Special Aviation Section

Drug Testing in Aviation: The Double Standard Continues

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I. INTRODUCTION

Substance abuse in the American workplace costs the economy between an estimated $25-33 billion annually[1] in lost productivity. Drug testing programs, according to the implementing rationale, benefit the economy by preventing and discouraging drug use and, thereby, increasing safety.[2] The primary impetus, then, for instituting mandatory drug

1. Jeffrey R. Lewis, *Drug Testing in the Workplace: Legal and Policy Implications For Employers and Employees*, DET C.L. REV. 699, 700-01 (1987) (citing John G. Kruchko, *Private Rights v. Public Protections: Drug Testing in the Workplace*, COMPLEAT LAW, 7, 11 (1986) and Peter A. Susser, *Legal Issues Raised by Drugs in the Workplace*, 36 LAB L.J. 42 (1985)).

2. *See generally* Michael J.Ogborn, *Substance Abuse in the Public Sector*, 32 S.D. L. REV. 252 (1987). In the aviation industry, however, the very programs instituted to enhance safety and aid in accident investigations strangle financially burdened airlines, infringing on employee's traditionally protected privacy interests, while uncovering little to no drug use in an industry already pervasively regulated to ensure safety.

testing in the aviation industry was deterrence from use and ultimate safety of operations.

Before drug testing programs were implemented, the Department of Transportation (DOT) had predicted that 7.5% of aviation employees tested would test positive for illegal substances.[3] But, an analysis of 120,642 drug tests conducted over a six-month period in 1990, showed positive findings in only 0.47% of the tests completed.[4] Previous FAA and DOT testing have yielded similar results.[5] When fully implemented, drug testing is expected to cover 538,000 aviation personnel and cost business approximately $24 million per year during the decade of the 1990s.[6]

Besides its deterrence function, post-accident/post-incident drug and alcohol testing performs a natural role in aiding accident investigators in determining the cause of accidents by eliminating or confirming the role of drugs and alcohol in a particular accident. Yet, the National Transportation Safety Board (NTSB), the body charged with investigating and determining the probable cause of aviation accidents, is being unduly hampered in its investigatory role by regulations which invest government supervisors (with no accident investigatory duties or experience) with the power to decide which of their fellow employees, if any, might have contributed to an accident and whom should be tested. In the chaotic aftermath of an accident, this is a difficult task even for the seasoned investigator.

The NTSB is further hindered in its investigatory function by a regulatory and legislative scheme which denies it the ability to request testing of those individuals the Board believes might bear some responsibility for, or contribute to, an accident. With no independent authority to require

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3. *Washington Roundup: The 7.5% Solution*, AVIATION WK. & SPACE TECH., March 7, 1988, at 15.

4. *Id.* During the testing period from Jan. 1, 1990 to June 30, 1990, 561 individuals were tested, with 61.5% of the positive findings detected in pre-employment tests. *Id.* Random testing accounted for 31.73% of the positives (178 cases) while periodic, post-accident, reasonable cause and return-to-duty testing accounted for 6.77% (38 cases). *Id.* The breakdown of the positive test results by occupation includes job applicants as well as those working in those positions: 18 pilots and other flight deck crew; 116 flight attendants; 300 maintenance personnel; 48 aircraft dispatchers; 41 security personnel; 5 flight instructors; 4 private air traffic control personnel (29 persons were not identified by job or were not properly reported). *Id.* Of the positives reported, 346 were attributed to marijuana, 196 to cocaine, 13 to opiates, 1 to PCP, and 15 to amphetamines. *Id.*

5. *Supreme Court Gives DOT Approval for Random Drug Testing*, AVIATION DAILY, May 1, 1990, at 205. DOT drug testing of 34,235 employees between September 1987 and April 1990 revealed 0.46% positives (159 individuals tested positive). *Id.* The FAA also tested 24,082 employees between September 1987 and November 1989 for illegal drugs with 0.5% positives (or 131 cases) discovered. *Id.*

6. Michael Mecham, *Industry Slow to Comply With FAA Drug Testing Rule*, AVIATION WK. & SPACE TECH., Sept. 18, 1989, at 20.

drug or alcohol tests, the NTSB must ask the government employees to voluntarily submit to testing or allow their results, if any, to be released to the Board. To date, no government air traffic controller has voluntarily released his/her test results nor voluntarily submitted to testing at the request of the NTSB, and few can be expected to do so. The result is that, following an accident, the NTSB has the testing results of pilots and other private sector employees, but is without similar test specimens from air traffic controllers.

Thus, in addition to being extraordinarily expensive programs yielding little tangible results, federal drug testing regulations are being inequitably applied. Specifically, in post-accident/post-incident testing, divergent standards prevent the testing of all potential contributors to an aviation accident. Private sector employees are subject to mandatory post-accident or post-incident testing with the results of those tests releasable without their consent. Government employees, DOT/FAA air traffic controllers in particular, are accorded greater privacy protection because the results of their drug or alcohol test may not be released without their express written consent. The result often is that one segment of the airline industry is being subjected without hesitation to mandatory post-accident drug and alcohol testing while another integral part of the commercial aviation system is not. In short, when an accident occurs, it is often only the pilots that are tested for drugs or alcohol irrespective of the role air traffic controllers might have played in the accident. The current drug and alcohol testing regimen, therefore, ignores the crucial role played by air traffic controllers in the aviation industry, affords greater privacy rights to government aviation employees while denying commercial sector employees similar protections, and diminishes the investigatory role of drug and alcohol tests in aviation accidents by arbitrarily limiting the scope of obtainable information.

This article explores drug and alcohol testing in aviation as promulgated by the Omnibus Transportation Employee Testing Act of 1991[7] and as implemented by the Department of Transportation's program governing federal aviation employees including air traffic controllers, and the Federal Aviation Administration's program extending drug testing to commercial aviation personnel.

II. Drug and Alcohol Testing in Application

A. *Pilots, Not Air Traffic Controllers, Tested*

Three recent accidents highlight the divergent standards being applied in post-accident drug and alcohol testing of pilots and air traffic con-

7. Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, 105 Stat. 917 (1991).

trollers. Despite the apparent cause of the accident, pilots are often automatically subjected to drug and alcohol testing while inconsistent criteria are used to determine which controllers were involved and whom should be required to submit to post-accident toxicological testing.

1. AVIANCA 052

On July 19, 1989, Avianca Airlines flight 052 (AVA 052), a Boeing 707 with Colombian registration, crashed in a wooded residential area in Cove Neck, Long Island, New York.[8] AVA 052 was a scheduled international passenger flight from Bogota, Colombia to John F. Kennedy International Airport, New York which, because of poor weather conditions in the northeastern United States, was placed in holding patterns three times by air traffic control. During the third holding period, the flight crew reported that the aircraft was running out of fuel, that it could not reach its alternate airport, Boston-Logan International, and that the flight could hold for no longer than 5 minutes. While trying to return to JFK after a missed approach, AVA 052 lost power to all four engines and crashed approximately 16 miles from the airport. Of the 158 persons aboard, 73 were killed.[9]

The National Transportation Safety Board investigated and determined that the probable cause of the accident was the failure of the flight crew to adequately manage the aircraft's fuel load and their failure to communicate an emergency fuel situation to air traffic control.[10] Listed as a contributing cause of the accident was inadequate traffic flow management by the Federal Aviation Administration and the lack of standardized understandable terminology for pilots and controllers for minimum and emergency fuel conditions.[11] U.S. air traffic controllers had been involved in handling AVA 052 from the time that the flight entered into U.S. controlled airspace near Miami (the flight traversed air traffic control facilities in Miami, Jacksonville, Washington, D.C., and finally, New York).[12]

The Captain, Co-pilot, and Engineer of AVA 052 were fatally injured upon impact. Toxicology samples of their remains were negative for alcohol and drugs.[13] The FAA obtained toxicological samples from five of the

8. Avianca, The Airline of Colombia, Boeing 707-321B, HK 2016, Fuel Exhaustion, Cove Neck, New York, NTSB Aircraft Accident Report, Pub. No. 91-910404 at 1 (Jan. 25, 1990). The flight was operating under the regulations of Colombia and was certified to operate in the United States under the provisions of Title 14 C.F.R. Pt. 129 which governs the operations of foreign air carriers and foreign operators of United States-registered aircraft engaged in common carriage. *Id.*

9. *Id.* at 1-14 (providing a history of AVA 052).

10. *Id.* at 76.

11. *Id.*

12. *Id.* at 19.

13. *Id.* at 38. One laboratory sample, however, found very low levels of ethanol and 2-

New York ATC specialists who controlled AVA 052 in the latter stages of its flight.[14] Under DOT regulations existing at that time, the FAA was not required to provide the results of those tests to the NTSB. NTSB investigators requested the results of those tests directly from the controllers themselves, but the controllers refused. The controllers also declined the NTSB's requests for separate toxicological testing.[15]

2. *NORTHWEST 1482/299*

In December 1990, two Northwest Airlines aircraft collided on the runway at Detroit Metropolitan Airport. Northwest Flight 299, a Boeing 727, had been cleared by air traffic control for takeoff and was proceeding down the runway when Flight 1482, a McDonnell Douglas DC-9, wandered into its path. During the heavy fog engulfing the airport at the time, the pilots of Flight 1482 had missed a taxiway due to weather, poor airport markings, inadequate taxiway signs, and non-functioning runway lights. Air traffic control had also lost track of the aircraft. Eight people aboard the DC-9 were killed and numerous others injured.[16]

Following the accident, the Captain and First Officer of the DC-9 provided blood and urine samples as did the Captain, First Officer, and Flight Engineer of the B-727 in compliance with Northwest's drug testing program.[17] These tests were negative for drugs and alcohol.[18] The FAA Divisional Manager required one ground controller to submit to drug testing five hours after the accident.[19] No positive results, however, were reported to the NTSB as required and the ground controller refused to provide the NTSB with additional blood and urine samples.[20] The FAA decided not to test any of the other air traffic controllers. The NTSB requested post-accident drug tests of all tower personnel but none "volunteered", i.e., the air traffic controllers responsible for tracking Northwest Flights 1482 and 299 refused the NTSB's request for post-accident drug and alcohol tests.[21]

As noted, DOT procedures provide that an FAA management official has sole discretion to determine which FAA employees are to be drug

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butanol in one crewman's liver, however, the sample was determined to have been contaminated with external material. *Id.*

14. *Id.*

15. *Id.*

16. *See* Northwest Airlines, Inc. Flights 1482 and 299 Runway Incursion and Collision, Detroit Metropolitan/Wayne County Airport, Romulus, Michigan, December 3, 1990, NTSB Aircraft Accident Report, Pub. No. 91-910405, at 1 (June 25, 1991).

17. *Id.* at 29, 32.

18. *Id.* at 32.

19. *Id.* at 32-33.

20. *Id.* at 33.

21. *Id.*

tested following an accident. After the collision of Flights 1482 and 299, the FAA Divisional Manager made this decision within 3½ to 4 hours following the accident based on a hastily made judgment as to the cause of the accident. He did not hear the accident tapes prior to making his drug testing decisions and admitted during the NTSB accident investigation hearing that the only source of information for his decision whether to test FAA employees came from the facility involved in the accident.

During the NTSB hearing, the Divisional Manager indicated that, based on what he subsequently learned during the course of the investigation, he would have required more air traffic controllers to submit to drug tests. It was also suggested during the hearing that the FAA's reluctance to test more controllers was influenced by labor-management factors as well as employee morale considerations.

