athletics. The district court granted the school district summary judgment, but was reversed on appeal. The Tenth Circuit panel found that any "special need" that the school district had for suspicionless testing of students in these circumstances was less immediate than the risk of injury posed to student athletes in *Veronia,* particularly "given the paucity of evidence of an actual drug abuse problem among those subject to the Policy" in the *Earls* case.

On June 27, 2002, by a 5 to 4 vote, the U.S. Supreme Court reversed the decision of the Tenth Circuit and held that the Tecumseh school district's random drug testing program was a "reasonable means" of preventing and deterring student drug use and did not violate the Fourth Amendment. The Court's decision, written by Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Breyer. In its role as "guardian and tutor," the majority reasoned, the state has responsibility for the discipline, health, and safety of students whose privacy interests are correspondingly limited and subject to "greater control than those for adults." Moreover, students who participate in extracurricular activities "have a limited expectation of privacy" as they participate in the activities and clubs on a voluntary basis, subject themselves to other intrusions of privacy, and meet official rules for participation. The fact that student athletes in the *Veronia* case were regularly subject to physical exams and communal undress was not deemed "essential" to the outcome there. Instead, that decision "depended primarily upon the school's custodial responsibility and authority," which was equally applicable to athletic and nonathletic activities.

The testing procedure itself – involving collection of urine samples, chain of custody, and confidentiality of results – was found by Justice Thomas to be "minimally intrusive" and "virtually identical" to that approved by the Court in *Veronia*. In particular, the opinion notes, test results are kept in separate confidential files only available to school personnel with a "need to know"; they may not be disclosed to law enforcement authorities; and they carry no disciplinary or academic consequences other than limiting extracurricular participation. "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of student's privacy is not significant."

Finally, the majority ruled that the school district had an "important interest " in the health and safety of its students – including prevention and deterrence of drug use – which was "reasonably" served by its drug testing program. Citing several anecdotal instances of drug use at Tecumseh schools, Justice Thomas nonetheless concluded that neither "individualized suspicion" nor a "demonstrated problem of drug abuse" were necessary predicates for a student drug testing program, and there is no "threshold level" of drug use that need be satisfied. Similarly, in a separate concurrence, Justice Breyer

emphasized the national scope of the "drug problem" in education and the inefficacy of "supply side interdiction" efforts by government as factors supporting the reasonableness of the school's drug testing program, even in the absence of "individualized suspicion."

Justice Ginsburg, joined in dissent by three other Justices, offered a point by point rebuttal of the majority rationale. First, the dissenters objected, a generalized "concern" for student health and safety, while "basic to the school's caretaking," was not so "immediate" as to constitute a "special need" satisfying the *Veronia* analysis. Nor were they persuaded that drug use by students engaged in extracurricular activities other than athletics – such as band and choir – exposed them to any greater safety risk than nonparticipants who use drugs in the general student population. Thus, the "special susceptibility to drug-related injury" of student athletes apparent in *Veronia* was not a factor in this case. While "voluntary" participation in extracurricular activities necessarily entailed some additional regulation of student conduct, Justice Ginsburg would not equate the situation to student athletics. "Interscholastic athletics . . . require close safety and health regulation; a school's choir, band, and academic team do not." More importantly, conceding evidence of some drug use among students at the Tecumseh schools, the problem was "not . . .major" as compared to the "explosive drug abuse problem sparked by members of athletic teams" described in *Veronia*. Absent a drug abuse problem among students participating in extracurricular activities, Justice Ginsburg concluded, the intrusion on students' privacy was constitutionally impermissible. Unlike student athletes, whose reasonable expectations of privacy are diminished by the communal nature of the sports locker room, participants in other extracurricular activities do not relinquish all sense of personal privacy to the realities of the school environment.

