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## **Warrantless Administrative Searches of the Person without Probable Cause or Particularized Suspicion: The New Contours of the Fourth Amendment**

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# WARRANTLESS ADMINISTRATIVE SEARCHES OF THE PERSON WITHOUT PROBABLE CAUSE OR PARTICULARIZED SUSPICION: THE NEW CONTOURS OF THE FOURTH AMENDMENT

## I. INTRODUCTION

The cases<sup>1</sup> considered in this comment address the problem of substance abuse and the efforts of United States policymakers to respond to this crisis. *Skinner v. Railway Labor Executives Association* and *National Treasury Employees Union v. Von Raab* both hold that warrantless and suspicionless administrative searches are authorized as long as the government can show a special need for such a search beyond normal law enforcement.<sup>2</sup>

In *Skinner*, the United States Supreme Court approved the use of warrantless and suspicionless mandatory searches, in the form of breath, blood, and urine tests, for all crew members<sup>3</sup> involved in certain railway accidents<sup>4</sup> or violating certain railway safety regulations.<sup>5</sup> The Court held that the government's valid interest in preventing accidents and casualties in rail operations resulting from drug or alcohol impaired crew members outweighs the privacy interests of the railway employees involved.<sup>6</sup>

In *Von Raab*, decided the same day as *Skinner*, the Court approved warrantless and suspicionless tests of Customs Service officials seeking transfer or promotion to certain positions. These positions involve direct participation in the interdiction of drugs, the enforcement of drug related laws, or the carrying of a firearm.<sup>7</sup> The Court did not extend the testing program to employees involved in handling "classified material," as requested by the Customs Service, because the Court found the definition of "classified" to be inadequately defined in the regulation.<sup>8</sup>

Considered together, these cases extend the allowable circumstances under which warrantless and suspicionless searches may be conducted. The purpose of this comment is to analyze these cases and their implications for traditional fourth amendment protections against unreasonable searches. Additionally, some recent decisions applying *Skinner* and *Von Raab* are reviewed for their implications for the future of public sector drug testing in America. Finally, a suggestion is presented for state courts

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1. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989).

2. *Skinner*, 489 U.S. at 619 (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)); *Von Raab*, 489 U.S. at 677.

3. 489 U.S. at 633-34.

4. See *infra* notes 24-38 and accompanying text.

5. See *infra* notes 24-38 and accompanying text.

6. *Skinner*, 489 U.S. at 633.

7. *Id.* at 664-65.

8. *Id.*

as an alternative to following the federal courts in a lock-step fashion.

## II. THE *SKINNER* CASE

### A. *Background*

The Federal Railroad Administration ("FRA" or "Agency"),<sup>9</sup> pursuant to authority delegated to it by the Secretary of Transportation,<sup>10</sup> determined that drug and alcohol abuse poses a serious threat to rail safety in the United States.<sup>11</sup> To counter this threat, the FRA promulgated regulations mandating blood and urine tests for employees involved in certain train accidents.<sup>12</sup> The regulations also permit, but do not require, the testing of employees who violate certain safety regulations.<sup>13</sup>

While railroads have long prohibited on-duty use of alcohol by operating employees,<sup>14</sup> this prohibition has recently been expanded to include use or possession of certain drugs.<sup>15</sup> These prohibitions are industry-wide, and the usual sanction for violation is dismissal.<sup>16</sup>

Prior to proposing the current regulation in 1983, the FRA expressed concern that the level of effort then expended to curtail drug and alcohol abuse in the railroad industry was inadequate.<sup>17</sup> To support its allegation that more comprehensive efforts were needed, the FRA referenced a study showing that on-the-job intoxication was a significant problem.<sup>18</sup> The Agency also referred to an internal review of accident reports for an eleven year period showing that alcohol or other drugs were the cause of or a contributing factor in at least twenty-one significant accidents resulting in twenty-five fatalities, sixty-one injuries, and property damage estimated at 19 million dollars.<sup>19</sup> The FRA also identified seventeen additional fatalities of operating employees working on or around rolling stock in which alcohol or other drugs were implicated as a cause or contributing factor.<sup>20</sup> One instance, involving the release of hazardous materials, resulted in the evacuation of an entire Louisiana community.<sup>21</sup>

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9. The Federal Railroad Administration is an administrative agency within the Department of Transportation charged with federal oversight of railroads in the United States. 45 U.S.C.A. § 431 (1986).

10. *Skinner*, 489 U.S. at 606.

11. *Id.*

12. *Id.*

13. *Id.*

14. "The problem of alcohol abuse is as old as the industry itself." *Id.* Carrier rules aimed at deterring alcohol use have been in existence for at least a century. Most rules prohibit operating employees from possessing alcohol or being intoxicated while on duty and from consuming alcoholic beverages while subject to being called for duty. More recently, these proscriptions have been expanded to include the use or possession of certain drugs. *Id.*

15. *Id.*

16. *Id.* at 607.

17. *Id.*

18. *Id.* at 607 n.1.

19. *Id.* (citing 48 Fed. Reg. 30,726 (1983)).

20. *Id.*

21. *Id.* at 608 (citing 49 Fed. Reg. 24,254, 24,259 (1984)).

In spite of the extent of the problem, railroads were able to detect very few violations of these policies, largely because of their reliance on supervisors' and co-workers' observations as their primary means of enforcement.<sup>22</sup> It was against this backdrop of abuse that the FRA sought ways to combat on-duty substance abuse.<sup>23</sup>

### B. The Testing Program

In 1985, the FRA proposed the regulation which caused the controversy in *Skinner*.<sup>24</sup> The proposed regulation<sup>25</sup> continued the ban on alcohol use and established the ban on use or possession of controlled substances when on duty or subject to call for duty.<sup>26</sup> Two subparts of the regulation pertain to testing. Subpart C, entitled "Post-Accident Toxicological Testing," is mandatory,<sup>27</sup> while subpart D, "Authorization to Test for Cause," is permissive.<sup>28</sup>

Subpart C requires the taking of blood and urine samples from employees assigned to perform service subject to the Hours of Service Act of 1907<sup>29</sup> for toxicological testing by the FRA following a major train accident,<sup>30</sup> an impact accident,<sup>31</sup> or any train accident involving a fatality to any on-duty railroad employee.<sup>32</sup> Primary reliance is placed on analysis of the blood samples as the only available body fluid that provides both a clear indication of the presence of drugs and alcohol in the body and an estimation of their impairment effects.<sup>33</sup> However, urine samples also are needed because drug traces remain in the urine longer than in the blood and circumstances may make it impossible to obtain a blood sample before a drug disappears from the bloodstream.<sup>34</sup>

Subpart D authorizes, but does not require, railroads to force employees within the designated categories to submit to breath or urine tests under certain circumstances not covered by subpart C.<sup>35</sup> For instance, railroads

22. *Id.* at 607-08 (citing 49 Fed. Reg. 24,266-24,267 (1984)).

23. *Id.* at 608.

24. *Id.*

25. 49 C.F.R. § 219 (1987).

26. *Skinner*, 489 U.S. at 608-09 (citing C.F.R. § 219.101(a)(2) (1987)).

27. *Id.* at 609 (citing 49 C.F.R. § 219.203(a) (1987)).

28. *Id.* at 611 (citing 49 C.F.R. § 219.301 (1987)).

29. 45 U.S.C.A. §§ 61-66 (1986). The regulation provides a limited exception from testing in cases where the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in causing the accident. The exception does not apply in the case of a major train accident, in which case all employees covered by the Hours of Service Act of 1907 must be tested. *Skinner*, 489 U.S. at 609-10 n.2.

30. A major train accident is defined as "any train accident that involves (i) a fatality, (ii) the release of hazardous material accompanied by an evacuation or a reportable injury, or (iii) damage to railroad property of \$500,000." *Id.* at 609 (citing 49 C.F.R. § 219.201(a)(1) (1987)).

31. An impact accident "is defined as a collision that results in a reportable injury, or in damage to railroad property of \$50,000 or more." *Id.* (citing 49 C.F.R. § 219.201(a)(2) (1987)).