3. USAir 1493

On February 1, 1991, USAir flight 1493, a Boeing 737, collided with Skywest flight 5569, a Fairchild Metroliner, while the USAir aircraft was landing at Los Angeles International Airport. The Skywest Metroliner was positioned on the same runway, awaiting clearance for takeoff, on which the USAir flight was landing. All 12 individuals on board the Skywest flight and 22 people aboard the USAir airplane were killed.[22]

The NTSB blamed the Los Angeles air traffic controllers and the FAA for the collision. Specifically, the NTSB accident investigation determined that the probable cause of the accident was the failure of the Los Angeles Air Traffic Facility Management to implement procedures that provided sufficient redundancy in controllers' operations and the failure of the FAA Air Traffic Service to provide adequate policy direction and oversight to its air traffic control facility managers. These failures, the NTSB found, created an unsafe environment in the Los Angeles Air Traffic Control tower that ultimately led to the failure of the local controller to maintain an appropriate awareness of the traffic situation, culminating in inappropriate clearances which resulted in the collision of the USAir flight with the Skywest aircraft. Listed as a contributing cause of the accident was the failure of the FAA to provide effective quality assurance of the air traffic control system.[23]

Approximately 4 hours after the accident, two air traffic controllers submitted urine specimens for toxicological analysis at the direction of Federal Aviation Administration Air Traffic Control management and in ac-

22. Runway Collision of USAir Flight 1493, Boeing 737 and Skywest 5569 Fairchild Metroliner, Los Angeles International Airport, Los Angeles, California February 1, 1991, NTSB Aircraft Accident Report Pub. No. 91-910409, at vi, 1, 8 (Oct. 22, 1991).

23. *Id.* at 76.

cordance with DOT requirements. No positive results were reported following analysis of these specimens and a review of the case by the FAA Medical Review Officer. The individual controllers involved refused the NTSB's subsequent requests for blood and urine specimens.[24]

The first officer of USAir 1493 submitted a urine specimen following the accident in accordance with Federal requirements. At the NTSB's request, the first officer voluntarily provided a blood specimen and agreed to release his FAA medical certification records.[25]

The captain of USAir 1493 and both crew members of SKW 5569 were fatally injured in the accident. Toxicological specimens collected from the remains were negative for alcohol and drugs, although the presence of over the counter cold medication was discovered in the body of the Skywest first officer and phenobarbital for a gastrointestinal problem in the remains of the USAir captain.[26]

In analyzing the FAA post-accident toxicological testing, the NTSB found that, as a minimum, the FAA air traffic management personnel should have required that the ground controllers and the clearance delivery controller be tested under the FAA's drug testing program because three controllers were handling the accident aircraft and the clearance delivery controller committed an error with a misplaced flight progress strip used to monitor the progress of flights between controller positions.[27] Recognizing that all the relevant facts and circumstances cannot be known in the period immediately following an accident and that it cannot be determined with certainty who should be subjected to drug testing at that time, the NTSB found that the FAA should test all individuals who may be reasonably associated with the circumstances of an accident, such as all controllers who had communications with an aircraft shortly before an accident and their supervisors. The NTSB proposed retaining those specimens until the investigation had established who was associated with the accident and then submitting only those specimens relevant to the investigation for analysis.[28]

Following the USAir accident, NTSB staffers met with the Department of Transportation Secretary's Special Assistant for Drug Enforcement and Program Compliance and others on the DOT staff to discuss DOT post-accident drug testing programs and the need to collect blood and urine specimens from all involved in an accident and to increase the number of

24. *Id.* at 31.
25. *Id.*
26. *Id.* at 31, 72.
27. *Id.* at 72.
28. *Id.* at 73. The NTSB further proposed returning those specimens not required for analysis to the individuals. *Id.* The NTSB also commended USAir's drug testing program for exceeding the FAA's post-accident drug testing provisions. *Id.*

drugs (including alcohol) in the program. The Secretary's Special Assistant indicated that DOT was currently evaluating the merits of establishing a separate program for drug and alcohol testing following accidents but DOT has not notified the NTSB of any planned action.[29]

Indeed, the NTSB took exception with the inconsistent approach taken by DOT in formulating regulations providing for the drug and alcohol testing of persons involved in accidents.[30] The NTSB noted that under *existing* FAA post-accident regulations, NTSB investigators may not be able to determine whether surviving aircraft crew members or air traffic controllers caused, or contributed to, an accident because of drug or alcohol impairment.[31]

B. *Inequitable Implementation*

These episodes illustrate how unevenly and inequitably federal drug testing programs are being administered in the aviation industry. Implemented to deter drug use and enhance safety, the drug and alcohol testing programs are operating with two different presumptions based on classification of the individual to be tested: for pilots—a presumption of guilt which must be refuted through a negative test result; for air traffic controllers—a presumption of innocence which must be overcome in the early phases of an accident investigation before drug and/or alcohol tests are required. The result when an accident occurs: pilots are tested for drug and alcohol, air traffic controllers often are not. If post-accident drug and alcohol testing is to be required, all potential contributors to an accident should be subjected to the tests. Post-accident drug testing, then, should be performed on a uniform basis with the same determining mechanisms and triggering events applied equally to all concerned.

The current regulatory scheme also infringes upon the role of the National Transportation Safety Board and denies the NTSB vital and complete information regarding the individuals involved in an accident.

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29. *Id.*

30. *See Id.* at 145, app. J (Letter from the NTSB to the Secretary of Transportation (Dec. 5, 1989)).

31. *Id.* at 145-46 app. J. The NTSB raised the following concerns about DOT regulations incorporating guidelines established by the Department of Health and Human Services (DHHS): (1) the guidelines specify the collection of urine only; (2) the guidelines specify the analysis for only five drugs or drug classes which do not include alcohol - the substance of most frequent abuse - prescription medications, and other illicit drugs; (3) the presence of drugs of alcohol (if tests were required) cannot be related to a level of performance impairment without the analysis of a blood sample (which is not required); (4) the drug level in the urine may be below the measurement threshold cutoffs specified in the DHHS guidelines due to the high thresholds in these guidelines and due to delays in collection of urine following an accident; and (5) the DHHS guidelines were never intended to be used for forensic purposes (to determine the causal relationship of drugs or alcohol to a transportation accident), yet the guidelines are being made to serve that purpose by their incorporation in post-accident/incident testing regulations. *Id.*

Charged with investigating and determining the probable cause of an accident, the NTSB has no independent authority to subject individuals to drug or alcohol testing. Instead, with all its experience in determining causes of accidents, the NTSB is forced to wait on the sidelines while an FAA management official, who probably lacks comparable accident investigatory experience, evaluates the accident site and makes a preliminary determination as to the cause of the accident and the controllers involved, and then decides who is to be tested. If the FAA does not require one of its own employees to submit to testing, the NTSB is powerless to mandate drug and alcohol tests and must hope that the controller will voluntarily comply with the Board's testing request — an unlikely result indeed.

The NTSB has raised this issue with DOT and urged DOT to eliminate the double standard between the disclosure of toxicological test results from private persons who have a direct responsibility for transportation and DOT employees who occupy safety sensitive positions.[32] The NTSB contended that one of the most (if not the most) important objectives of post-accident drug and alcohol testing is to determine whether such substances caused or contributed to an accident.[33] If DOT employees in safety sensitive positions are free to withhold the results of post-accident toxicological tests, the NTSB maintained that crucial information pertaining to the accident would be withheld from investigators thereby undermining the NTSB's mandate to determine the probable cause of an accident and develop appropriate safety recommendations.[34] While sympathetic to the NTSB's dilemma, DOT declined to alter existing regulations citing statutory limitations concerning the release of test results involving DOT employees.[35]

In fact, instead the DOT has sought to codify the disparate treatment accorded pilots and FAA air traffic controllers in recently published proposed alcohol and drug testing procedures implementing the Omnibus Transportation Employee Testing Act of 1991.[36] The proposed rules,[37]

32. *Id.* at 148, app. J.

33. *Id.* The NTSB's use of such test results has led to the development and implementation of recommendations and procedures to prevent future accidents. *See id.*

34. *Id.*

35. *Id.* at 160 app. J (Letter from DOT to NTSB Responding to Dec. 5, 1989 letter from NTSB (Aug. 3, 1990)).

36. *See* 57 Fed. Reg. 59,460 (1992) (to be codified at 14 C.F.R. §§ 61, 63, 65, 121, 135) (proposed Dec. 15, 1992). DOT issued two notices of proposed rulemaking concerning implementation of an alcohol misuse prevention program and modifications of the FAA's record-keeping and reporting requirements for its anti-drug program. DOT also issued an advance notice of proposed rulemaking seeking comments concerning implementing drug and alcohol regulations as to foreign air carriers.

37. In general the proposed rules regarding alcohol would prohibit "covered employees" in safety sensitive positions from: (1) having an alcohol concentration of 0.04 or greater; (2) con-

for example, prohibiting certain alcohol-related conduct by airmen other than flight crew members perpetuate the disparity by defining "covered employee" as employees who perform air traffic control duties directly or by contract for an employer that is an air traffic control facility *not* operated by the FAA or the United States military.[38] Thus, air traffic control facilities operated by the FAA, an overwhelming majority in the United States, are exempt from the general drug and alcohol regulations imposed on other segment of the transportation industry; instead the FAA maintains its own testing rules.

In short, under existing federal regulations, pilots but not air traffic controllers are being subjected to post-accident drug and alcohol testing while the body charged with determining the probable cause of an aviation accident is denied potentially vital investigatory information. How did such inequitable standards develop?

III. FAA Regulations Requiring Drug Testing of Commercial Airline Personnel in Safety-Sensitive Positions Upheld

In 1991, in the first challenge to the FAA's regulations, the Supreme Court let stand the FAA's regulations requiring commercial airline pilots, flight attendants, maintenance personnel, and others employed in safety-sensitive positions to submit to random drug testing.[39] Shortly after the

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suming alcohol within four hours of reporting to work for air traffic controllers and other non-crewmembers (the eight hour prohibition for crewmembers remains intact); (3) consuming alcohol on the job; (4) consuming alcohol for eight hours following an accident if their involvement has not been discounted as a contributing factor in the accident or until they are tested; (5) working under the influence of alcohol as evidenced by behavior and appearance characteristic of alcohol misuse or by being adversely affected by alcohol use; and (6) refusing to submit to alcohol tests. 57 Fed. Reg. 59,382 (1992) (common preamble). The proposed rules would require employers to conduct pre-employment, reasonable suspicion, post-accident, random, return-to-duty, and follow-up testing with evidential breath testing devices. They also would impose reporting and recordkeeping requirements and provide for alcohol misuse information for employees, supervisor training, and referral of employees to Employee Assistance Programs (EAP). 57 Fed. Reg. 59,460 (1992) (to be codified at 14 C.F.R. §§ 61, 63, 65, 121, 135) (proposed Dec. 15, 1992).

38. The proposed rules also extend to employers by prohibiting an employer with *actual knowledge* of an employee violation from permitting that employee to work. *See* 57 Fed. Reg. 59,460 (1992) (to be codified at 14 C.F.R. § 65) (proposed Dec. 15, 1992).

39. *See Supreme Court Says Government Can Require Airline Drug Tests*, Reuter Bus. Rep., Feb. 19, 1991 at 1; Commuter Regional Airline News, Feb. 25, 1991 at 6.

To determine the constitutionality of drug testing programs, the courts must consider whether the testing is a significant intrusion that constitutes a search, a seizure, or both and whether that search or seizure is reasonable. *Texas v. Brown*, 460 U.S. 730, 747-48 (1983) (Stevens, J., concurring). *See generally* Stephen M. Fogel, et al., *Survey on the Law of Employee Drug Testing*, 42 U. Miami L. Rev. 553 (1988). If found not reasonable, courts must then determine whether there is some overriding justification or compelling governmental interest for the intrusion.

FAA implemented mandatory employee drug testing,[40] various employees subject to the new regulations, industry labor organizations, and an organization of aviation employees and employers challenged the drug testing provisions as unreasonable searches in violation of the Fourth Amendment in *Bluestein v. Skinner*.[41] The Ninth Circuit held that the unannounced drug testing of airline employees in safety-sensitive positions did not violate the Fourth Amendment[42] and the Supreme Court refused to review the decision. In formulating its holding, the Ninth Circuit relied on Supreme Court decisions handed down the same day which reviewed the constitutionality of two federal drug testing programs in *National Treasury Employees Union v. Von Raab*[43] and *Skinner v. Railway Labor Executives' Association*.[44]

A. VON RAAB: *TESTING EMPLOYEES SEEKING TRANSFERS TO CERTAIN POSITIONS UPHELD*

1. *CUSTOMS' PROGRAM*

In *Von Raab*, the Supreme Court held that the Customs Service's[45] drug testing requirement for employees seeking transfers or promotions

40. 53 Fed. Reg. 47057-58 (1988).