Student drug-testing proliferated in public schools across the nation after the 1995 *Veronia* decision. Application of the "special needs" analysis to programs of increasing scope and variety had largely confounded the lower federal courts, which as illustrated above, failed to achieve consistent results even as to tests administered in virtually identical circumstances. Beyond resolving this judicial conflict, the majority interpretation of the Fourth Amendment in *Pottowatomie County* may significantly broaden the discretion of public school officials to perform student searches in the academic setting. Despite a relatively scant record of prior student drug abuse, Justice Thomas' opinion emphasizes a fairly general concern of the state for student health and safety – and an "important" deterrence interest – as justification for a broadly based drug testing program. Absent from the equation seems to be the risk of serious injury and pervasive history of drug abuse by student athletes that actuated the Court's deliberations in *Veronia*. As such, the latest opinion may set a new constitutional mark, blurring any real distinctions for drug testing purposes between "high risk" students groups and the general school population .

Prior to the Tenth Circuit decision in *Tecumseh*, for example, a federal district court in Texas invalidated a universal drug testing requirement by one school district, which made passing a drug test a condition to public school attendance by all students.[97]

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[97] Tannahill ex rel. Tannahill v. Lockney Independent School District, 133 F. Supp.2d 919 (continued...)

Also implicated may be other "special needs" searches in the schools involving, for example, metal detectors, drug-sniffing dogs, and random-locker inspections, implemented by many school district as a response to school violence.[98] Whatever outer limits there may be to the "special needs doctrine," however, whether as applied to universal student drug testing or to other alleged invasions of student privacy in the academic setting, will have to await further High Court action. In particular, the constitutionality of random testing of students athletes – or more general student populations – at the college and university level,[99] where the *in loco parentis* doctrine applies with less force remains unsettled.

Suspicionless Drug Testing in Other Regulatory Contexts

A growing body of caselaw has developed from the efforts of lower federal and state courts to apply the "special needs" approach to an expanding array of governmental programs and regulatory activities. While the focus of judicial scrutiny has largely remained fixed on workplace and public school drug testing, questions have also arisen in regard to testing in other administrative venues. The Third Circuit, for example, anticipated *Skinner* and *Von Raab* when it upheld mandatory testing of horse racing jockeys, officials, and trainers in *Shoemaker v. Handel*,[100] a decision which has since been extended to other participants in that "heavily regulated" industry.[101]

In another regulatory context, the Illinois Supreme Court in *Fink v. Ryan*[102] upheld that state's "implied consent" statute under the "special needs" exception to the Fourth

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[97](...continued)
(N.D.Tex. 2001). The school district policy in Lockney essentially made random testing a prerequisite to attending the public schools. Any refusal to submit a consent form for urine testing subjected the student to the same punishment as a positive result: a twenty-one day suspension from all extracurricular activities, three days of in-school suspension and three sessions of substance abuse counseling. All 388 of the secondary school students in the district, except for the plaintiff, had taken the drug tests.

[98]See B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999).

[99]Compare Hill v. NCAA, 7 Cal. 4th 1, 865 P.2d 633 (1994) where the California Supreme Court upheld the NCAA's right to randomly test student athletes because "the invasion is justified by a competing interest--the NCAA's interest in protecting the integrity of athletic competition (in the case of steroid abuse, for example) and to protect the safety of the student athlete[,]" with University of Colo. v. Derdyn, 863 P.2d 929 (Colo. 1993). cert. denied, 114 S. Ct. 1646 (1994), holding that the random urinalysis testing of college athletes violated the Fourth Amendment.

[100]Shoemaker v. Handel, 795 F.2d 1135 (3d Cir. 1986).

[101]See Carelli v. Ginsburg, 956 F.2d 598 (6th Cir. 1992) (testing of licensed thoroughbred horse trainers); *Dimeo v. Griffin*, 943 F.2d 679 (7th Cir. 1991)(en banc)(random searches of the living quarters of persons employed as "backstretchers"); Holtus v. Louisiana State Racing Commission, 580 So. 2d 469 (La. App. 1991)(random testing of licensees of the State racing Commission).