32. *Id.* (citing 49 C.F.R. § 219.201(a)(3) (1987)).

33. *Id.* at 610 (citing 49 Fed. Reg. 24,291 (1984)).

34. *Id.* (citing 49 Fed. Reg. 24,291 (1984)).

35. The railroad may order breath or urine tests or both: (1) after a reportable accident or incident, where a supervisor has a "reasonable suspicion" that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident; or (2) in the event of certain specific rule violations, including noncompliance with a signal and excessive speeding. *Id.* at 611 (citing 49 C.F.R. §§ 219.301(b)(2), 219.301(b)(3) (1987)).

may require breath testing when a supervisor has a reasonable suspicion that an employee is under the influence of alcohol, or both breath and urine tests may be required when two supervisors make a determination that the employee is under the influence of some chemical substance.<sup>36</sup> Whenever the results of the breath or urine tests are intended for use in disciplinary proceedings, the employee must be informed that he or she has the right to provide a contemporaneous blood sample for analysis at an independent medical facility.<sup>37</sup> If the employee fails to provide a blood sample and the urine sample is positive, "the railroad may presume impairment absent persuasive evidence to the contrary."<sup>38</sup>

### C. Procedural History

The Railway Labor Executives Association, joined by some of its member labor organizations, brought suit in the United States District Court for the Northern District of California to enjoin the FRA regulations on various statutory and constitutional grounds. The district court granted summary judgment for the government, ruling that the railroad employees' interests were outweighed by the competing public and governmental interest in promoting railway safety.<sup>39</sup>

The Ninth Circuit reversed and invalidated the regulations.<sup>40</sup> The court held that the authority conferred by the regulations involved sufficient government action to implicate the fourth amendment and that the urine tests it authorized were fourth amendment searches.<sup>41</sup>

In its analysis, the Ninth Circuit found that the circumstances and competing interests of the parties permitted testing without first obtaining a warrant or adhering to traditional probable cause standards. However, in assessing the reasonableness of the search, the court concluded that particularized suspicion is essential.<sup>42</sup> Only by requiring particularized suspicion would the testing be limited to the detection of current impairment rather than the discovery of drug residues that remain in the body for days or even weeks.<sup>43</sup>

The United States Supreme Court granted certiorari<sup>44</sup> to consider whether the invalidated regulations constituted a violation of the fourth amendment.<sup>45</sup> The Court reversed the decision of the Ninth Circuit.<sup>46</sup>

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36. If the supervisors suspect that the impairment is due to a drug other than alcohol, "at least one of those supervisors must have received training in detecting the signs of drug intoxication." *Id.* at 611 (citing 49 C.F.R. § 219.301(c)(2)(ii) (1987)).

37. *Id.* (citing 49 C.F.R. § 219.303(c) (1987)).

38. *Id.* (citing 49 C.F.R. § 219.307(b) (1987)).

39. *Id.* at 612.

40. *Railway Labor Executives Ass'n v. Burnley*, 839 F.2d 575, 583 (9th Cir. 1988).

41. *Id.*

42. *Id.*

43. Metabolites of some drugs, such as cannabis, are stored in the fatty tissues of the body and remain detectable for extended periods of time after the last use. The presence of such traces in the urine of an individual has no direct bearing to the level of drug intoxication at the time of the accident under investigation and would therefore be of questionable relevance. *Id.* at 588-89.

44. *Skinner v. Railway Labor Executives Ass'n*, 486 U.S. 1042 (1988).

45. *Skinner*, 489 U.S. at 613.

46. *Id.*

## D. The Supreme Court's Analysis

### 1. Preliminary Questions

Writing for the majority, Justice Kennedy stated that *Skinner* presents two preliminary questions: first, are the blood and urine tests in question attributable to the government or its agents? Second, do these tests amount to searches or seizures within the meaning of the fourth amendment?<sup>47</sup>

In deciding whether an accident investigator for the railroad should be considered a government agent, the primary consideration is the degree of government participation in the investigator's activities.<sup>48</sup> The Court decided that in this case, the government's degree of involvement was substantial.<sup>49</sup> The FRA regulations establishing the drug testing program preempt state laws, rules, and regulations covering the same subject matter and are designed to supersede collective bargaining agreements as well.<sup>50</sup> The regulations authorize the FRA to receive biological samples and test results procured by the railroads.<sup>51</sup> Further, a railroad may not divest itself of the authority to perform the optional tests authorized by subpart D, nor may a railroad compromise this authority by contract or other means.<sup>52</sup> An employee may not decline his employer's request to submit to breath or urine tests under the conditions set forth in subpart D without risking being withdrawn from covered service.<sup>53</sup> Based on these factors, the Court found clear indications of governmental encouragement, endorsement, and participation sufficient to implicate the fourth amendment.<sup>54</sup>

In analyzing the second preliminary question, the Court stated that taking a blood sample is recognized as an infringement of a legitimate privacy expectation and is deemed a fourth amendment search.<sup>55</sup> Breath testing, which is also authorized by the FRA regulation, is very similar to blood testing in that it requires a "deep lung" breath and implicates concerns for bodily integrity similar to those considered in *Schmerber v. California*.<sup>56</sup> Therefore, breath testing is also considered a fourth amendment search.<sup>57</sup>

The collection of urine specimens, the third category of drug testing authorized by the FRA regulation, requires no surgical intrusions into

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47. *Id.* at 614.

48. *Id.* (citing *Lustig v. United States*, 338 U.S. 74, 78-79 (1949) (plurality opinion); *Byars v. United States*, 273 U.S. 28, 32-33 (1927)).

49. *Id.* at 615.

50. *Id.* (citing 49 C.F.R. § 219.13(a) (1987)).

51. *Id.* (citing 49 C.F.R. § 219.11(c) (1987)).

52. *Id.* (citing 50 Fed. Reg. 31,552 (1985)).

53. *Id.* (citing 49 C.F.R. § 219.11(b) (1987)).

54. *Id.* at 615-16.

55. *Id.* at 616 (citing *Schmerber v. California*, 384 U.S. 757, 767-68 (1966); *Winston v. Lee*, 470 U.S. 753 (1985); *Terry v. Ohio*, 392 U.S. 1 (1968)).

56. The Court's primary concern was the compelled intrusion into the body to obtain the substance to be analyzed. 384 U.S. 757, 767-68 (1966).

57. *Skinner*, 489 U.S. at 616-17 (citing *California v. Trombetta*, 467 U.S. 479 (1984)).

the body.<sup>58</sup> However, the test can reveal many facts about the donor other than those related to drug use.<sup>59</sup> Additionally, the fact that collection of the sample may involve visual or aural monitoring of urination clearly implicates privacy interests.<sup>60</sup> The Court concluded that collecting and testing urine samples is an intrusion upon long recognized, reasonable privacy expectations and, therefore, must be deemed a search under the fourth amendment.<sup>61</sup>

## 2. The Warrant Requirement

The Court next focused on the standards to be used in determining the appropriateness of the searches in question.<sup>62</sup> The fourth amendment does not prohibit all searches and seizures; it only prohibits those that are unreasonable.<sup>63</sup> The reasonableness of a search or seizure depends upon the circumstances surrounding it and the nature of the search or seizure itself.<sup>64</sup> The determination in any given instance is made by balancing the fourth amendment rights of the individual against legitimate governmental interests advanced by the search or seizure.<sup>65</sup>

In most cases, except for a few well-defined exceptions, a search or seizure is unreasonable unless accomplished pursuant to a judicial warrant issued upon probable cause.<sup>66</sup> However, when "special needs, beyond the normal need for law enforcement" arise, the Court has been willing to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements.<sup>67</sup>

The Court has recognized some notable exceptions to the warrant and probable cause requirement.<sup>68</sup> For example, the search of a probationer's home for firearms was upheld in *Griffin v. Wisconsin*<sup>69</sup> because of the state's special need to supervise probationers. The search of an automobile junkyard was upheld in *New York v. Burger*<sup>70</sup> because of the diminished expectation of privacy related to doing business in a highly regulated industry. Work-related searches of public employees' desks and offices were upheld in *O'Connor v. Ortega*<sup>71</sup> because of the substantial govern-

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58. *Id.* at 617.