41. Bluestein v. Skinner, 908 F.2d. 451 (9th Cir. 1990), *cert. den.*, 111 S. Ct. 954 (1991). Besides various employees, the plaintiffs included: the Air Line Pilots Association; the Association of Flight Attendants, International; the Association of Machinists and Aerospace Workers; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Transportation-Communications International Union; Orange County Airport Association; the Independent Federation of Flight Attendants; the Association of Professional Flight Attendants; and the Independent Union of Flight Attendants. *Id.*

42. *Id.* at 453; *see generally* Michael R. O'Donnell, *Employee Drug Testing—Balancing the Interests in the Workplace: A Reasonable Suspicion Standard*, 74 VA. L. REV. 969 (1988).

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

44. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989). Other federal courts following the Bluestein decision have likewise relied on *Skinner* and *Von Raab* in upholding the constitutionality of drug testing of safety and security-sensitive workers in industries DOT regulates. *See, e.g.*, International Brotherhood of Teamsters v. Department of Transp., 932 F.2d 1292 (9th Cir. 1991) (upholding constitutionality of Federal Highway Administration regulations requiring random, biennial, pre-employment and post-accident drug testing of commercial motor vehicle drivers operating in interstate commerce); Railway Labor Executives' Association v. Skinner, 934 F.2d 1096 (9th Cir. 1991) (upholding constitutionality of Federal Railroad Administration's regulations requiring random drug testing of railroad employees in safety-sensitive positions); United Steelworkers of America v. Skinner, 768 F.Supp. 30 (D. RI 1991) (upholding constitutionality of Research and Special Programs Administration's regulations requiring random, pre-employment, and post-accident drug testing of safety-sensitive employees engaged in natural gas, liquified natural gas and hazardous liquid pipeline operations).

45. The U.S. Customs Service, a bureau of the Department of the Treasury, is the federal agency responsible for processing persons, carriers, cargo, and mail into the U.S., collecting revenue from imports, and enforcing customs and related laws. *Von Raab*, 489 U.S. at 659. An important responsibility of Customs is the interdiction and seizure of contraband, including illegal drugs. *Id.*

to certain positions did not violate the Fourth Amendment.[46] In response to a task force study exploring the possibility of implementing a drug-screening program at Customs,[47] the Commissioner of Customs, in 1986, announced the implementation of a drug testing program for applicants to positions[48] which (1) required direct involvement in drug interdiction; (2) required carrying firearms; or (3) allowed access to classified material.[49]

After two months, the program was extended to current employees seeking a transfer to a covered position.[50] Because no applicant for initial employment was a party to the suit, the Fifth Circuit and the Supreme Court considered only the constitutionality of the drug testing program as applied to employees seeking transfers to covered positions.[51]

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46. *Id.* at 656.

47. In December 1985, the Commissioner of Customs established a Drug Screening Task Force to consider implementing a drug screening program. *Von Raab*, 489 U.S. at 660. After the task force concluded "that drug screening through urinalysis is technologically reliable, valid and accurate," the Commissioner announced implementation of a drug testing requirement despite acknowledging that "Customs is largely drug-free." *Id.*

48. The covered positions start with top administrative posts and include criminal investigators, intelligence officers, customs inspectors, and even clerical workers assigned to the tasks described. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 173 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656 (1989).

49. *Id.* Customs did not, however, attempt to justify its drug testing program on the grounds that it suspected a significant level of drug use among its employees. *Id. See also* Andrea Neal, *Mandatory Drug Testing: Court Weighs Civil Liberties Objections*, A.B.A. J. Oct. 1, 1988 at 58.

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

51. *Id.* Under Customs' drug testing program, an employee who had qualified for and was tentatively selected to receive a transfer to a covered position was advised in writing that the appointment was contingent upon successful completion of a drug test. Nat'l Treasury Employers Union v. Von Raab, 489 U.S. 656, 661 (1989). If the employee then withdrew the application, the employee remained in his/her present position and no adverse inference was drawn from the decision not to pursue the transfer. Nat'l Treasury Employers Union v. Von Raab, 816 F.2d 170, 173 (5th Cir. 1987). At least five days after Customs notified the employee, *Id.*, an independent contractor contacted the employee to arrange for collecting the urine sample. *Von Raab*, 489 U.S. at 661. At the test site, an observer gave the employee a form to list any medications taken or any other legitimate reasons for exposure to illicit drugs during the preceding thirty days. *Von Raab*, 816 F.2d at 173-74. The form was sealed in an envelope that was not opened unless a positive test resulted. *Id.* at 174. After reporting to the test site, the employee had to produce a picture form of identification and surrender all outer garments and personal belongings to an observer who then gave the employee a collection bottle. *Von Raab*, 489 U.S. at 661. The employee could produce the sample behind a partition or in a bathroom stall. *Id.* In order to prevent tampering or substitution, the observer remained nearby to listen for the normal sounds of urination (the observer did not visually observe the act of urination). *Id.* Dye was also added to the toilet water to prevent the employee from using water to dilute the sample. *Id.*

Upon receiving the specimen, the observer inspected it to ensure its proper temperature; the observer was instructed to reject an unusually hot or cold sample. *Von Raab*, 816 F.2d at 174. After verifying the sample's temperature and color, the observer placed a tamper-proof seal on the bottle, had the employee initial the label, and otherwise verified that proper chain-of-custody procedures had been correctly followed. *Von Raab*, 489 U.S. at 661. The sample was then sent to the laboratory for testing for marijuana, cocaine, opiates, amphetamines, and PCP. *Id.*

Initially, all samples were screened by the enzyme-multiplied-immunoassay technique

2. *District Court Enjoins Testing as Overly Intrusive; Fifth Circuit Reverses*

A union of federal employees and a union official challenged the Customs Service's drug testing program as violating the Fourth Amendment. Acknowledging "the legitimate governmental interest in a drug-free work place and work force" the district court, nevertheless, agreed with the union and concluded that Customs' drug testing plan "constitutes an overly intrusive policy of searches and seizures without probable cause, or reasonable suspicion, in violation of legitimate expectations of privacy."[52] The district court, then, enjoined the drug testing program.

The Fifth Circuit Court of Appeals vacated the injunction.[53] Noting that privacy interests were clearly implicated, the Court of Appeals, in a subsequently oft-quoted passage, explained:

> There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.[54]

Nevertheless, the Fifth Circuit concurred that Customs' drug testing program constituted a search within the meaning of the Fourth Amendment, but found that search reasonable based on the government's strong interest in employing individuals in key positions who are not drug users, the limited intrusiveness of the program, and the fact that employees subject to drug testing voluntarily sought a transfer, and, after notification of the requirement, consented to the drug test.[55]

(EMIT). *Von Raab*, 489 U.S. at 662. All positive test results had to be confirmed using gas chromotography/mass spectrometry (GC/MS). *Id.* The GC/MS confirmatory test was required because of the high incidence of false positives using EMIT. *Von Raab*, 816 F.2d at 174. GC/MS, however, is considered highly accurate. *Id.* Positive test results were reported to the Medical Review Officer (MRO) for review. *Id.* If the GC/MS test was positive, the employee could designate a laboratory to test the original sample independently. *Id.* Because EMIT will generally report the test for drug use as negative when five days have elapsed between the last use of drugs and the testing date, the test may have failed to detect the prior use of drugs by persons who had abstained for five days. *Id.* Customs employees who tested positive for drugs and could not offer a satisfactory explanation for a positive test result were subject to dismissal. *Von Raab*, 489 U.S. at 663.

52. National Treasury Employers Union v. Von Raab, 649 F. Supp. 380, 387 (E.D. La. 1986).

53. National Treasury Employers Union v. Von Raab, 816 F.2d 170, 182 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656 (1989).

54. *Id.* at 175.

55. *Id.* at 173, 177-80.

3. *Supreme Court Affirms Testing of Employees Directly Involved in Drug Interdiction: Customs' Program Clearly Constitutes Fourth Amendment Search*

The Supreme Court affirmed the Fifth Circuit's decision as to employees directly involved in drug interdiction or required to carry firearms, but vacated the judgment requiring the testing of employees seeking positions involving classified materials.[56] According to the Court, requiring employees to produce urine samples for chemical testing clearly implicates the Fourth Amendment because those tests invade reasonable expectations of privacy.[57] The question, then, becomes whether Customs' drug testing program meets the Fourth Amendment's reasonableness requirement.[58]

4. *Special Governmental Need Exists to Circumvent Usual Warrant and Probable Cause Requirements*

Generally, the Court explained, a search must be supported by a warrant issued upon probable cause.[59] Neither a warrant, probable cause, nor any measure of individualized suspicion is necessary, the Court reasoned, where the Fourth Amendment[60] intrusion serves special

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56. National Treasury Employers Union v. Von Raab, 489 U.S. 656, 664-65 (1989). The Court found itself unable to assess the reasonableness of the government's testing program for employees handling classified material. *Id.* at 677. The Court agreed that the government has a compelling interest in protecting truly sensitive information from those who might compromise it, *id.* (citing Department of the Navy v. Egan, 484 U.S. 518, 528 (1988)), but noted that it was not clear whether the category defined by Customs' testing directive encompassed only those Customs employees likely to gain access to sensitive information or whether Customs defined this category more broadly than necessary. *Id.* at 677-78. The Court remanded the case to the Fifth Circuit to clarify the scope of employees subject to testing in the "classified materials" category. *Id.* at 678.

57. *Id.* at 665. The Court also noted that its earlier cases settled that the Fourth Amendment protects individuals from unreasonable searches conducted by the government, even when the government acts as an employer. *Id.* (citing O'Connor v. Ortega, 480 U.S. 709, 717, (1987) (plurality opinion)); *see also id.* at 731 (Scalia, J., concurring in judgment).

58. *Id.* at 665.

59. *Id.*; *see, e.g.*, Griffin v. Wisconsin, 483 U.S. 868, 873 (1987); United States v. Karo, 468 U.S. 705, 717 (1984). The Court noted that *Skinner* reaffirms the longstanding principle that neither a warrant, probable cause, nor individualized suspicion is an indispensable component of reasonableness in every circumstance. *Von Raab*, 489 U.S. at 665; Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, (1989); *see also* New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985); United States v. Martinez-Fuerte, 428 U.S. 543, 556-61 (1976).

60. The Fourth Amendment guarantees in part that: "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST., amend. IV.

The Supreme Court in *Winston v. Lee* reiterated that " 'the overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State'." Winston v. Lee, 470 U.S. at 759-60 (1985) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)). The Fourth Amendment recognizes that values of individual privacy and dig-

governmental needs, beyond the normal need for law enforcement, and obtaining a warrant or requiring individualized suspicion would be impractical.[61]

First, the Court examined whether special governmental need existed. Customs' drug testing program, the Court determined, clearly was not designed to serve the ordinary needs of law enforcement because the test results could not be used in a criminal prosecution without the employee's consent.[62] Next, the Court noted that the purpose of Customs' program was to deter drug use among those eligible for promotion to sensitive positions and prevent promotion of drug users to those same positions.[63] This substantial governmental interest, the Court concluded, presented a special need justifying a departure from the ordinary warrant and probable cause requirements.[64]

The Customs Service, the Court reasoned, is entrusted with pressing responsibilities and its mission would be compromised if it were required to obtain a search warrant in connection with routine yet, sensitive, employment decisions.[65] Explaining that a warrant serves primarily to advise an individual that the intrusion is authorized by law and limited in scope and to interpose a neutral magistrate between the individual and the law enforcement officer,[66] the Court found that a warrant would provide Customs' employees with little or nothing in the way of additional protection of personal privacy because "the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically . . ., and doubtless are well-known to covered employees."[67]

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nity are " 'basic to a free society'." *Id.* at 760 (quoting *Schmerber*, 384 U.S. at 767). The Fourth Amendment seeks to protect these values by emphasizing the "individual's legitimate expectations that in certain places and at certain times he has " 'the right to be let alone - the most comprehensive of rights and the right most valued by civilized men.' " *Id.* at 757-58 (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

61. *Von Raab*, 489 U.S. at 665-66. The Court noted that the determination of impracticality is based on balancing the individual's privacy expectations against the government's interests. *Id.*

62. *Id.* at 666.