[102]174 Ill. 2d 302, 673 N.E. 2d 281 (Ill. 1996).

Amendment and its state constitutional counterpart. The Illinois law authorizes chemical testing for drugs or alcohol of drivers who are arrested and issued a traffic citation for any accident causing serious injury or death. No individualized suspicion was required because the state's special need to suspend and deter chemically impaired drivers went beyond normal law enforcement. Moreover, drivers' expectation of privacy was "diminished" by the highly regulated character of automobile usage upon state highways and because state law imposes a separate duty on drivers in such circumstances to remain at the scene to assist injured parties and law enforcement officials.

In 1999, the State of Michigan enacted a pilot program to test welfare recipients and applicants for drugs as a prerequisite to receiving assistance. Pursuant to authority granted by Congress,[103] the state legislature had required the Michigan Family Independence Agency to implement a statewide, suspicionless drug testing program for welfare recipients, to be carried out in a minimum of three counties around the state. The federal district court in *Marchwinski v. Howard*[104] preliminarily enjoined the state statute, concluding that the prescribed drug testing regime was not so critical to public safety as to justify exception to traditional Fourth Amendment requirements. On October 18, 2002, the Sixth Circuit reversed and upheld the program. The appellate court disagreed with the proposition that only the state's interest in public safety would amount to a "special need" warranting suspicionless drug testing. It instead found that Michigan has a strong interest in insuring that the public monies it expends for social welfare actually promote the legislature's intended purposes and, in particular, that the needs of children are met.

> Primary concerns of [federal welfare programs] are that children of needy families may be cared for in their own or in their relatives' homes, and that the parents of these children may be assisted in overcoming dependence on government programs and in becoming economically self-sufficient. . . . We have no doubt that the safety of children of [welfare] families . . . is a substantial public safety concern that must be factored into the determination of whether Michigan has shown a special need to this drug testing program. An additional public safety concern is the risk to the public from the crime associated with illicit drug use and trafficking. And we think it is beyond cavil that the state has a special need to insure that public monies expended in the [program] are used by recipients for their intended purposes and not for procuring controlled substances – a criminal activity that not only undermines the objectives of the program but directly endangers both the public and the children the program is designed to assist.

In addition, the court determined that applicants for welfare have a diminished expectation of privacy by virtue of extensive federal and state regulation, which require them to "relinquish important and often private information" as a condition to receipt of benefits.

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[103]The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, 21 U.S.C. § 862b, authorized the states to test welfare recipients and to sanction those who test positive.

[104]309 F.3d 330 (6th Cir. 2002).

The legality of governmental drug tests was recently addressed by the Supreme Court within another administrative framework. In response to the problem of cocaine abuse by expectant mothers, and its deleterious impact on fetuses, the City of Charleston joined with a state university hospital to develop a plan to test certain pregnant women for illegal drug abuse – those receiving no, late, or incomplete prenatal care and others experiencing certain complications during pregnancy. Initially, women who tested positively for drugs – during pregnancy or during labor – were reported to police and arrested. The policy was modified so that those testing positive during pregnancy were given the option of substance abuse treatment; if the woman tested positive a second time or missed a treatment session, she was arrested. Women arrested under the policy complained that the warrantless and unconsented drug tests were conducted for criminal investigatory purposes and were unconstitutional. The Fourth Circuit appeals court decided that the drug tests were reasonable and applied special needs analysis to conclude that "the interest in curtailing the pregnancy complication and medical costs" of maternal cocaine use outweighed any "minimal intrusion on the privacy of the patients." In *Ferguson v. City of Charleston*,[105] the Supreme Court reversed and specifically rejected the state's invocation of the special needs doctrine. The balancing test of *Von Raab*, *Veronia*, and *Chandler* was inappropriate since the "central and indispensable feature" of the present policy was to coerce patients, aided by law enforcement, into treatment for substance abuse. The Court distinguished city officials' "ultimate" purpose, protecting maternal and fetal health, from the "purpose actually served," gathering evidence of crimes committed by patients." A special need may justify suspicionless drug testing under a program devised for a "proper governmental purpose other than law enforcement." But the exception to Fourth Amendment warrant requirements does not apply where the results are forwarded to law enforcement officials who are extensively involved at every stage of the policy.