59. For instance, the sample can be tested to reveal if the donor is epileptic, diabetic, or pregnant. *Id.*

60. *Id.*

61. *Id.*

62. *Id.* at 619.

63. *Id.* (citing *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *Schmerber*, 384 U.S. at 768).

64. *Id.* (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985)).

65. This balancing of the governmental interest in searching against the individual's legitimate right to and expectation of privacy has been the Court's modern approach to fourth amendment problems. *Id.* (citing *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976)).

66. *Id.* (citing *Payton v. New York*, 445 U.S. 573, 586 (1980); *Mincey v. Arizona*, 437 U.S. 385, 390 (1978)).

67. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, (1987)).

68. *Id.*

69. 483 U.S. at 873.

70. 482 U.S. 691, 702-03 (1987).

71. 480 U.S. 709, 725 (1987).

ment interest in the efficient operation of the workplace. The search of a student's purse by a school's vice-principal was allowed in *New Jersey v. T.L.O.*<sup>72</sup> because of the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds.<sup>73</sup> And, finally, in *Bell v. Wolfish*,<sup>74</sup> the Court upheld body cavity searches of inmates because of legitimate prison security interests.<sup>75</sup>

The employees subject to testing<sup>76</sup> in *Skinner* performed safety-sensitive tasks, namely operating trains or working around them.<sup>77</sup> Therefore, the Court concluded that the government's interest in ensuring railroad safety presented the requisite special needs justifying a departure from the usual warrant and probable cause requirements.<sup>78</sup>

Additionally, the testing program was characterized by the Court as administrative, rather than criminal, in nature.<sup>79</sup> In most criminal cases, a search or seizure is deemed reasonable only if conducted pursuant to a judicial warrant issued by an impartial magistrate upon probable cause.<sup>80</sup> The purpose of the data uncovered by the tests in *Skinner* is the promotion of rail safety, not the prosecution of the employee tested.<sup>81</sup> This distinction is important because there has been a trend during the past twenty years toward permitting greater leeway in administrative searches, often referred to as "inspections" or "regulatory searches."<sup>82</sup>

The Court first clearly articulated the standard for an administrative search in *Camara v. Municipal Court*.<sup>83</sup> *Camara* concerned the conviction of a homeowner who refused to permit a municipal health inspector to enter and inspect his premises without a search warrant.<sup>84</sup> The Court held that the valid public interest justifying the need to conduct an administrative search must be balanced against the individual's expectation of being free from unreasonable government invasions of privacy.<sup>85</sup>

The Court listed several factors it considers in performing this balancing test: (1) the history of judicial and public acceptance of the practice in question;<sup>86</sup> (2) the existence of a less intrusive method; and (3) whether the practice involves a relatively limited invasion of privacy, such as a building inspection, or a search for evidence of a crime.<sup>87</sup>

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72. 469 U.S. 325, 341-42 (1985).

73. *Id.* at 339.

74. 441 U.S. 520 (1979).

75. *Id.* at 560-62.

76. See *supra* notes 29-32, 35-36 and accompanying text.

77. *Skinner*, 489 U.S. at 620.

78. *Id.*

79. *Id.* at 621 n.5.

80. *Id.* at 621-22.

81. *Id.* at 620-21 (citing 49 C.F.R. § 219.1(a) (1987)).

82. W. LAFAVE & J. ISRAEL, *CRIMINAL PROCEDURE* 187 (1985).

83. 387 U.S. 523 (1967).

84. *Id.* at 525.

85. *Id.* at 539.

86. *Id.* at 537.

87. *Id.*



At issue in *Camara* was a building inspection aimed at finding safety and building code violations.<sup>88</sup> The Court concluded that administrative inspections of the kind here involved, while less intrusive than a typical search for the fruits and instrumentalities of crime, still fell within the scope of fourth amendment protection against unreasonable government searches.<sup>89</sup> To decide otherwise would have the effect of providing such protection only to individuals suspected of a crime.<sup>90</sup> The Court also concluded that although a warrant was needed to conduct the type of housing inspection in question,<sup>91</sup> the probable cause needed for such a warrant to issue could be found in the legislative or administrative standards of the act authorizing the inspection.<sup>92</sup> The issuance of the proper warrant need not depend upon an inspector's specific knowledge of the condition of the particular dwelling.<sup>93</sup>

In *Skinner*, the Court reasoned that the primary purpose of the warrant requirement is to protect privacy interests by ensuring such intrusions are not the random or arbitrary acts of government agents.<sup>94</sup> A warrant provides both the proof that the search is authorized and a statement of its specific scope and objectives. A warrant also provides oversight by an impartial magistrate to ensure that the intrusion is justified.<sup>95</sup>

The Court found that a warrant in the *Skinner* case would do little more to achieve these purposes.<sup>96</sup> The reasons for testing and the permissible limits of the tests themselves were clearly and specifically defined in the regulations authorizing them. Only minimal discretion was vested in the individuals charged with administering the program and there were virtually no facts for a neutral magistrate to evaluate.<sup>97</sup>

Additionally, the Court recognized that the government's interest in searching without a warrant is often most urgent when the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.<sup>98</sup> Although the metabolites of some drugs remain detectable in urine for considerable periods of time,<sup>99</sup> the samples must be collected as soon as possible after the accident, safety rule violation, or other triggering event to enable the FRA to determine whether the employee was impaired at the time of the accident or violation, as opposed to determining whether the employee was using drugs during the days preceding the test.<sup>100</sup> In this respect the delay involved in obtaining a warrant could result in a loss of evidence.<sup>101</sup>

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88. *Id.* at 525.

89. *Id.* at 530.

90. *Id.*

91. *Id.* at 538.

92. *Id.*

93. *Id.*

94. *Skinner*, 489 U.S. at 621-22.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 623 (citing *Camara v. Municipal Court*, 387 U.S. 523, 533 (1967)).

99. *Id.*

100. *Id.*

101. *Id.*

The Court also considered the fact that sample collection was to be carried out by railroad employees, primarily supervisors.<sup>102</sup> These individuals were not experienced in matters relating to law enforcement and possessed little or no experience with the intricacies of warrant procedures. The Court therefore found it unreasonable to impose the burden of complying with warrant procedures upon these supervisors.<sup>103</sup> Based on a combination of the above factors, the Court concluded that a warrant was not required to render the tests reasonable under the fourth amendment.<sup>104</sup>

### 3. The Requirement of Individualized Suspicion

Normally, even a search that may be conducted without a warrant must still be based upon probable cause.<sup>105</sup> In some cases where the Court has found that the "balance of interests" precludes a showing of probable cause, it has nonetheless required some quantum of individual suspicion before concluding that a search is reasonable.<sup>106</sup> However, the Court has concluded that individualized suspicion is not a constitutional floor below which a search must be presumed unreasonable.<sup>107</sup> If the balancing test shows that privacy interests are minimal, governmental interests are important, and governmental interests are frustrated by a requirement of individualized suspicion, the search may be reasonable even in the absence of specific suspicion. The Court in *Skinner* found these conditions to be present and concluded that the drug testing searches are reasonable even absent individualized suspicion.<sup>108</sup>

The opinion in *Skinner* was based upon several factors: (1) an employee's movement is already restricted as a normal part of being at work;<sup>109</sup> (2) the intrusion occasioned by a blood test is "not significant";<sup>110</sup> (3) breath tests are less intrusive than blood tests and implicate no significant privacy concerns;<sup>111</sup> and (4) although urine tests do implicate significant privacy concerns,<sup>112</sup> the regulations endeavor to reduce the intrusiveness of the collection process.<sup>113</sup> The Court upheld the regulations in question, concluding that the testing procedures pose only limited

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102. *Id.*

103. *Id.* at 623-24.

104. *Id.*

105. *Id.*

106. *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)).

107. *Id.* (citing *Martinez-Fuerte*, 428 U.S. at 561).