63. *Id.*

64. *Id.* The Court explained that requiring the government to procure a warrant for every work-related intrusion "would conflict with 'the common-sense realization that government offices cold not function if every employment decision became a constitutional matter.'" *Id.* (*quoting* O'Connor v. Ortega, 480 U.S. 709, 722 (1987) (quoting Connick v. Myers, 461 U.S. 138, 143 (1983))).

65. *Id.* at 667.

66. *Id.* at 667 (citing Johnson v. United States, 333 U.S. 10, 14 (1948)).

67. *Id.* (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 662 (1989)). In safeguarding "personal privacy and dignity against unwarranted intrusion by the State," Winston v. Lee, 470 U.S. 753, 759-60 (1985) (quoting Schmerber v. California, 384 U.S. 757, 767 (1966)), the Fourth Amendment explicitly protects against "searches" which occur when the

5. *Court Emphasizes Voluntariness of Testing; Employee Not Subject to Discretion of Official in the Field*

The Court, then, focused on notice and voluntariness in upholding Customs' drug testing. Under Customs' program, every employee who seeks a transfer to a covered position knows that passing a drug test is a prerequisite and is probably aware of the procedures Customs utilizes in administering the tests.[68]

The Court also focused on the fact that the covered employee is simply not subject "to the discretion of the official in the field"[69] because the process becomes automatic when the employee voluntarily applies for, and thereafter pursues, a covered position.[70] Because Customs did not make a discretionary determination to search, there were "no special facts for a neutral magistrate to evaluate."[71]

6. *Probable Cause Waived Where Government Seeks to Prevent Hazardous Condition or Guard Against Substantial Harm*

After dispensing with the warrant requirement, the Court moved next to the requirement of probable cause. Even when it is reasonable to dispense with the warrant requirement in a particular circumstance, the Court maintained that a search must be ordinarily based on probable cause.[72] The Court, however, found this probable cause standard "peculiarly related to criminal investigations"[73] and not helpful in analyzing the reasonableness of routine administrative functions[74] especially where the government seeks to prevent hazardous conditions from developing or to

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government infringes upon "an expectation of privacy that society is prepared to consider reasonable", United States v. Jacobsen, 466 U.S. 109, 113 (1984), and "seizures" which occur when the government either meaningfully interferes with a person's liberty, Terry v. Ohio, 392 U.S. 1, 16 (1968), or with the individual's possessory interest in property. *Jacobsen*, 466 U.S. at 113. Not all invasions of privacy or interferences with liberty or property interests, therefore, are searches or seizures. Before the intrusion can be labeled either a "search" or a "seizure," the government action must be *unreasonable* or constitute a *meaningful* interference. National Treasury Employees Union v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987), *aff'd in part and vacated in part*, 489 U.S. 656 (1989). The Fourth Amendment, then, prohibits only those searches and seizures that are unreasonable in the particular circumstances in which they are performed. *Id.*

68. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989).

69. *Id.* (quoting Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 532 (1967)).

70. *Id.*

71. *Id.* (quoting South Dakota v. Opperman, 428 U.S. 364, 383 (1976) (Powell, J. concurring)).

72. *Id.* (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989)).

73. *Id.* at 667-68 (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987) (quoting South Dakota v. Opperman, 428 U.S. 364, 370 n.5 (1976))).

74. *Id.* at 668 (citing Colorado v. Bertine, 479 U.S. 367, 371 (1987)); *see also* O'Connor v. Ortega, 480 U.S. 709, 723 (1987).

detect violations that rarely generate articulable grounds for searching any particular place or person.[75] In certain limited circumstances, the Court found, the government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.[76]

In holding that the government's need to conduct suspicionless searches required by the Customs' program outweighed the privacy interests of employees engaged directly in drug interdiction and those required to carry firearms, the Court emphasized "the veritable national crisis in law enforcement caused by smuggling of illicit narcotics" and Customs' role in defending against this threat.[77] The Court cited the government's compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeachable integrity and judgment and forecast that the national interests in self-protection could be irreparably damaged if those charged with safeguarding it were "unsympathetic" to their mission because of their own drug use.[78] The public interest, the Court reasoned, demanded effective measures to bar drug users from positions directly involving drug interdiction or from positions requiring them to carry firearms because the public should not bear the risk that employees suffering from impaired perception and judgment will be promoted to these types of positions.[79]

7. *Compelling Governmental Interest Balanced Against Individual Privacy Interest; Voluntary Nature of Test Emphasized*

This valid compelling governmental interest, however, must be balanced against individual privacy interests in determining the reasonableness of the urine tests.[80] Because reasonableness is contextual,[81] the

75. *Id.*; *cf.* Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 535-36 (1967) (noting that building code inspections, unlike searches conducted pursuant to a criminal investigation, are designed "to prevent even the unintentional development of conditions which are hazardous to public health and safety"); United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (noting that requiring particularized suspicion before routine stops on major highways near the Mexican border "would be impractical because the flow of traffic tends to be too heavy to allow the particularized study of a given car that would enable it to be identified as a possible carrier of illegal aliens").

76. *Von Raab*, 489 U.S. at 668; *accord* Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 624 (1989).

77. *Von Raab*, 489 U.S. at 668 (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 538 (1985)); *see also* Florida v. Royer, 460 U.S. 491, 513 (1983) (Blackmun, J., dissenting).

78. *Von Raab*, 489 U.S. at 670.

79. *Id.* at 670-71.

80. *Id.* at 671.

Court found that Customs' employees directly involved in drug interdiction or required to carry firearms had a diminished expectation of privacy based on the nature of their job and its attendant physical requirements.[82] Unlike most private citizens or government employees in general, the Court explained, employees involved in drug interdiction should reasonably expect inquiry into their fitness because the successful performance of their job depends uniquely on their judgment and dexterity.[83] Again, the Court emphasized the voluntary nature of the tests when it noted that only employees who have been tentatively accepted for promotion or transfer to one of the categories of covered positions are tested and transfer applicants know at the outset that passing a drug test is a requirement for those positions.[84] Furthermore, employees are also notified in advance of the scheduled sample collection thereby reducing to a minimum any "unsettling show of authority"[85] that may be associated with *unexpected* intrusions on privacy.[86]

Because the possible harm against which the government sought to guard is substantial, the Court found that the need to prevent the harm's

81. Despite the fact that the interference with individual privacy that results from the collection of a urine sample for subsequent chemical analysis could be substantial, the Court reasoned that the "operational realities of the workplace" may render entirely reasonable certain work-related intrusions by supervisors and co-workers that might be viewed as unreasonable in other contexts. *Von Raab*, 489 U.S. at 671. *But cf.* O'Connor v. Ortega, 480 U.S. 709, 717 (1989) (holding that the Fourth Amendment requires the government to meet a reasonable standard for a search even where the government is an employer). The Court admitted that while these operational realities rarely affect an employee's expectations of privacy with respect to searches of his person, or of personal effects brought to the workplace, the Court maintained that certain forms of *public* employment may diminish privacy expectations. *Von Raab*, 489 U.S. at 672.

82. *Von Raab*, 489 U.S. at 672.

83. *Id.* at 672; *cf.* In re Caruso v. Ward, 530 N.E. 2d 850, 854-55 (1988). The "almost unique mission" the Customs Service performs, the Court observed, gives the government a compelling interest in ensuring that these covered employees do not use drugs, even off duty, because of the risk of bribery or blackmail against which the government is entitled to guard. *Von Raab*, 489 U.S. at 674. The Court found that drug abuse is one of the most serious problems confronting society and doubted that American workplaces were immune from this pervasive social problem. *Id.*

84. *Von Raab*, 489 U.S. at 672 n.1(i). The Court concluded that, in light of the extraordinary safety and national security hazards possible by the promotion of drug users to positions that require carrying firearms or interdicting controlled substances, Customs' policy of deterring drug users from seeking such promotions could not be considered unreasonable. *Id.* at 674. Customs' program, the Court reasoned, is designed to prevent promotion of drug users to sensitive positions and to detect those employees who use drugs. *Id.* at 676.

85. *Id.* at 672 n.1(i) (quoting Delaware v. Prouse, 440 U.S. 648, 657 (1979)).

86. *Id.*; *cf.* United States v. Martinez-Fuerte, 428 U.S. 543, 559 (1976) (noting that intrusion on privacy occasioned by routine highway checkpoints is minimized by the fact that motorists "are not taken by surprise as they know, or may obtain knowledge of, the location of the checkpoints and will not be stopped elsewhere"); Wyman v. James, 400 U.S. 309, 320-21 (1971) (providing a welfare recipient with advance notice that she would be visited by a welfare caseworker minimized the intrusion on privacy occasioned by the visit).

occurrence furnished ample justification for reasonable searches to advance the government's goal.[87] The Court concluded, then, that suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm is reasonable because "the government's compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry"[88] outweighs the privacy interests or those who seek promotion to those positions who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions.[89]

8. *Dissent Emphasizes Privacy and Personal Dignity*

In a spirited dissent, Justice Scalia, joined by Justice Stevens, denounced Customs' drug tests as "particularly destructive of privacy and offensive to personal dignity."[90] Scalia noted that, until *Von Raab* and *Skinner*, the Court had upheld bodily searches separate from arrest and without individualized suspicion of wrong-doing only with respect to prison inmates.[91] Scalia explained that he joined the majority's opinion in *Skinner* because of the demonstrated frequency of drug and alcohol use by the targeted class of employees and the demonstrated connection between such use and the grave harm the government sought to protect against.[92] With no evidence of a drug problem to be solved by drug testing, Scalia found the policies of prevention and deterrence insufficient to justify the intrusion into an individual's privacy.[93]

B. Skinner: *Post-Accident and Post-Violation Drug Testing Constitutional*

1. *History of Drug and Alcohol Abuse in Railroad Industry Cited*

In a case seemingly more analogous to aviation, the Supreme Court

87. *Von Raab*, 489 U.S. at 674-75. The petitioners had argued that there was no factual justification for imposing drug tests because Customs had no documented history of drug use. *See also* Bluestein v. Skinner, 908 F.2d 451 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 954 (1991). The mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing, the Court rationalized, does not impugn the program's validity. *Von Raab*, 489 U.S. at 674.

88. *Von Raab*, 489 U.S. at 679.

89. *Id.* at 677-79.

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

91. *Id.*

92. *Id.*

93. *Id.* at 681-86 (Scalia, J., dissenting).

in *Skinner v. Railway Labor Executives' Association*[94] held that Federal Railroad Administration (FRA) safety regulations mandating or authorizing post-accident, post-incident or post-violation alcohol and drug tests without warrants or individualized suspicion did not violate the Fourth Amendment.[95] Noting that the "problem of alcohol use on American railroads is as old as the industry itself" and that carriers' efforts to deter employee alcohol use began at least a century ago,[96] the Supreme Court recognized that the FRA promulgated regulations providing for blood and urine tests following train accidents or rule violations based on a finding that alcohol and drug abuse by railroad employees posed a serious threat to safety.[97]

In July 1983, the FRA had expressed concern that previous industry efforts were not adequate to curb alcohol and drug use by railroad employees.[98] Pointing to evidence indicating that on-the-job intoxication was a significant problem in the railroad industry,[99] the FRA reported that from 1972 to 1983 "the nation's railroads experienced at least 21 significant train accidents involving alcohol or drug use as a probable cause or contributing factor."[100] Even without the benefit of regular post-accident testing, the FRA identified 34 fatalities, 66 injuries, and over $28 million in property damage (in 1983 dollars) that resulted from errors committed by alcohol and drug-impaired employees in 45 train accidents occurring be-

94. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).

95. *Id.* at 633-34.

96. *Id.* at 606. Railroads for many years prohibited operating employees from possessing alcohol, being intoxicated while on duty, or consuming alcohol while on-call for duty. *Id.* These prohibitions were recently expanded to forbid possession or use of certain drugs in "Rule G," an industry-wide operating rule promulgated by the Association of American Railroads and enforced by virtually every railroad in the country. *Id.* at 606-07.

97. *Id.* at 606.