Conclusion

Constitutional law on the subject of governmentally mandated drug-testing is primarily an outgrowth of the Fourth Amendment prohibition on unreasonable searches and seizures. Judicial exceptions to traditional requirements of a warrant and individualized suspicion for "administrative" searches have been extended to mandatory drug-testing of public employee and student athletes in the public schools where the government is able to demonstrate a "special need" beyond the demands of ordinary law enforcement. To date, however, special needs analysis has largely been confined to relatively narrow circumstances directly implicating "compelling" public safety, law enforcement, or national security interests of the government. More generalized governmental concerns for the "integrity" or efficient operation of the public workplace have usually not been deemed sufficient to justify intrusion on the "reasonable expectation of privacy" of workers or other individuals to be tested.

The constitutional parameters of "special needs" analysis were outlined by the Supreme Court *Skinner*, *Von Raab*, and *Veronia* cases. In dispensing with the "reasonable suspicion" standard, the Court focused on the connection between an individual's duties, or the activity involved, and the harm the government seeks to avert

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[105] 532 U.S. 67 (2001).

through the program. Thus, in *Skinner*, the Court emphasized the "safety-sensitive tasks" that railroad employees perform, and found testing justified because the covered employees "discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences." Analogizing the railroad worker to those with "routine access to dangerous power facilities," the Court noted that they "can cause great human loss before any signs of impairment become noticeable to supervisors or others." Generally, these precedents suggest that substantial constitutional difficulties probably confront any broad-based testing proposal that is not limited to specific occupational categories or, within other regulatory contexts, to persons for whom the government is able to demonstrate a public safety, national security, or other "compelling" need to test. For this reason, any governmental plan to impose universal testing as a requirement for drivers' license applicants, welfare recipients, or other beneficiaries of state or federal programs could face formidable constitutional hurdles. The legality of mandatory testing in these other regulatory contexts, however, may depend upon the range of governmental interests that the Court ultimately declares to be "compelling" for purposes of this Fourth Amendment analysis, and on how close the required "nexus" to such interests must be to justify random testing of specific individuals or groups.

Similar considerations may pertain to drug testing of Members and employees of the legislative branch. The Court's ruling on the State of Georgia's efforts to test candidates for high elective office has obvious ramifications for this issue. At a minimum, the *Chandler* case stands for the proposition that a governmental purpose to promote official integrity or public trust in the institutions of government is not a constitutionally adequate "special need" to justify suspicionless drug testing of public officials, at least in the absence of a "demonstrated problem of drug abuse" among the specific groups to be tested. As per the caselaw discussion earlier in this report, however, random or periodic testing of House or Senate employees may be justified by public safety or national security considerations that have sustained federal executive branch drug-free workplace programs. Accordingly, for example, test procedures as applied to the Capitol police or other employees authorized to carry firearms, to congressional staff with access to classified national security information, to drivers for House officials or other employees routinely entrusted with the operation of motors vehicles on or about the Capitol grounds may arguably fall into "special needs" categories under existing judicial authority. On the other hand, suspicionless testing of "routine" administrative or office personnel, Capitol grounds and maintenance employees, and like positions may be more problematic. The testing of Members themselves could conceivably be justified constitutionally on the basis either of their access to national security information or, under the *Stigile* rational, because of their not infrequent physical proximity to the President, Vice-President, or other elected officials standing in direct line of succession to the Presidency. The full ramifications of the D.C. Circuit's rationale remain uncertain, but carried to its logical end, *Stigile* could be forceful precedent for permitting fairly extensive mandatory drug screening within the legislative branch.