108. *Id.*

109. *Id.* at 624-25.

110. The Court reasoned that blood tests are a commonplace experience, a normal part of a routine physical examination. The quantity of blood taken is minimal and for most people "the procedure involves virtually no risk, trauma, or pain." *Id.* at 625 (citing *Schmerber v. California*, 384 U.S. 757, 771 (1966)).

111. *Id.* at 625-26.

112. *Id.* at 626.

113. The regulations do not require that samples be furnished under the direct observation of a monitor. In addition, the sample is collected in a medical environment by personnel unrelated to the railroad employer. Finally, the privacy expectations of covered employees are reduced by their participation in an industry that is heavily regulated to ensure safety. *Id.* at 626-27.

threats to the privacy expectations of the covered employees, and that, by contrast, the governmental interests in testing without a showing of individualized suspicion are compelling.<sup>114</sup> These compelling interests include: (1) the importance of preventing rail accidents caused by drug or alcohol impairment; (2) deterring covered employees from using drugs or alcohol on duty; and (3) providing the rail industry with information regarding the cause of major rail accidents.<sup>115</sup>

The decision in *Skinner* significantly expands the special needs exception to the fourth amendment by extending the acceptable categories of searches conducted without probable cause to include those aimed at the person.<sup>116</sup> The *Skinner* decision also abolishes the existence of individualized suspicion as a prerequisite for approval under a special needs analysis<sup>117</sup> and clears the way for wide-spread use of drug testing in the public sector.<sup>118</sup>

### E. Dissent

#### 1. Major Concerns

Justice Marshall authored the dissent, in which Justice Brennan joined.<sup>119</sup> The dissent is premised on a fear that the majority's interpretation is a significant step toward reading the probable cause requirement out of the fourth amendment.<sup>120</sup> In support of this assertion, the dissent points out that the Court has "permitted 'special needs' to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of 'persons,'<sup>121</sup> 'houses,'<sup>122</sup> 'papers,'<sup>123</sup> and 'effects.'"<sup>124</sup>

The dissenters argue that previously the Court relaxed the probable cause standard only when the government action had a substantially less intrusive impact on privacy than a full scale search.<sup>125</sup> Even in cases which dispensed with the probable cause requirement, the government was almost always required to show individualized suspicion to justify the search.<sup>126</sup> The decision in *Skinner* widens the special needs exception to permit testing without probable cause or particularized suspicion.<sup>127</sup>

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114. *Id.* at 628.

115. *Id.* at 628-30.

116. *Id.* at 640 (Marshall, J., dissenting).

117. *Id.*

118. *Id.* at 655.

119. Justice Stevens concurred in the judgment and with the majority position with the exception of the portion of the Court's opinion that relies on a rationale of deterrence. Justice Stevens reasoned that if the threat of death or injury in a major rail accident was not sufficient to deter the use of drugs, the fear of apprehension by a drug test would not be more likely to do so. *Id.* at 671 (Stevens, J., concurring).

120. *Id.* at 636 (Marshall, J., dissenting).

121. *Id.*

122. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868 (1987)).

123. *Id.* at 636-37 (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987)).

124. *Id.* at 637 (citing *New Jersey v. T.L.O.*, 469 U.S. 325 (1985)).

125. *Id.* at 638 (citing *Dunaway v. New York*, 442 U.S. 200, 214 (1979)).

126. *Id.*

127. *Id.* at 640.

Prior to this decision, the special needs exception was limited to searches involving property rather than persons.<sup>128</sup>

The dissenters' objections to the *Skinner* decision centered on the expansion of the exceptions to fourth amendment protections.<sup>129</sup> The elimination of the probable cause requirement, the elimination of the particularized suspicion requirement, and the expansion of the exception to searches of the person all tend to blur the outer boundary of what protection yet remains under the fourth amendment.<sup>130</sup>

## 2. Dissent's Analysis of the Case

Using an analysis similar to that used by the majority,<sup>131</sup> the dissent reached different conclusions.<sup>132</sup> The dissenters answered the preliminary questions<sup>133</sup> in the same way as the majority, agreeing that the tests were attributable to government action and implicated the fourth amendment.<sup>134</sup>

The dissenters then considered the question of whether the search was based on a valid warrant or recognized exception to the warrant requirement.<sup>135</sup> They concluded that while the need to expeditiously collect the samples might override the warrant requirement, there was no reason a warrant could not be obtained after sample collection but prior to testing of the sample. Because samples do not quickly degrade if properly stored, there was no longer an immediate danger of losing evidence.<sup>136</sup>

The dissent's final consideration was related to the requirement that the search be based on probable cause or lesser particularized suspicion if the search was characterized as minimally intrusive.<sup>137</sup> The dissenters concluded that the searches in question involved neither probable cause nor any degree of individualized suspicion.<sup>138</sup> Further, the dissenters characterized the tests as very intrusive, quoting the majority's own characterization of urination as highly personal and private.<sup>139</sup> The dissenters concluded that the only way the majority reached a different conclusion

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128. *Id.*

129. *Id.*

130. *Id.*

131. Justice Marshall outlined the inquiry traditionally made in fourth amendment cases prior to the advent of the "special needs" analysis as follows:

1. Has a fourth amendment search taken place?
2. Was the search based on a valid warrant or pursuant to a recognized exception to the warrant requirement?
3. Was the search based on probable cause or validly based on lesser suspicion because it was minimally intrusive?
4. Was the search conducted in a reasonable manner?

*Id.* at 641-42.

132. *Id.* at 642-43.

133. See *supra* notes 47-61 and accompanying text.

134. *Skinner*, 489 U.S. at 642 (Marshall, J., dissenting).

135. *Id.*

136. *Id.* at 642-43.

137. *Id.* at 643.

138. *Id.*

139. *Id.* at 647 (citing *National Treasury Employees Union v. Von Raab*, 816 F.2d 170, 175 (5th Cir. 1987)).

was by falsely classifying as minimal the privacy and dignity interests involved and by inflating the efficacy of the FRA's testing program.<sup>140</sup>

In conclusion, the dissent stated that, based on the factors considered above, the drug tests in question in *Skinner* should be allowed only on a showing of probable cause.<sup>141</sup> The dissent termed the special needs consideration relied upon by the majority as "a manipulable balancing inquiry,"<sup>142</sup> "unprincipled and dangerous,"<sup>143</sup> and a serious threat to the right to be let alone.<sup>144</sup>

The dissent raises another interesting concern by pointing out that the Agency's regulations do not prohibit using the results of their testing program for criminal prosecution.<sup>145</sup> Justice Marshall quotes the portion of the regulation that states "each sample . . . may be made available to . . . a party in litigation upon service of appropriate compulsory process on the custodian of the sample . . . ."<sup>146</sup> The majority observes that evidence of criminal behavior uncovered during an otherwise valid regulatory search is not excludable unless the search is shown to be a pretext for obtaining evidence for a criminal trial.<sup>147</sup> However, the Court leaves "for another day the question whether routine use in criminal prosecutions of evidence obtained pursuant to the administrative scheme would give rise to an inference of pretext."<sup>148</sup> This makes it conceivable that a covered employee could be prosecuted and convicted in a criminal proceeding based solely on the results of a warrantless, suspicionless search.<sup>149</sup>

### III. THE *VON RAAB* CASE

#### A. Background

*National Treasury Employees Union v. Von Raab*, decided the same day as *Skinner*, involved a similar attempt by the United States Customs Service ("Service"), a bureau of the Department of the Treasury, to require urine testing of employees seeking transfer or promotion to certain positions.<sup>150</sup> This testing was required without any individualized suspicion and would merely qualify an individual for a requested transfer or promotion.<sup>151</sup> William Von Raab, the Commissioner of Customs, justified the new testing requirements by stating that drug interdiction had become

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140. *Id.* at 650.

141. *Id.* at 648.

142. *Id.* at 640.

143. *Id.* at 641.

144. *Id.*

145. *Id.* at 650.

146. *Id.* at 650-51 (citing 49 C.F.R. § 219.211(d) (1987)).

147. *Id.* at 652 n.10 (citing *ante* at 621 n.5).