98. *Id.* at 607. The FRA solicited comments from interested parties regarding various regulatory responses to the problem of drug and alcohol use in the railroad system. These comments indicated that railroads were able to detect a relatively small number of Rule G violations based primarily on their practice of relying on supervisors' and co-workers' observations to enforce the rule. *See* 49 Fed. Reg. 24,266-67 (1984).

99. *Skinner*, 489 U.S. at 607. A 1979 study examining the scope of alcohol abuse on seven major railroads found that "[a]n estimated one out of every eight railroad workers drank at least once while on duty during the study year." 48 Fed. Reg. 30,724 (1983). Additionally, "5% of workers reported to work 'very drunk' or got 'very drunk' on duty at least once in the study year," and "13% of workers reported to work at least 'a little drunk' one or more times during that period." *Id.* The study also found that 23% of the operating personnel were "problem drinkers," but that only 4% of these employees "were receiving help through an employee assistance program, and even fewer were handled through disciplinary procedures." *Id.*

100. *Skinner*, 489 U.S. at 607. These accidents "resulted in 25 fatalities, 61 non-fatal injuries, and property damage estimated at $19 million (approximately $27 million in 1982 dollars)." 48 Fed. Reg. 30,726 (1983). The FRA identified "an additional 17 fatalities to operating employees working on or around rail rolling stock that involved alcohol or drugs as a contributing factor." *Id.*

tween 1975 and 1983.[101] Thus, based on a significant and acknowledged industry-wide problem, the FRA promulgated regulations addressing the problem of alcohol and drugs on the nation's railroad system in 1985.[102]

2. *Railroad Drug Testing Regulations Emphasize Triggering Event*

Subpart C,[103] entitled "Post-Accident Toxicological Testing," provides for mandatory testing following a "major train accident,"[104] an "impact accident,"[105] or any incident involving the death of an on-duty railroad employee.[106] After the triggering event occurs, the railroad transports all crew members and other covered employees directly involved in the accident to an independent medical facility to obtain blood and urine samples.[107] The regulations provide a limited exception from testing "if the railroad representative can immediately determine, on the basis of specific information, that the employee had no role in the cause(s) of the accident/incident."[108] Because the FRA found it especially difficult to assess fault and degrees of fault in the aftermath of more substantial accidents,[109] FRA does not provide an exception when a "major train accident" occurs.[110] Blood samples are used to "provide a clear indication not only of the presence of alcohol and drugs, but also

101. 49 Fed. Reg. 24,254 (1984). Some of these accidents resulted in the release of hazardous materials, and on one occasion, the evacuation of an entire community in Louisiana. 49 Fed. Reg. 24,254, 24,259 (1984).

102. *Skinner*, 489 U.S. at 608. The final regulations apply to employees assigned to perform service subject to the Hours of Service Act, ch. 2939, 34 Stat. 1415 (1907) (codified as amended at 45 U.S.C. §§ 61-66 (1988)). The FRA regulations prohibit covered employees from using or possessing alcohol or controlled substances. 49 C.F.R. § 219.101(a)(1) (1992). The regulations also prohibit employees from reporting for duty under the influence of alcohol (having a blood alcohol level of .04 or more) or any controlled substance. 49 C.F.R.§ 219.101(a)(2) (1992). The regulations, however, do not restrict a railroad's authority to impose an absolute prohibition on the presence of alcohol or drugs in an employee's body and do not replace, or render unenforceable, Rule G. 49 C.F.R. § 219.101(c) (1992).

103. 49 C.F.R. §§ 219.201 to 219.213 (1992). Subpart C provides that railroads "shall take all practical steps to assure that all covered employees of the railroad directly involved '"provide blood and urine samples for toxicological testing by FRA,"' upon the occurrence of certain specified events. 49 C.F.R. § 219.203(a) (1992).

104. A "major train accident" is defined as any train accident that involves (1) a fatality, (2) the release of hazardous material accompanied by an evacuation or a reportable injury, or (3) damage to railroad property of $500,000 or more. 49 C.F.R. § 219.201(a)(1) (1992).

105. 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. 49 C.F.R. § 219.201(a)(2) (1992).

106. 49 C.F.R. § 219.201(a)(3) (1992).

107. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 609 (1989).

108. 49 C.F.R. 219.203(a)(3) (1992).

109. 50 Fed. Reg. 31,544 (1985).

110. *Cf.* 49 C.F.R. 219.203 (a)(3) (1992).

their current impairment effects."[111] Similarly, a positive urine test, the FRA found, taken in conjunction with specific information regarding a particular drug's pattern of elimination, the employee's behavior, and the circumstances surrounding the accident "may be crucial to the determination of" the cause of an accident.[112] Subpart C, then, requires post-accident drug testing as an investigative tool to aid in determining the cause of a particular accident.

Subpart D, entitled "Authorization to Test for Cause" provides for permissive testing following (1) an accident or incident in which a supervisor has a reasonable suspicion that an employee's acts or omissions contributed to the accident,[113] (2) a specific rule violation,[114] and (3) a supervisor's reasonable suspicion that an employee is under the influence of drugs or alcohol.[115] If an employee declines to give a blood sample, the railroad is entitled to presume impairment from a positive showing of controlled substance residues in the urine.[116]

3. *District Court Holds Valid Fourth Amendment Protection Outweighed By Competing Governmental Interest; Ninth Circuit Reverses*

Following promulgation of FRA's drug testing requirements, the Railway Labor Executives' Association and various member labor organizations filed suit in the U.S. District Court for the Northern District of California seeking to enjoin the regulations on various statutory and con-

111. 49 Fed. Reg. 24,291 (1984).

112. *Id.* The regulations also require that FRA notify and provide the employee with an opportunity to respond to a positive test result before a final investigative report on the accident is prepared. 49 C.F.R. § 219.211(e) (1992). Employees who refuse to provide blood or urine samples may not perform covered service for nine months. 49 C.F.R. § 219.213(a) (1992). They are, however, entitled to a hearing regarding their refusal to submit to mandatory testing. 49 C.F.R. § 219.213(b)(1) (1992).

113. 49 C.F.R. § 219.301(b)(2) (1992).

114. 49 C.F.R. § 219.301(b)(3) (1992) (including non-compliance with a signal and excessive speeding).

115. 49 C.F.R. 219.301(b)(1) (1992). A railroad may require a breath test if a supervisor has a reasonable suspicion that an employee is under the influence of alcohol based on specific, personal observations concerning the employee's appearance, behavior, speech or body odors. *Id.* A railroad may require urine tests only if two supervisors make the appropriate determination. 49 C.F.R. § 219.301(c)(2)(i) (1992). If supervisors suspect impairment due to controlled substance use, at least one of the supervisors must have received specialized training in detecting the signs of drug impairment in order to require the employee to submit to a urine test. 49 C.F.R. § 219.301(c)(2)(ii) (1992).

116. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 611 (1989). The railroad must provide detailed notice of this presumption and advise employees of their right to provide a contemporaneous blood sample. *Id.* If the results of either breath or urine tests are to be used in a disciplinary proceeding, the employee must be given the opportunity to provide a blood sample for analysis at an independent medical facility. 49 C.F.R. § 219.303(c)(1) (1992).

stitutional grounds. The district court concluded that railroad employees "have a valid interest in the integrity of their own bodies" that deserved Fourth Amendment protection[117] but that this interest was outweighed by the competing "public and governmental interest in the . . . promotion of . . . railway safety, safety for employees, and safety for the general public that is involved with transportation."[118] A divided Ninth Circuit reversed.[119] The Ninth Circuit first found that the FRA drug tests constituted Fourth Amendment searches but that the "exigencies of testing for the presence of alcohol and drugs in blood, urine or breath require prompt action which preclude obtaining a warrant."[120] Explaining that "accommodation of railroad employees' privacy interest with significant safety concerns of the government does not require adherence to a probable cause requirement," the court determined that the legality of the searches depended upon their reasonableness.[121]

4. *Ninth Circuit Focusses on Reasonableness of Testing Involved; Requires Individualized Suspicion*

In examining the reasonableness of the testing involved, the Ninth Circuit concluded that particularized suspicion is essential.[122] Requiring individualized and particularized suspicion, the Court of Appeals reasoned, would impose "no insurmountable burden on the government"[123] and would ensure that the tests are confined to detection of current impairment as opposed to the discovery of the metabolites of various drugs which remain in the body following ingestion.[124] The Ninth Circuit, then, invalidated the FRA regulations which did not require a showing of individualized suspicion.[125]

5. *Supreme Court Reviewed Only Post-Accident/Violation Portions of Regulation; Finds Fourth Amendment Search*

The Supreme Court reviewed only the post-accident and post-violation portions of the FRA's regulations.[126] After determining that the

117. *Skinner*, 489 U.S. at 612.
118. *Id.*
119. Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575 (1988) *rev'd sub nom.*, Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989).
120. *Id.* at 583.
121. *Id.* at 587.
122. *Id.*
123. *Id.* at 588.
124. *Id.* at 588-89.
125. *Id.* The Ninth Circuit upheld FRA regulations authorizing breath and urine tests based on reasonable suspicion of drug or alcohol use, 49 C.F.R. §§ 219.301(b)(1) & (c)(2) (1987). *Id.*
126. Skinner v. Railway Executives' Ass'n, 489 U.S. 602, 606, 634 (1989). In reversing the

Fourth Amendment applied to the FRA's post-accident and post-violation drug testing regulations, the Supreme Court next examined whether the tests at issue constituted a search within the meaning of the Fourth Amendment.[127] Recognizing that it has long found that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must

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Ninth Circuit, the Supreme Court first examined whether administration of the drug tests at issue could be attributable to the government or its agents. Noting that the Fourth Amendment does not apply to a private party search or seizure unless the private party acted as an instrument or agent of the government, *Id.* at 614; *accord* United States v. Jacobsen, 466 U.S. 109 (1984); *see also* Burdeau v. McDowell, 256 U.S. 465 (1921), the Supreme Court determined that a railroad complying with Subpart C & D of the regulations does so by compulsion of sovereign authority, thereby implicating Fourth Amendment concerns. *Skinner*, 489 U.S. at 614. Petitioners had contended that the Fourth Amendment was not implicated by Subpart D because Subpart D did not compel testing. *Id.* The Supreme Court rejected that argument. Determining whether a private party should be deemed an agent of the government for Fourth Amendment purposes, the Court explained, turns on the degree of the government's participation in the private party's activities in light of all the circumstances. *Id.*; *cf.* Lustig v. United States, 338 U.S. 74, 78-79 (1949) (plurality opinion). The fact that the government has not compelled a private party to perform a search does not, the Court reasoned, establish that the search is a private one. *Skinner*, 489 U.S. at 615. Instead, specific features of the FRA regulations combined to convince the Court that the government did more than adopt a passive position toward the underlying private conduct. *Id.* Specifically, the Supreme Court noted that the regulations preempted state law and were intended to supersede "any provision of a collective bargaining agreement, or arbitration award construing such an agreement." *Id.* (quoting 50 Fed. Reg. 31,552 (1985)); *see also* 49 C.F.R. § 219.13(a) (1992) (FRA regulations pre-empt state laws, rules, or regulations covering the same subject matter). The regulations also permit the FRA to receive certain biological samples and test results procured by railroads pursuant to Subpart D. 49 C.F.R. § 219.11(c) (1992). The FRA, also, is not permitted to divest itself of or compromise by contract the authority vested in it by Subpart D. *Skinner*, 489 U.S. at 615. Instead, the FRA explained that such "authority . . . is conferred for the purpose of promoting the public safety, and a railroad may not shackle itself in a way inconsistent with its duty to promote the public safety." *Id.* (quoting 50 Fed. Reg. 31,552 (1985)). Furthermore, a covered employee may not decline the railroad's request to submit to a drug test without being removed from service. *See* 49 C.F.R. § 219.11(b) (1992). Because the government removed all legal barriers to drug testing contemplated by the regulations, indicated its strong preference for testing, and desired to share in the results of such intrusions, the government, the Court found, encouraged, endorsed, and participated in the railroads' drug testing sufficient to implicate the Fourth Amendment. *Skinner*, 489 U.S. at 615-16. The Court, therefore, rejected petitioners' submission that tests conducted in reliance on Subpart D would be primarily the result of private initiative. *Id.* at 658.