148. *Id.* at 621 n.5.

149. *Id.* at 651.

150. 489 U.S. 656, 659 (1989).

151. *Id.* at 660.

the primary mission of the Service.<sup>152</sup> Von Raab opined that the Service is largely drug free, but "no segment of our society is immune from the threat of illegal drug use."<sup>153</sup> He stressed that there can be no tolerance of those within the Service who use or possess illegal drugs.<sup>154</sup>

### B. The Testing Program

The drug tests in question are a condition of placement or employment for positions meeting any of the following criteria. The test is required when an employee has "direct involvement in drug interdiction or enforcement of related laws."<sup>155</sup> Similarly, an employee seeking to move into a position which requires that he carry a firearm must be tested.<sup>156</sup> Finally, an employee seeking a position in which he is required to handle "classified" material must be tested.<sup>157</sup>

The tests are scheduled after an employee qualifies for a position covered by the Service testing program. An independent contractor contacts the employee to schedule a time and place for collecting the sample.<sup>158</sup> The employee may produce the sample behind a screen or in the privacy of a bathroom stall with only aural monitoring.<sup>159</sup> No information regarding medications currently being taken by the employee is collected unless the specimen tests positive.<sup>160</sup> Employees who test positive and cannot present a satisfactory explanation for the result are subject to dismissal from the Service.<sup>161</sup>

One significant way in which this program differs from that in *Skinner* is that under the Treasury regulation, the "[t]est results may not . . . be turned over to any other agency, including criminal prosecutors, without the employee's written consent."<sup>162</sup> This appears to eliminate one objection the dissent in *Skinner* had to the drug testing program involved in that case.<sup>163</sup>

### C. Procedural History

The National Treasury Employees Union ("Union"), a union of federal employees, sued the Service in the United States District Court for the Eastern District of Louisiana seeking to enjoin the proposed new testing requirements. The Union alleged that the "drug-testing program violated, *inter alia*, the Fourth Amendment" by requiring Service employees to submit to an unreasonable search in order to qualify for certain jobs

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152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 661.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 661-62 n.1.

161. *Id.* at 663.

162. *Id.*

163. See *supra* notes 145-49 and accompanying text.

within the Service. The district court agreed with the Union and granted the injunction sought by the Union.<sup>164</sup>

The Fifth Circuit vacated the injunction.<sup>165</sup> While agreeing with the lower court that the testing program was a search within the meaning of the fourth amendment, the Fifth Circuit found the tests to be reasonable.<sup>166</sup> The court noted the Service's attempt to minimize the intrusiveness of the search by not requiring visual observation and by affording the employee prior notice.<sup>167</sup> The Fifth Circuit also found it significant that there was very limited discretion under the guidelines in determining which employees to test and that the tests were an aspect of the employment relationship.<sup>168</sup>

The court found that the government has a strong interest in ensuring the integrity of Service employees in the affected positions. The court concluded that "considering the nature and responsibilities of the jobs for which the applicants were being considered," requiring the drug test as a condition of employment was not unreasonable.<sup>169</sup>

The dissenting judge in the fifth circuit based his opinion on the rationale that the program, as formulated, could not meet the Service's stated goals for two reasons. First, the tests would not detect drug use because the five day advance notice given employees prior to testing made the program ineffective. Second, "persons already employed in sensitive positions [were] not subject to the test[ing]."<sup>170</sup>

The United States Supreme Court granted certiorari<sup>171</sup> and affirmed the portions of the Fifth Circuit decision which upheld the testing of employees directly involved in drug interdiction or required to carry firearms.<sup>172</sup> However, the Supreme Court vacated the portion of the Fifth Circuit decision pertaining to the testing of applicants for positions requiring the handling of classified materials.<sup>173</sup>

#### D. The Court's Analysis

##### 1. Preliminary Questions

The Court considered the same preliminary questions addressed in *Skinner*.<sup>174</sup> Here, as in *Skinner*, the Court determined that the drug tests in question constitute searches which implicate the fourth amendment.<sup>175</sup>

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164. *Von Raab*, 489 U.S. at 663.

165. *Id.*

166. *Id.*

167. *Id.* at 663-64.

168. *Id.* at 664.

169. *Id.*

170. *Id.*

171. *National Treasury Employees Union v. Von Raab*, 485 U.S. 903 (1988).

172. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 664 (1989).

173. *Id.* at 664-65.

174. The preliminary questions are: (1) are the tests in question attributable to the government or its agents; and (2) do the tests amount to searches or seizures? See *supra* note 47 and accompanying text.

175. *Von Raab*, 489 U.S. at 665.

Therefore, the Service's drug testing program must meet the reasonableness requirement of the fourth amendment.<sup>176</sup>

The Court reiterated the general preference that all searches be supported by a warrant and probable cause.<sup>177</sup> It also cited its holding in *Skinner*, which requires a balancing of the individual's privacy expectations against the government's interests when determining whether it is impractical to require a warrant or individualized suspicion in any particular case involving special needs beyond the normal need for law enforcement.<sup>178</sup>

## 2. The Majority's Treatment of the Case

The Court examined the facts in *Von Raab* and concluded that the Service's drug testing program was not designed to meet the ordinary needs of law enforcement; its purpose was not to identify drug users for prosecution.<sup>179</sup> The Court found the purposes of the program to be deterring drug use among those eligible for promotion to sensitive positions within the Service and preventing the promotion of drug users to those positions.<sup>180</sup>

### a. The Warrant Requirement

The Court decided no warrant was needed in conjunction with the testing program.<sup>181</sup> It cited past decisions permitting warrantless searches under a variety of circumstances.<sup>182</sup> The Court also focused on the importance of the Service's mission and the possibility of compromising that mission if every "routine, yet sensitive, employment decision" required a warrant.<sup>183</sup> Finally, as in *Skinner*, the Court found that in the present context involving no discretionary determination to search, there are no special facts for a neutral magistrate to evaluate.<sup>184</sup> Therefore, a warrant requirement would provide no additional protection for the covered employee.<sup>185</sup>

### b. The Probable Cause Requirement

As in *Skinner*, the Court stated that even when it is reasonable to dispense with the warrant requirement, a search must still ordinarily be based upon probable cause. However, this traditional standard "is peculiarly related to criminal investigations" and may not be helpful in analyzing routine administrative functions.<sup>186</sup>

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176. *Id.*

177. *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

178. *Id.* (citing *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989)).

179. *Id.* at 666.

180. *Id.*

181. *Id.* at 666-67.

182. *Id.*

183. *Id.* at 667.

184. *Id.* (citation omitted).

185. *Id.*

186. *Id.* at 667-68 (citations omitted).



Criminal law enforcement is typically directed toward hostile or aggressive conduct, which most often occurs in public places and leaves a trail of discernable facts.<sup>187</sup> The traditional probable cause test functions quite well under such circumstances. However, administrative searches, such as housing inspections, involve conditions not detectable from outside the premises and seldom provide probable cause that could serve as the basis for a warrant. In other words, while the warrant and probable cause requirement functions reasonably well in the criminal setting, it is unworkable in many administrative settings.<sup>188</sup> This is particularly true when a program is preventive in nature.<sup>189</sup> Events rarely lead to any articulable grounds for searching any particular place or person.<sup>190</sup>

In evaluating the government's specific need to conduct the searches in question, the Court considered the success of drug smugglers in bringing drugs into the United States.<sup>191</sup> Additionally, the Court found that many of the Service's employees are regularly exposed to this criminal element and the drugs in which they traffic. Employees are subjected to threats and are tempted by bribes and by their own access to contraband seized by the Service.<sup>192</sup> Therefore, the Court concluded that "the Government has a compelling interest in ensuring that front-line interdiction personnel are physically fit, and . . . [possess] unimpeachable integrity and judgment."<sup>193</sup>

The Court applied the balancing test from *Skinner* and held that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms."<sup>194</sup> The Court reasoned that the public interest requires that the employees charged with preventing drugs from entering this country themselves be drug-free.<sup>195</sup> The national interest in preventing drugs from coming into this country could be irreparably damaged by agents unsympathetic to the mission of the Service or in collusion with those attempting to subvert the law. Additionally, the Court stated that the public should be spared the risk that employees impaired by drug abuse will be promoted or transferred into positions requiring the use of a firearm and the potential use of deadly force.<sup>196</sup>

The Court then compared the interference with individual liberty caused by these tests against the governmental interests just described.<sup>197</sup> The

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187. W. LAFAVE & J. ISRAEL, *supra* note 82, at 189.

188. *Id.* at 189-90.

189. *Camara v. Municipal Court*, 387 U.S. 523, 535-36 (1967).

190. *Id.*

191. *Von Raab*, 489 U.S. at 668-69 (citing *United States v. Montoya de Hernandez*, 473 U.S. 531, 538 (1985)).

192. *Id.* at 669.

193. *Id.* at 670.

194. *Id.* at 668.

195. *Id.* at 670.

196. *Id.*

197. *Id.* at 671.

Court began by noting that "operational realities of the workplace [often] render entirely reasonable certain work-related intrusions by supervisors and co-workers that . . . [would] ordinarily be viewed as unreasonable [under] other circumstances."<sup>198</sup> Depending on the job, these intrusions might even extend to searches of the person.<sup>199</sup> For example, employees of the United States Mint can expect to be searched daily as they leave the workplace, and military and intelligence personnel may be required to provide extraordinary assurances of trustworthiness, probity, and physical fitness.<sup>200</sup>

The Union argued against the drug testing program, stating that "it is not based on a belief that testing will [uncover] any drug use by covered employees."<sup>201</sup> The Government presented no evidence of a perceived drug problem within the Service<sup>202</sup> and previous testing had resulted in very few positive results.<sup>203</sup> The Union also claimed the program was insufficiently productive to justify its intrusiveness because, with the advance notice given, an employee can evade detection by abstinence or specimen adulteration.<sup>204</sup>

The majority's response to the Union's first contention was to draw an analogy between the drug tests at issue in *Von Raab* and airport searches.<sup>205</sup> In airports, searches are conducted of all boarding passengers in spite of the fact that very few are guilty of carrying any form of weapon. In the case of airport searches, the risk of someone smuggling a weapon or explosives on board an aircraft meets the test of reasonableness as long as the search is conducted in good faith and for the purposes for which it has been approved.<sup>206</sup> The fact that the level of intrusiveness involved is also much lower than in urine testing is not mentioned by the majority. The Court again emphasized the unique and important mission of the Service, the requirement that employees remain drug free to reduce susceptibility to blackmail, and the extreme hazards to safety and national security that could result from promotion of drug users to the positions covered by testing.<sup>207</sup>

In response to the Union's second contention that the program, as structured, is not effective enough to justify the intrusions on the employees' privacy, the Court stated that addicted employees will not be able to abstain for even the five days for which they receive notice.<sup>208</sup> Additionally, the Court argued that the avoidance techniques suggested

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198. *Id.* (citation omitted).

199. *Id.*

200. *Id.*

201. *Id.* at 673.

202. *Id.*

203. There have been five positive tests out of approximately 3,600 administered. *Id.*

204. *Id.*

205. *Id.* at 675-76 n.3.

206. *Id.*

207. *Id.* at 674-75.

208. *Id.* at 676.

by the petitioners are uncertain and "not likely to be known or available to the employee."<sup>209</sup>

### c. The Holding

The Court held that the Government demonstrated "compelling interests in safeguarding our borders and the public safety [which] outweigh the privacy expectations of employees who seek to be promoted to [the] positions" covered by the testing program.<sup>210</sup> The majority therefore concluded that the testing of employees seeking positions involving the interdiction of drugs, the enforcement of related laws, or the carrying of a firearm is reasonable under the fourth amendment.<sup>211</sup> However, the Court did not extend its holding to Service employees with access to "classified" information, as the Government had requested.<sup>212</sup> Instead, the Court stated that the definition of what constitutes "classified" information was not sufficiently clear from the record to permit a decision regarding the need for the testing program.<sup>213</sup> The portion of the Fifth Circuit decision addressing the testing of employees with access to classified information was vacated and the issue was remanded for further proceedings.<sup>214</sup> The Court left open the possibility of including this category of employee at a later date.<sup>215</sup>

### E. The Dissent

#### 1. Justices Marshall and Brennan

Justice Marshall, joined by Justice Brennan, wrote a dissent very similar to the one he wrote in *Skinner*.<sup>216</sup> As in that case, his argument was based on a perception that the Court's holding abandoned the fourth amendment's protections against unreasonable searches. Justice Marshall argued that the fourth amendment requires probable cause to justify a search of the person. He also stated his agreement with the rationale expressed in Justice Scalia's dissenting opinion.<sup>217</sup>

#### 2. Justices Scalia and Stevens

Justice Scalia, joined by Justice Stevens, wrote a separate dissenting opinion.<sup>218</sup> Both Justices Scalia and Stevens concurred in *Skinner* based upon "the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use

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209. *Id.*

210. *Id.* at 677.

211. *Id.*

212. *Id.* at 677-78.

213. *Id.* at 678.

214. *Id.*

215. *Id.* at 679.

216. *Id.* (Marshall, J., dissenting).

217. *Id.* at 679-80.

218. *Id.* at 680 (Scalia, J., dissenting).

and grave harm . . . .'<sup>219</sup> The evidence of drug and alcohol abuse presented in *Skinner* and its connection to railway accidents rendered the search in that case a reasonable means of protecting society.<sup>220</sup> However, no direct evidence of an identifiable problem involving drug abuse in the Service was presented in the *Von Raab* case. The government's failure to provide any such evidence in *Von Raab* was cited by the Justices in distinguishing this case from *Skinner* and as the reason for their dissent.<sup>221</sup>

In fourth amendment law, the question of reasonableness depends largely upon the social necessity that prompts the search.<sup>222</sup> For instance, in upholding an administrative search of a student's purse at school, the Court in *New Jersey v. T.L.O.* relied upon the serious problem of maintaining order in schools in an atmosphere of drug use and violent crime.<sup>223</sup> In upholding fixed checkpoints near the Mexican border with the authority to stop and search cars for illegal aliens, the Court in *United States v. Martinez-Fuerte* relied on Immigration and Naturalization Service information that as many as ten or twelve million aliens may currently be in the country illegally.<sup>224</sup> Furthermore, the drug and alcohol tests upheld in *Skinner* were based upon a showing of a long-standing and wide-spread problem with substance abuse in the railroad industry.<sup>225</sup>

The dissent then argued that the majority's opinion in *Von Raab* contained no evidence of a problem which can be solved by urine testing Service employees.<sup>226</sup> For instance, no evidence was presented to show that a Service employee who uses drugs is any more vulnerable to bribes than one who does not.<sup>227</sup> Nor was any evidence presented showing that drug testing will be effective in preventing Service agents who carry guns from risking impaired perception and judgment due to drug abuse. At present, agents are aware that if they risk drug impairment, they can be killed in combat with unimpaired drug smugglers. The dissenters did not believe that the fear of detection through a pre-announced drug test would have more of an inhibiting effect on possible drug use than the dangers inherent in the job already provide.<sup>228</sup> Justice Scalia stated that the majority's argument lacked any proof that the dangers cited as the basis for the compelling governmental interest actually occur. Although the Court pointed out that several employees had been removed for taking bribes and other integrity violations, and that at least nine officers had

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219. *Id.*

220. *Id.*

221. *Id.* at 680-81.

222. *Id.* at 681.

223. The problems of maintaining order in the schools, drug use, and violence were documented in an agency report to Congress. *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985)).

224. *Id.* (citing *United States v. Martinez-Fuerte*, 428 U.S. 543, 551-552 (1976)).

225. The problem was documented in a study and in a review of accident records. *Id.* (citing *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602, 606-08 (1989)).

226. *Id.*

227. *Id.* at 682.