127. *Skinner*, 489 U.S. at 616-17. The Supreme Court noted that where the government seeks to obtain physical evidence from a person, the Fourth Amendment may be relevant at several levels. *Id.* at 616; *see, e.g.*, United States v. Dionisio, 410 U.S. 1, 8, (1973). The initial detention necessary to procure the evidence may be a seizure of the person, Cupp v. Murphy, 412 U.S. 291, 294-95 (1973); Davis v. Mississippi, 394 U.S. 721, 726-27 (1969), *cert. denied*, 409 U.S. 855 (1972), if the detention amounts to a meaningful interference with his freedom of movement. INS v. Delgado, 466 U.S. 210, 215 (1984); United States v. Jacobsen, 466 U.S. 109, 113 n.5 (1984). Obtaining and examining the evidence may also be a search, *see* Cupp v. Murphy, 412 U.S. 291, 295 (1973); United States v. Dionisio, 410 U.S. 1, 8 (1973), if doing so infringes an expectation of privacy that society is prepared to recognize as reasonable. *See, e.g.*, California v. Greenwood, 486 U.S. 35, 43 (1988); United States v. Jacobsen, 466 U.S. 109, 113 (1984).

be deemed a Fourth Amendment search,[128] the Supreme Court asserted that it is obvious that the FRA regulations providing for "this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable."[129] The ensuing chemical analysis of that sample in order to obtain physiological data, the Court reasoned, is a further invasion of the tested employee's privacy interests.[130] The Court, therefore, concluded that the collection and subsequent testing of the requisite biological samples constituted intrusions that must be deemed searches under the Fourth Amendment.[131]

6. *Supreme Court Balances Privacy Interests Against Reasonableness of Search; Finds Special Governmental Need*

Noting that the Fourth Amendment only proscribes unreasonable searches,[132] the Supreme Court proceeded to balance the respective in-

128. *Skinner*, 489 U.S. at 616; *see* Schmerber v. California, 384 U.S. 757, 767-68 (1966); *see also* Winston v. Lee, 470 U.S. 753, 760 (1985).

129. *Skinner*, 489 U.S. at 616. The Court emphasized that this finding was based on society's concern for the security of one's person. *Id.*; *see, e.g.*, Terry v. Ohio, 392 U.S. 1, 9 (1968).

130. *Skinner*, 489 U.S. at 616; *cf.* Arizona v. Hicks, 480 U.S. 321, 324-25 (1987). Although no physical penetration beneath the skin is necessary with the breath-testing procedures required under Subpart D, the Court, nevertheless, found that the same rationale applied to the collection of this data. *Skinner*, 489 U.S. at 616-17. The Court explained that subjecting a person to a breathalyzer test, which generally requires "deep lung" breath for chemical analysis implicates similar concerns about bodily integrity and, therefore, constitutes a search. *Id.*; *see, e.g.*, California v. Trombetta, 467 U.S. 479, 481 (1984); *see also* Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1449 (9th Cir. 1986); Shoemaker v. Handel, 795 F.2d 1136, 1141 (3d Cir. 1986), *cert. denied*, 479 U.S. 986 (1986). Even though the urine samples prescribed by the FRA regulations do not entail a surgical intrusion into the body, the analysis of these samples may reveal a host of private medical facts about an employee, thereby implicating privacy interests. *Skinner*, 489 U.S. at 617.

131. *Skinner*, 489 U.S. at 617-18. Because the Supreme Court concluded that both collection and analysis constituted a Fourth Amendment search, the Court found it unnecessary to characterize the employer's antecedent interference with the employee's freedom of movement as an independent Fourth Amendment seizure. *Id.* As the Court noted, not every governmental interference with an individual's freedom of movement raises the constitutional concern that there is a seizure of the person. *Id.* at 618; *see also* United States v. Dionisio, 410 U.S. 1, 9-11 (1973) (holding grand jury subpoena, though enforceable by contempt, does not effect a seizure of the person); United States v. Mara, 410 U.S. 19, 21 (1973). For purposes of reviewing the FRA post-accident and post-violation regulations, the Supreme Court found it sufficient to note that any limitation on an employee's freedom of movement necessary to obtain a blood, urine, or breath sample must be considered in assessing the intrusiveness of the searches. *Skinner*, 489 U.S. at 618; *cf.* United States v. Place, 462 U.S. 696, 707-09 (1983).

132. *Skinner*, 489 U.S. at 619; *see also* United States v. Sharpe, 470 U.S. 675, 682 (1985); Schmerber v. California, 384 U.S. 757, 768 (1966). What is reasonable, the Court explained, "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner*, 489 U.S. at 619; *see also* United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985).

terests involved to assess the reasonableness of the testing.[133] Except in certain circumstances, a search or seizure is not considered reasonable unless based on a warrant[134] issued upon probable cause.[135] Exceptions, however, are recognized "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' "[136] The Court found that the government's interest in regulating the conduct of railroad employees to ensure safety[137] presented "special needs" beyond normal law enforcement that justified departing from the traditional warrant and probable cause requirements.[138]

That special needs beyond normal law enforcement existed, the

133. *Skinner*, 489 U.S. at 619. The Supreme Court explained that the permissibility of a particular practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Id.* (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)); *see also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

134. The Court noted that in most criminal cases, the balance is struck in favor of the procedures described by the Fourth Amendment Warrant Clause. *Skinner*, 489 U.S. at 619; *see also* United States v. Place, 462 U.S. 696, 701 n.2 (1983); United States v. United States Dist. Ct. for E. Dist. of Mich., S. Div., 407 U.S. 297, 315 (1972).

135. *Skinner*, 489 U.S. at 619; *see, e.g.*, Payton v. New York, 445 U.S. 573, 586 (1980); Mincey v. Arizona, 437 U.S. 385, 390 (1978).

136. *Skinner*, 489 U.S. at 619 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987) (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring in judgment))). The Court noted that when faced with such "special needs" it has not hesitated to balance the governmental and privacy interests in assessing the practicality of the warrant and probable cause requirements in the particular context of certain searches. *Id.*; *see, e.g.*, Griffin v. Wisconsin, 483 U.S.868, 873 (1987) (search of probationer's home); New York v. Burger, 482 U.S. 691, 699-703 (1987) (search of premises of certain highly regulated businesses); O'Connor v. Ortega, 480 U.S. 709, 721-25 (1987) (work-related searches of employees' desks and offices); New Jersey v. T.L.O., 469 U.S. 325, 337-42 (1985) (search of student's property by school officials); Bell v. Wolfish, 441 U.S. 520, 558-60 (1979) (body cavity searches of prison inmates).

137. The Supreme Court likened this function to the supervision of probationers, regulated industries, or the operation of a government office, school, or prison. *Skinner*, 489 U.S. at 620.

138. *Skinner*, 489 U.S. at 620; *see also* Griffin v. Wisconsin., 483 U.S. 868, 873-74 (1987). As in *Von Raab*, the Court noted that the essential purpose of the warrant requirement is to protect privacy interests by assuring individuals subject to a search that the intrusion is not the random or arbitrary act of government agents. *Skinner*, 489 U.S. at 621-22. The issuance of a warrant assures the individual that the intrusion is authorized by law, narrowly limited in scope, and approved of by a neutral magistrate. *Id.*; *see, e.g.*, New York v. Burger, 482 U.S. 691, 703 (1987); United States v. Chadwick, 433 U.S. 1, 9 (1977); Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 532 (1967). Applying the warrant requirement to the FRA program, the Court found, would do little to further the interests protected by the requirement because the FRA tests were narrowly defined in the regulations, were well-known to the employees, and contained virtually no facts for a neutral magistrate to evaluate. *Skinner*, 489 U.S. at 622; *cf.* Colorado v. Bertine, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring). The Court further noted that the government's interest in dispensing with the warrant requirement is greatest when, as with the FRA toxicological tests, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Skinner*, 489 U.S. 623 (quoting *Camara*, 387 U.S. at 533); *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

Court opined, was evident from the purposes of the FRA's toxicological tests.[139] The FRA prescribed toxicological tests, not to assist law enforcement in prosecuting drug using employees, the Court explained, but rather "to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs."[140] Because alcohol and drugs are eliminated from the body at a constant rate[141] samples must be taken, the Court reasoned, as soon as possible after the triggering event occurs.[142] Imposing a warrant requirement, the Court concluded, would add little to the assurance of certainty and regularity already afforded by the FRA's regulations while significantly hindering or possibly frustrating the government's objectives.[143]

7. *Individualized Suspicion Not Required*

After dispensing with the warrant requirement, the Court considered whether probable cause or some measure of individualized suspicion was necessary to justify the testing.[144] The Court balanced the relevant interests involved and disposed of the probable cause requirement as well.[145] In assessing whether individualized suspicion was necessary, the Court explained that, in limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be jeopardized by requiring individualized suspicion, the search might be reasonable despite a lack of individualized suspicion.[146]

The Court believed that the interference necessary to obtain the required blood, breath, or urine samples was minimal given the employment context in which the tests took place.[147] By virtue of their voluntary

139. *Skinner*, 489 U.S. at 620-21.

140. *Id.* (*quoting* 49 C.F.R. § 219.1(a) (1987)). The Court found that this governmental interest in ensuring the safety of the traveling public and of the employees themselves plainly justified prohibiting covered employees from using drugs or alcohol on duty and also justified exercising supervision to assure compliance. *Id.*; *see also* Griffin v. Wisconsin, 483 U.S. 868, 875 (1987).

141. *Skinner*, 489 U.S. at 623; *see also* 49 Fed. Reg. 24,291 (1984).

142. *Skinner*, 489 U.S. at 623; *see also* Schmerber v. California, 384 U.S. 757, 770-71 (1966). Although the metabolites of some drugs remain in urine for longer periods of time and may enable the FRA to estimate whether the employee was impaired when the triggering event occurred, 49 Fed. Reg. 24,291 (1984), the Court felt the delay necessary to procure a warrant might result in the destruction of valuable evidence. *Skinner*, 489 U.S. at 623.

143. *Skinner*, 489 U.S. at 624.

144. *Id.*; *see also* New Jersey v. T.L.O., 469 U.S. 325, 340 (1985); *see, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 560 (1985).

145. *Skinner*, 489 U.S. at 624.

146. *Id.* The Court emphasized that it has made it clear that "a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable." *Id.*; *see, e.g.*, United States v. Martinez-Fuerte, 428 U.S. 543, 561 (1976).

147. *Skinner*, 489 U.S. at 624. The Court explained that because an employee ordinarily consents to significant restrictions in his freedom of movement where necessary for his employ-

participation in an industry pervasively regulated to ensure safety, a goal dependent on the health and fitness of covered employees, the Court reasoned that railroad workers had a diminished expectation of privacy.[148] The Court, however, was careful to point out that it was not suggesting that the interest in bodily integrity enjoyed by those employed in a regulated industry must *always* be considered minimal.[149] Railroad workers, the Court emphasized, had long been a principal focus of regulatory concern,[150] no doubt stemming from the industry's extended history of drug and alcohol abuse.

8. *Court Declines to Extend Findings to All Regulated Industries; Focuses On Deterrence Rationale*

The Court expressly noted that its findings were not intended to be extended to include *all regulated industries*.[151] Instead, the Court noted that although some of the privacy interests implicated by the FRA's toxicological testing might be viewed as significant in other contexts, given the railroad industry's unique history, the post-accident and post-violation tests provided for in Subpart C & D posed only limited threats to the justifi-

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ment, any additional interference that occurs in the time it takes to procure a blood, breath, or urine sample for testing, cannot, by itself, be said to infringe upon significant privacy interests. *Id.* at 624-25; *see, e.g.*, INS v. Delgado, 466 U.S. 210, 218 (1984). The Court went on to reason that a blood test is not significant since such "tests are a commonplace in these days of periodic physical examinations and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain." *Skinner*, 489 U.S. at 625 (quoting Schmerber v. California, 384 U.S. 757, 771 (1966)). Breath tests, the Court concluded are even less intrusive than blood tests because they do not require piercing the skin and they reveal only the level of alcohol in the employee's blood stream. *Id.* Urine tests are more difficult but, the Court cited the procedures utilized as reducing the intrusiveness of the collection process and thereby making urine testing acceptable. *Id.* at 626-27.

148. *Skinner*, 489 U.S. at 627. The Court noted that the relation between safety and employee fitness was recognized by Congress when it enacted the Hours of Service Act in 1907, ch. 2939, 34 Stat. 1415 (1907) (codified as amended at 45 U.S.C. §§ 61-66 (1988)); *see also* Baltimore & Ohio R. Co. v. Interstate Commerce Commission, 221 U.S. 612, 619 (1911), and also when Congress authorized the Secretary to "test . . . railroad facilities, equipment, rolling stock, operations, *or persons*, as he deems necessary to carry out the provisions" of the Federal Railroad Safety Act of 1970, 45 U.S.C. § 437(a) (1988) (emphasis added). *Skinner*, 489 U.S. at 627. The relationship between safety and employee fitness has also been recognized by state governments, and has long been reflected in industry practice, as evidenced by the industry's promulgation and enforcement of Rule G. In fact, the FRA found that "most railroads require periodic physical examinations for train and engine employees and certain other employees." 49 Fed. Reg. 24,278 (1984); *see* Railway Labor Executives' Ass'n v. Burnley, 839 F.2d 575, 585 (9th Cir. 1988) (acknowledging industry practice of periodic employee physical examinations); *see also* Railway Labor Executives' Ass'n. v. Norfolk & W. R.R. Co., 833 F.2d 700, 705-06 (7th Cir. 1987); Brotherhood of Maintenance of Way Employees, Lodge 16 v. Burlington N. R.R. Co., 802 F.2d 1016, 1024 (8th Cir. 1986).

149. *Skinner*, 489 U.S. at 628.

150. *Id.*

151. *Id.*

able expectations of privacy enjoyed by covered railroad employees.[152] The employees' privacy interests were, therefore, outweighed by the government's compelling interest in preventing railroad workers from discharging duties "fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."[153]

The Supreme Court also focused on the deterrence rationale for implementing post-accident and post-violation testing.[154] By ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the Court reasoned that the FRA's regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, while increasing the likelihood that employees will forego using drugs or alcohol while on duty.[155] Besides the deterrent effect, the Court was also influenced by the tests' use in accident investigations.[156] The scene of a serious rail accident is chaotic, the Court noted, and investigators arriving at the scene might find it difficult to determine which train crew members contributed to its occurrence.[157] Therefore, "[o]btaining evidence that might give rise to the suspicion that a particular employee is impaired, a difficult endeavor in the best of circumstances, is most impracticable in the aftermath of a serious accident.[158]

The Court reasoned that it would be unrealistic in this post-accident situation and inimical to the government's goal of ensuring safety in rail transportation "to require a showing of individualized suspicion *in these circumstances*."[159] Because blood and urine tests constitute highly effective means of ascertaining on-the-job impairment and of deterring drug usage, the Supreme Court found the FRA's post-accident toxicological testing reasonable and found that the government's compelling interest served by FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to reasonable suspicion before post-accident testing could occur.[160] In light of the limited discretion exercised by railroad employers under the regulations, the surpassing safety interests served by post-accident and post-violation tests, and the diminished privacy expectation of the covered employees, the

152. *Id.*
153. *Id.*
154. *Id.* at 629; *see also* 50 Fed. Reg. 31,541 (1985).
155. *Skinner*, 489 U.S. at 630; *cf.* Griffin v. Wisconsin, 483 U.S. 868, 876 (1987).
156. *Skinner*, 489 U.S. at 630.
157. *Id.* at 631.
158. *Id.*
159. *Id.* (emphasis added). Even if urine tests revealed nothing more than the recent use of a controlled substance, this information would provide the basis for further investigative work to determine if the employee was impaired by drugs at the time of the accident. *Id.* at 632.
160. *Id.* at 632-33.

Supreme Court upheld the FRA's testing in both Subparts C & D.[161]

9. *Concurring Opinion Rejects Deterrence Justification; Dissent Claims Doctrinal Basis or Fourth Amendment Ignored*

In an opinion concurring in the judgment, Justice Stevens based his support of the challenged regulations solely on the public interest in determining the causes of serious railroad accidents.[162] In rejecting the deterrence justification, Justice Stevens opined that most railroad employees do not go to work with the expectation that they will be involved in a major accident and, thus, forego using drugs or alcohol.[163] Justices Marshall and Brennan, in their dissent, supported Justice Stevens' position that the majority holding was strongly influenced by the investigatory nature of the post-accident toxicological tests.[164] According to Justices Marshall and Brennan, the majority's balancing approach ignores the text and doctrinal history of the Fourth Amendment which require that highly intrusive searches of this type be based on probable cause, *not* cost-benefit analysis conducted by judges or federal agencies.[165]

The dissent explained that, until recently, an unbroken line of cases had recognized probable cause as an indispensable requirement for a full-scale search regardless of whether such a search was conducted pursuant to the warrant clause or one of its recognized exceptions.[166] Only where the government action in question had a "substantially less intrusive" impact on privacy[167] and, thus, did not constitute a full-scale search, did the Court relax the probable cause requirement.[168] Except for those narrowly defined intrusions, the dissent observed, "the requisite

161. *Id.* at 634.

162. *Id.* at 634 (Stevens, J., concurring in judgment).

163. *Id.*

164. *Id.* at 635-36 (Brennan and Marshall, JJ., dissenting).

165. *Id.* Brennan and Marshall characterized the majority's acceptance of dragnet blood and urine testing as evidence that the "first, and worst, casualty of the war on drugs will be the precious liberties of our citizens." *Id.* The Court, the dissent noted, is moving closer toward reading the probable clause requirement out of the Fourth Amendment by permitting "special needs" to displace constitutional text in each of the four categories of searches enumerated in the Fourth Amendment: searches of persons, *Id.* at 613-14; houses, Griffin v. Wisconsin, 483 U.S. 868 (1987); papers, O'Connor v. Ortega, 480 U.S. 709 (1987); and effects, New Jersey v. T.L.O., 469 U.S. 325 (1985). *Skinner*, 489 U.S. at 635-36 (Brennan and Marshall, JJ., dissenting). As the dissent explained, without the content which those provisions give to the Fourth Amendment's overarching command that searches and seizures be "reasonable," the Amendment lies virtually devoid of meaning subject to interpretation based on the prevailing problems of the day. *Id.* at 637 (Brennan and Marshall, JJ., dissenting).

166. *Skinner*, 489 U.S. at 637-38 (Brennan and Marshall, JJ., dissenting); *see also* New Jersey v. T.L.O., 469 U.S. 325, 359 n.3 (1985) (opinion of Brennan, J.); Chambers v. Maroney, 399 U.S. 42, 51 (1970).

167. Dunaway v. New York, 442 U.S. 200, 210 (1979).

168. *Id.* at 214.

'balancing' . . . is embodied in the principle that seizures are 'reasonable' only if supported by probable cause."[169] Even then, the Court almost always required the government to show some individualized suspicion to justify the search.[170] By widening the "special needs" exception to probable cause to authorize searches of the human body, unsupported by any evidence of wrong-doing, the dissent observed that the majority has eliminated altogether the probable cause requirement and has substituted a manipulable balancing inquiry under which, the mere assertion of a "special need" is all that is needed to make even the deepest dignity and privacy interests vulnerable to governmental incursion.[171]

The dissent agreed with the majority's threshold determination that covered railroad employees had been subjected to a search within the meaning of the Fourth Amendment but disagreed as to the nature of the search at issue.[172] According to Justices Brennan and Marshall, three distinct searches were involved: (1) blood collection, (2) urine collection, and (3) sample analysis.[173] While recognizing that the importance of collecting blood and urine samples before drug or alcohol metabolites disappear may justify waiving the warrant requirement for those two types of searches under the narrow "exigent circumstances" exception,[174] the dissent emphasized that no such exigency prevents railroad officials from obtaining a warrant before testing the samples collected.[175] The dissent reasoned that, because blood and urine do not spoil if properly preserved and railroad officials could easily become aware of the procedures utilized to obtain a warrant, dispensing with the warrant requirement to analyze the collected samples is wholly unjustified.[176] Justices Brennan and Marshall also refuted the majority's opinion that railroad workers possessed a diminished expectation of privacy based on their involvement in a pervasively regulated industry. The dissent maintained that the Court's prior regulatory search decisions exclusively involved searches of employer property, with respect to which "[c]ertain industries have such a history of government oversight that no reasonable expectation of privacy

169. *Id.*; *see also* New Jersey v. T.L.O., 469 U.S. 325, 360 (1985) (opinion of Brennan, J.).

170. Skinner, 489 U.S. at 638 (Brennan and Marshall, JJ., dissenting). The dissent noted that the regulatory regime upheld requires the post-accident collection and testing of all covered employees even if every member of this group gives every indication of sobriety and attentiveness. *Id.* at 635.

171. *Id.* at 640-41 (Brennan and Marshall, JJ., dissenting).

172. *Id.* at 642 (Brennan and Marshall, JJ., dissenting).

173. *Id.*

174. *Id.*; *see also* Schmerber v. California, 384 U.S. 757, 770 (1966) (observing that "the delay necessary to obtain a warrant" may destroy evidence).

175. *Skinner*, 489 U.S. at 642 (Brennan and Marshall, JJ., dissenting).

176. Id. at 642-43 (Brennan and Marshall, JJ., dissenting); *see also* Chimel v. California, 395 U.S. 752, 761-64 (1969) (exigency exception permits warrantless searches only to the extent that exigency exists).

could exist for a *proprietor* over the *stock* of such an enterprise."[177] According to the dissent, the Supreme Court has never "intimated that regulatory searches reduce employees' rights of privacy in their *persons*."[178]

C. BLUESTEIN: *NINTH CIRCUIT EXTENDS* VON RAAB *AND* SKINNER *TO FAA'S DRUG TESTING PROGRAM; SUPREME COURT DECLINES REVIEW*

1. *SPECIAL NEEDS JUSTIFY ABROGATING TRADITIONAL FOURTH AMENDMENT RIGHTS*

The Ninth Circuit stated that *Von Raab* and *Skinner* settled three threshold questions: (1) drug testing performed by private employers under compulsion of government regulations constitutes governmental action subject to constitutional restrictions;[179] (2) urinalysis is considered a search under the Fourth Amendment because "it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,"[180] and, (3) the usual Fourth Amendment requirements of a warrant and probable cause do not necessarily apply in the drug testing context because, when a search "serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[181] After determining that Fourth Amendment conduct was involved, the Ninth Circuit focused on "special needs" analysis in upholding the FAA's drug testing requirements. In finding that the FAA regula-

177. *Skinner*, 489 U.S. at 648 (*quoting* Marshall v. Barlow's, Inc., 436 U.S. 307, 313, (1978)) (Brennan and Marshall, JJ., dissenting) (emphasis added).

178. *Id.*; *see also* Camara v. Municipal Ct. of San Francisco, 387 U.S. 523, 537, (1967) ("inspections are [not] personal in nature"); *cf.* Marshall v. Barlow's, Inc. 436 U.S. 307, 313 (1978). The dissent noted that individuals do not lose Fourth Amendment rights at the workplace gate, *see* Oliver v. United States, 466 U.S. 170, 178 n.8 (1984), any more than they relinquish these rights at the schoolhouse door, *see* New Jersey v. T.L.O., 469 U.S. 325, 333 (1985), or the hotel room threshold, *see* Hoffa v. United States, 385 U.S. 293, 301 (1966). *Skinner*, 489 U.S. at 648 (Brennan and Marshal, JJ., dissenting); *see also* O'Connor v. Ortega, 480 U.S. 709, 716-18 (1987), The dissent observed, "[t]hese rights mean little indeed if, having passed through these portals, an individual may remain subject to a suspicionless search of his person justified solely on the grounds that the Government already is permitted to conduct a search of the inanimate contents of the surrounding area." *Skinner*, 489 U.S. at 648-49 (Brennan and Marshal, JJ., dissenting).

179. Bluestein v. Skinner, 908 F.2d. 451, 455 (9th Cir. 1990).

180. *Id.* (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-15 (1989)); *accord* National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664-65 (1989).