228. *Id.* at 683.

died in the line of duty since 1974, there was no indication that any of these instances were related to drug use by Service employees.<sup>229</sup>

The dissent's argument pointed out that in numerous previous decisions, the Court had taken pains to establish the existence of a special need for the search based upon well-known or well-demonstrated evils clearly linked to the problem at hand with well-known or well-demonstrated consequences.<sup>230</sup> According to Justice Scalia, the majority in *Von Raab* abandoned that principled search for a legitimate special need. Instead, the majority justified the testing program based upon the existence of a pervasive social problem—drug abuse—combined with speculation as to the effect of that problem on people employed by the Service.<sup>231</sup>

#### IV. THE SEARCH FOR A PRINCIPLED DISTINCTION

*Skinner* and *Von Raab* extend the boundaries of a proper fourth amendment search. Both decisions allow warrantless searches of the person without requiring the probable cause or particularized suspicion previously required for this type of search.<sup>232</sup> The cases do not set a new outer limit or provide any guidance other than the "special needs" criteria and the balancing test from *Camara*.<sup>233</sup>

The dissenting opinions in each case attempt to provide a principled basis for establishing a new outer limit for the protections of the fourth amendment.<sup>234</sup> Justices Marshall and Brennan would require at least some indication of particularized suspicion for a search of the person, with a strong preference for a full showing of probable cause.<sup>235</sup>

Justice Scalia's attempt to distinguish between *Skinner* and *Von Raab* presents an approach for delineating a new outer boundary for limiting intrusive government searches.<sup>236</sup> In *Skinner* and other previous cases, the Court always had specific information establishing a specific problem or problems to which the search in question was advanced as a solution.<sup>237</sup> In *Von Raab*, no evidence of a specific problem was advanced.<sup>238</sup> Instead, the Court relied upon general statements about the societal problem of drug abuse to justify the testing program.<sup>239</sup>

Justice Scalia was not willing to take that extra step and eliminate the requirement of a specific, documented problem that could be solved or improved by implementation of the drug testing program in question.<sup>240</sup> His separate opinion made it clear that he considered the decision le-

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229. *Id.*

230. *Id.* at 684-85.

231. *Id.* at 684.

232. *Skinner*, 489 U.S. at 639-40.

233. *Id.*

234. See *supra* notes 132-49, 216-31 and accompanying text.

235. *Skinner*, 489 U.S. at 636; *Von Raab*, 489 U.S. at 679-80.

236. *Von Raab*, 489 U.S. at 680-81.

237. *Id.* at 681.

238. *Id.*

239. *Id.* at 682.

240. *Id.*

gitimizing the tests as unsupported by the evidence. At a minimum, Justice Scalia would require credible evidence of a specific problem and a logical connection between the evil perceived and the solution proposed.<sup>241</sup>

In *Skinner*, there was ample evidence of a serious rail safety problem caused by drug or alcohol impaired employees.<sup>242</sup> There was documentary evidence of deaths and property damage caused by the problem.<sup>243</sup> The testing of employees involved in certain accidents or safety violations is a logical solution to at least some aspects of the overall problem.<sup>244</sup> However, *Von Raab* does not present the same situation.<sup>245</sup> For Justice Scalia, this omission of evidence of a specific problem at which to direct the testing provides the point for drawing the line in deciding how far to expand traditional fourth amendment protections.<sup>246</sup>

While Justice Scalia's attempt to provide a principled basis for deciding future fourth amendment cases has the virtue of narrowing the broad scope presented in the Court's opinions in *Skinner* and *Von Raab*, it too suffers from considerable subjectivity. Left open for future decisions are the issues of how serious the problem sought to be corrected must be in order to trigger the special needs analysis, how much evidence of a problem within the field is enough, what sources of such evidence are acceptable, and the appropriate standard to use in judging the fit between the problem and the questioned procedure advanced as a solution.<sup>247</sup> However, while not perfect, the principles provided by Justice Scalia's separate opinion are a step in the direction of narrowing the overly broad principles of the Court's majority opinion under which virtually any search or seizure can be justified as meeting special governmental needs.<sup>248</sup>

## V. LATER CASES

### A. Federal Cases

A number of cases have been decided by various federal courts since *Skinner* and *Von Raab*. In *Harmon v. Thornburgh*,<sup>249</sup> the court considered a challenge to random drug testing<sup>250</sup> of some employees<sup>251</sup> of the De-

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241. *Id.* at 683.

242. *See supra* notes 17-21 and accompanying text.

243. *Skinner*, 489 U.S. at 607.

244. *Id.* at 608.

245. *Von Raab*, 489 U.S. at 681-82.

246. *Id.* at 682-83.

247. *Id.*

248. *Id.*

249. 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990).

250. *Id.* at 485. The court found the random aspect of the testing program in question here to be simply one more factor to be weighed in the balancing test used to evaluate the program in question. *Id.* at 489.

251. The drug testing plan called for the random testing of employees in five categories: (1) employees with top secret clearance; (2) employees involved with grand jury proceedings; (3) employees serving under Presidential appointments; (4) employees assigned to prosecute criminal cases; and (5) employees involved with the storing or safeguarding of drugs. *Id.* at 486.

partment of Justice.<sup>252</sup> The court applied the balancing test from *Skinner* and *Von Raab*,<sup>253</sup> holding that the governmental interest in safeguarding classified information was the only claim made by the government worthy of serious consideration.<sup>254</sup> Therefore, the testing program was upheld only for those employees with a top secret national security clearance.<sup>255</sup> *Harmon* is noteworthy for its extension of the principles announced in *Skinner* and *Von Raab* to a situation in which there was no significant public safety interest. The court upheld the testing program by considering the government's interest in protecting classified information.<sup>256</sup>

In *National Federation of Federal Employees v. Cheney*,<sup>257</sup> the court upheld a drug testing program for many categories of civilian employees<sup>258</sup> of the Department of Defense directly related to safety and drug abuse reduction considerations. However, the court rejected the plan for employees<sup>259</sup> working in job categories where the need to test was less clear.<sup>260</sup>

*American Federation of Government Employees v. Skinner*<sup>261</sup> upheld a drug testing program, which included random urinalysis, for Department of Transportation employees in a wide variety of jobs.<sup>262</sup> Because most of the employees involved in the suit were vehicle operators, this was the job classification most strongly challenged by the Union.<sup>263</sup> The court upheld testing for those employees driving shuttle buses and other passenger vehicles on the basis of the safety rationale.<sup>264</sup> The court differentiated drivers of vehicles such as mail vans, however, and it also approved the random testing of their operators based upon their handling of classified information.<sup>265</sup>

## B. State Cases

The response of state courts to the decisions in *Skinner* and *Von Raab* has, for the most part, been similar to that of the federal courts.<sup>266</sup>

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252. *Id.*

253. *Id.* at 488.

254. *Id.* at 490.

255. *Id.*

256. *Id.*

257. 884 F.2d 603 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990).

258. *Id.* at 608. The drug testing was upheld for civilian employees who service aircraft, fly aircraft, and those who serve as police officers and guards. *Id.* at 610.

259. The court disapproved the random drug testing plan for a wide variety of job classifications, including positions working with chemical and nuclear materials. The disapproval was based on the inclusion of much less dangerous jobs, such as secretarial and animal caretaker positions, in the same category. *Id.* at 611-12.

260. *Id.*

261. 885 F.2d 884 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 1960 (1990).

262. Workers whose jobs directly involved safety, law enforcement, and national security were subject to the random, suspicionless drug testing program. *Id.* at 887.

263. *Id.* at 891.

264. *Id.*

265. *Id.* at 893.

266. The majority of state court decisions have followed the general pattern of ruling the tests constitutional and upholding them when special need can be demonstrated. *See, e.g.,* Chiles Offshore,

However, courts in both California and New York have, on some occasions, relied on state constitutions to protect the rights of individuals.<sup>267</sup> While the number of cases following this approach are few, it may suggest a possible rationale under which state courts can preserve a greater measure of individual rights than the level currently possible in the federal courts.

For instance, the New Mexico Supreme Court has recently demonstrated its willingness to rely on the state constitution to afford greater protection to its citizens. In *State v. Cordova*,<sup>268</sup> the court decided to continue to use the *Aguilar-Spinelli* test<sup>269</sup> as the basis for the standard to be followed by magistrates in issuing search warrants based on hearsay information.<sup>270</sup> The court opted for *Aguilar-Spinelli*, the more stringent test, relying on the New Mexico Constitution and court rules,<sup>271</sup> rather than following the federal courts in adopting the *Illinois v. Gates* test.<sup>272</sup> If New Mexico and other jurisdictions look to their state constitutions, the erosion of traditional fourth amendment rights resulting from the decisions in *Skinner* and *Von Raab* may be minimized.

## VI. CONCLUSION

Since the decisions in *Skinner* and *Von Raab*, courts have upheld random testing in a variety of cases,<sup>273</sup> while rejecting it in others.<sup>274</sup>

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Inc., v. Administrator, Dept. of Employment Sec., 551 So.2d 849 (La. Ct. App. 1989) (upholding employer's use of random drug screening urinalysis test); *Duarte v. Healy*, 405 Mass. 43, 537 N.E.2d 1230 (1989) (upholding random urinalysis for probationary fire fighter); *City of Annapolis v. United Food and Commercial Workers*, 317 Md. 544, 565 A.2d 672 (Ct. App. 1989) (no violation of fourth amendment to randomly drug test city police officers and fire fighters); *In re Carberry*, 114 N.J. 574, 556 A.2d 314 (1989) (random drug testing of state troopers not unconstitutional); *Seelig v. Koehler*, 151 A.D.2d 53, 546 N.Y.S.2d 828 (1989) (plan requiring random drug testing of all New York City correction officers was not constitutionally infirm); *McKenzie v. Jackson*, 152 A.D.2d 1, 547 N.Y.S.2d 120 (1989) (upholding random urinalysis for correction officers); *Independent School Dist. No. 1 of Tulsa County v. Logan*, 789 P.2d 636 (Ok. Ct. App. 1989) (upholding random drug tests for school bus drivers); *Singleton v. Commonwealth Unemployment Compensation Bd. of Review*, 558 A.2d 574 (Pa. 1989) (upholding transit authority's inclusion of drug screening as part of reinstatement physical).

267. For instance, in *Doe v. Roe, Inc.*, 143 Misc. 2d 156, 539 N.Y.S.2d 876 (Sup. Ct. 1989), the court found that denial of employment to plaintiff on the basis of a positive drug test violated his rights under the state's Human Rights Law. In *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (Ct. App. 1989), *Semore v. Pool*, 217 Cal. App. 3d 1087, 266 Cal. Rptr. 280 (Ct. App. 1990), and *Luck v. Southern Pac. Transp.*, 218 Cal. App. 3d 1, 267 Cal. Rptr. 618 (Ct. App. 1990), California courts looked to the state constitution to define the rights of individuals objecting to random drug testing. In the first case, *Wilkinson*, the court found that a private employer's conditioning of employment upon successfully passing a drug screening test did not violate the state's constitution. In *Semore*, the court held that the right of privacy in the California Constitution in some circumstances protects individuals from the actions of private employers as well as governmental agencies. In *Luck*, the court held that the right to avoid giving a urine sample was a privacy interest protected by the state constitution.

268. 109 N.M. 211, 784 P.2d 30 (1989).

269. *Aguilar v. Texas*, 378 U.S. 108 (1964); *Spinelli v. United States*, 393 U.S. 410 (1969).

270. 109 N.M. at 219, 784 P.2d at 38.

271. SUP. CT. RULES ANN. 5-211(E), 6-208(F), 7-208(E), 8-208(F) (Recomp. 1986); *Cordova*, 109 N.M. at 214 n.4, 784 P.2d at 33 n.4.

272. 462 U.S. 213 (1983).

273. *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (correctional employees who came into regular contact with prisoners or who had opportunities to smuggle drugs to prisoners); *Thomson*



Courts appear to be taking a cautious approach to permitting random drug testing, failing to uphold such programs in the absence of particularized suspicion of drug abuse against the group or class sought to be tested. The following patterns appear from the cases decided to date. First, the courts have preferred governmental interests predicated on concrete issues, such as public safety or the protection of classified information, over more subjective interests, such as preserving workforce integrity. Second, the courts have preferred narrowly drawn categories of employees with specifically justified reasons for conducting drug testing over broader categories and justifications. Third, some state courts have looked to their state constitutions in affording greater protection to their citizens than that provided by the United States Constitution under these recent decisions.

While the decisions considered in this comment have reduced the protections traditionally available under the fourth amendment, the relatively cautious approach to implementation taken by the lower courts

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v. Marsh, 884 F.2d 113 (4th Cir. 1989) (civilian employees in Army chemical weapons plant); Transport Workers Union of Philadelphia v. Southeastern Pa. Transp. Auth., 884 F.2d 709 (2nd Cir. 1989) (mass transit workers covered by the Railway Labor Act); Jones v. Jenkins, 878 F.2d 1476 (D.C. Cir. 1989) (bus attendant involved in transporting handicapped children); Transportation Institute v. Burnley, 727 F. Supp. 648 (D.D.C. 1989) (pre-employment testing, license application or renewal testing, and post-casualty testing in event of a serious accident for private employees aboard commercial ships); Moxley v. Regional Transit Serv., 722 F. Supp. 977 (W.D.N.Y. 1989) (regional transit authority's testing of drivers); American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989) (Department of Education motor vehicle operators); Brown v. City of Detroit, 715 F. Supp. 832 (E.D. Mich. 1989) (city police officers).

274. The courts rejected government arguments for random urinalysis in the following cases: Amalgamated Transit Union v. Skinner, 894 F.2d 1362 (D.C. Cir. 1990) (Urban Mass Transportation Administration lacked statutory authority to impose uniform national solution to local problem by prophylactic rule making); Taylor v. O'Grady, 888 F.2d 1189 (7th Cir. 1989) (drug testing was not upheld for all prison employees in general, only for those who came into regular contact with prisoners or had opportunity to smuggle drugs to prisoners); Beattie v. City of St. Petersburg Beach, 733 F. Supp. 1455 (M.D. Fla. 1990) (fire fighters, in the absence of current evidence of problems caused by drug use); National Treasury Employees Union v. Yeutter, 733 F. Supp. 403 (D.D.C. 1989) (plant protection and quarantine officers, computer specialists, and motor vehicle operators of the Department of Agriculture); Brooks v. East Chambers Consol. Indep. School Dist., 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) (high school students in grades 7-12 engaged in extra-curricular activities); Transportation Inst. v. Burnley, 727 F. Supp. 766 (D.D.C. 1989) (while upholding pre-employment testing, license application or renewal testing, and postcasualty testing, the court did not uphold random testing of almost all employees aboard commercial vessels); American Postal Workers Union v. Frank, 725 F. Supp. 87 (D. Mass. 1989) (postal workers not highly regulated and have no history of drug-related safety problems); National Treasury Employees Union v. Watkins, 722 F. Supp. 766 (D.D.C. 1989) (motor vehicle operators and computer or communications specialists or assistants); American Fed'n of Gov't Employees v. Cavazos, 721 F. Supp. 1361 (D.D.C. 1989) (while upholding the testing of motor vehicle operators, the court refused to permit random testing of automatic data processors who did not have access to truly sensitive information); Dimeo v. Griffin, 721 F. Supp. 958 (N.D. Ill. 1989), *aff'd*, 924 F.2d 664 (7th Cir. 1991) (horse racing employees, including outriders, parade marshals, starters, assistant starters, drivers, and jockeys); American Fed'n of Gov't Employees v. Thornburgh, 720 F. Supp. 154 (N.D. Cal. 1989) (all employees of Federal Bureau of Prisons, regardless of job function); American Fed'n of Gov't Employees v. Austin, 712 F. Supp. 986 (D.D.C. 1989) (drug testing of civilian employees of federal government not based on generalized suspicion that special circumstances existed which warranted the testing).

is encouraging. The actual shape of the new contours of the fourth amendment will become clearer in the months and years to come.

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