181. *Bluestein*, 908 F.2d at 455 (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664-65 (1989)).

tions serve "special needs, beyond the normal need for law enforcement," the court emphasized the FAA's goals of deterrence and prevention: the FAA's program, the court noted, is designed to deter drug use among employees in safety-sensitive positions and to prevent the performance of safety-sensitive functions by employees under the influence of narcotics.[182]

2. *Governmental Interests Weighed Against Individual Privacy Interests*

After praising the FAA program's goals, the court determined the constitutionality of the program by balancing the government's interests against the employees' privacy interests.[183] First, the Ninth Circuit noted that the FAA rules specify that "[t]est results may not be used in a criminal prosecution of the employee without the employee's consent,"[184] thereby eliminating the threat of self-incrimination and subsequent criminal prosecution by submitting to drug testing. Next, the court examined the government's interests in subjecting individuals to the type of searches at issue. After concluding that the testing program under review in *Von Raab* invaded reasonable expectations of privacy and that the tests were motivated by special needs other than law enforcement, the Ninth Circuit explained that the Supreme Court had balanced the private and governmental interests at stake and found that the government's compelling interests in public safety justified the *Von Raab* testing program.[185]

As the Supreme Court did in *Von Raab*, the Ninth Circuit rejected the contention that there was insufficient evidence of a drug problem in the aviation industry to justify suspicionless testing.[186] Evidence of drug use is not needed to establish the substantial governmental need necessary to justify drug testing because of the deterrent purposes of the program and the potential for serious harm.[187] Nevertheless, although finding that no factual justification warranting drug testing was required, the Ninth Circuit found that the FAA administrative record included evidence that a

182. *Id.*

183. *Id.*

184. *Id.* (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 664-65 (1989)).

185. *Id.* at 455-56 (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 678-80 (1989)).

186. *Id.* at 456. The petitioners had argued that the FAA failed to demonstrate a sufficiently high level of drug use in the industry to justify its testing program. *Id.* The Ninth Circuit, however, focused on their concession that " 'the government has a strong interest in assuring aviation safety and that the drug-related job impairment of any safety-sensitive aviation employee is a basis for the most serious concern.' " *Id.* (quoting Reply Brief of Petitioners at 15-16).

187. *Id.* (citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674-76 (1989)).

number of pilots and other airline crew members had received treatment for cocaine overdoses or addiction; that tests by companies in the industry had found drug use by pilots and mechanics; and that drugs were present in the bodies of pilots in two airplane crashes.[188] Emphasizing the harm that can be caused by an airplane crash, the Ninth Circuit explained that the FAA's need for drug testing to prevent the type of harm that can be caused by drug impairment exceeded the need the Supreme Court ratified in *Von Raab*.[189]

Although it found that the government's compelling interest in public safety justified testing, the Ninth Circuit recognized the intrusive nature of testing involved and the privacy interests infringed upon because the FAA's tests were random.[190] Despite the fact that the lack of notice in the FAA's testing program added "some weight to the 'invasion of privacy' side of the Fourth Amendment balance," the court found this insufficient to tip the scales against the FAA.[191] Instead, the Ninth Circuit focused on the FAA's deterrent justification for the plan. Privacy interests, the court explained, are outweighed by the FAA's "reasonable conclusion that random testing without advance notice will prove to be a greater deterrent than testing with advance notice."[192]

3. *Argument That FAA Plan Grants too Much Discretion Rejected*

The court similarly dismissed petitioners' contention that the FAA plan grants employers too much discretion.[193] First, the Ninth Circuit reasoned, the strict randomness requirements ensure that no employer will have discretion in deciding which employees should be searched.[194] Second, employers' discretion as to how to structure their testing programs will be limited by collective bargaining and the requirement that the FAA approve the plans of individual employers.[195] The court relied on the FAA's assertion that it will review individual programs to ensure that dis-

188. *Id.*; *see also* Harmon v. Thornburgh, 878 F.2d 484, 487 (D.C. Cir. 1989), *cert. denied, sub. nom.*, Bell v. Thornburgh, 110 S.Ct. 865 (1990).

189. *Bluestein*, 908 F.2d at 456.

190. *Id.*

191. *Id.* at 456-57; *see also* Harmon v. Thornburgh, 878 F.2d 484 (D.C. Cir. 1989). In *Harmon*, the court upheld (as to some employees) a Department of Justice program testing plan that provided for random testing with notice "on the same day, preferably within two hours of the scheduled testing." *Harmon*, 878 F.2d at 486. The court noted that the random nature of the testing program is a relevant consideration which would, in a particularly close case, possibly tip the scales. *Id.* at 489. The court, however, refused to take a fundamentally different approach to this aspect of the program than the Court had in *Von Raab*. *See id.*

192. *Bluestein*, 908 F.2d at 457.

193. *Id.*

194. *Id.*

195. *Id.*

cretion is in fact sufficiently limited under each plan.[196]

Thus, in upholding the FAA's regulations requiring random drug testing of commercial aviation personnel in safety-sensitive positions, the court focused primarily upon the government's compelling interests in preventing drug use by persons in safety sensitive positions regardless of demonstrated factual evidence of a drug use problem in the industry. Instead, the Ninth Circuit emphasized the Supreme Court's pronouncement that evidence of drug use is not necessary to establish the substantial governmental need required for intrusive searches. This governmental need can be found, then, in the program's deterrence purposes and in the potential for serious harm caused by a drug-related lapse.

IV. ORIGINS OF FEDERAL DRUG TESTING PROGRAMS

Finding that a significant proportion of the national work force used drugs resulting in billions of dollars of lost productivity each year, President Ronald Reagan established federal drug testing programs to combat the "serious adverse effects" illegal drug use is having on the national work force.[197] On or off-duty illegal drug use by federal employees, according to Executive Order Number 12,564, "evidences less than the complete reliability, stability, and good judgment that is consistent with access to sensitive information and creates the possibility of coercion, influence, and irresponsible action under pressure that may pose a serious risk to national security, the public safety, and the effective enforcement of the law."[198] Because "persons who use illegal drugs are not suitable for Federal employment," Executive Order Number 12,564 required that each executive branch agency establish mandatory programs to drug test employees in "sensitive positions", when there exists reasonable suspicion of drug use, or "in an examination authorized by the agency regarding an accident or unsafe practice."[199] Each agency's drug testing program must comply with the procedures set forth in Executive Order Number 12,564 and must be carried out in accordance with guidelines established by the Department of Health and Human Services.[200]

196. *Id.* at 457 n.9; *c.f.* 53 Fed. Reg. 47,028 (1988).

197. Drug-Free Federal Workplace, Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986), *reprinted in* 5 U.S.C. § 7301 (1988).

198. Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986).

199. Exec. Order No. 12,564 §§ 2, 3, 51 Fed. Reg. 32,889 (1986).

200. Exec. Order No. 12,564 § 4, 51 Fed. Reg. 32,889 (1986); *see also* 53 Fed. Reg. 11,970 (1988) (Health and Human Services drug testing procedure guidelines).

A. DEPARTMENT OF TRANSPORTATION

1. DRUG TESTING PROGRAM

The Department of Transportation (DOT) became the first executive agency to implement a drug testing program pursuant to the President's Order.[201] On December 1, 1989, DOT issued its final rule setting forth procedural requirements for drug testing, entitled, "Procedures for Transportation Workplace Drug Testing Programs."[202] Each of DOT's six agencies issued its own rules addressing various drug testing issues relevant to that particular mode of transportation, such as which employees are subject to testing and how employers must maintain records and conduct tests.[203] The Secretary of Transportation announced a comprehensive plan for drug testing certain DOT employees June 29, 1987, and the plan went into effect September 8, 1987.[204]

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201. *See* American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 886-87 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990); *see also* Drug-Free Departmental Workplace, U.S. Department of Transportation Order 3910.1, J.A. at 17 (June 29, 1987) [hereinafter DOT Order 3910.1]. DOT regulates six modes of transportation through six of its agencies: The Federal Aviation Administration (FAA), Federal Railroad Administration (FRA), Federal Highway Administration (FHWA), Research and Special Programs Administration (RSPA), Urban Mass Transportation Administration (RSPA), and the United States Coast Guard (USCG). *See* 49 C.F.R. Pt. 40 (1992). The complete list of covered employees is as follows: Office of the Secretary: motor vehicle operators. United States Coast Guard: fire fighters, nurses, criminal investigators, vessel traffic controllers, maritime traffic controllers (pilot), electronics mechanics, metals inspectors, shipwright foremen, transportation equipment operation family, aircraft oxygen equipment mechanics, aircraft engine mechanics, aircraft mechanics, master pilots (ferryboat), chief engineers (ferryboat), oiler (ferryboat and diesel). Federal Aviation Administration: electronics technicians, civil aviation security specialists, aviation safety inspectors, air traffic control specialists, inspection/flight test pilots, transportation equipment operation family, aircraft mechanics. Federal Highway Administration: highway safety specialists, motor carrier safety specialists, transportation equipment operation family. Federal Railroad Administration: industrial hygienists (headquarters), general engineer (field and headquarters), civil engineers (field and headquarters), motor vehicle operators, safety engineer (headquarters), electrical engineers (headquarters), chemical engineer (headquarters), transportation specialists (headquarters). Saint Lawrence Seaway Development Corporation: lock and dam operators, vessel traffic controllers, transportation equipment operation family. Office of Inspector General: criminal investigators. Maritime Administration: transportation equipment operation family, engineers (watchstander), maritime general maintenance mechanics (deck/engine). *See* DOT Order 3910.1, *supra*, at App. A.

202. 49 C.F.R. Pt. 40 (1992). The DOT final rule includes preparation for testing, specimen collection procedures, laboratory requirements, Medical Review Officer qualifications and functions, reporting and transmission of test results and employee protection safeguards.

203. DOT has adopted the HHS guidelines, but those procedures apply only to employers (i.e., contractors) who conduct activities regulated by DOT. 49 C.F.R. Part 40.1 (1992). Testing requirements for employees of contractors (e.g. air traffic controllers not employed directly to DOT/FAA) are set forth in 14 C.F.R. Pt. 121, App. I (1992).

204. DOT Order 3910.1, *supra* note 201, at J.A., p. 17.

2. *EMPLOYEE CLASSIFICATIONS*

DOT Order 3910.1 establishes two categories of employees subject to testing based on the "safety and security criticalness of the employee's position."[205] Category I employees have positions with a "direct and immediate impact on public health and safety, the protection of life and property, law enforcement, or national security and are subject to five types of testing: (1) random; (2) periodic, if required to take periodic physical examinations; (3) reasonable suspicion; (4) accident or unsafe practice; and (5) follow-up after return from rehabilitation program."[206] Nearly 94% of the employees covered hold aviation related positions.[207] Of these, approximately two-thirds of the employees subjected to random and periodic urinalysis testing are air traffic controllers.[208] All applicants for Category I positions must submit to pre-employment or pre-appointment testing.[209]

DOT classifies all other employees in sensitive positions as Category II employees, thereby subject to three types of testing: (1) reasonable suspicion; (2) accident or unsafe practice; and, (3) follow-up.[210] Any employee "who refuses to provide a urine specimen or otherwise refuses to cooperate in the collection procedures will be removed from the Federal service."[211]

3. *DRUG TESTING PROCEDURES*

Order 3910.1 explicitly provides that all DOT collection and drug testing be done in strict accordance with the guidelines for drug testing pub-

205. *Id.* at Ch. III, § 2, p. III-1.

206. *Id.* at Ch. III, § 3(A), p. III-1-2. Employees in these positions are selected for random testing through haphazard neutral computer selection. All employees subject to random testing have an equal statistical chance to be chosen for each testing list without regard to previous selections. Random testing is, of course, unannounced and could occur on any workday. *Id.* at Ch. III, § 4, p. III-2.

207. *See* American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 889-90 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990). These positions include, air traffic controllers, electronic technicians, aviation safety inspectors and aircraft mechanics. *Id.* Additionally, fire fighters, nurses, railroad safety inspectors, armed law enforcement officers and "top secret" security clearance personnel are among those subject to random testing. *Id.*

208. *Id.* at 887. Nearly twenty-two percent are employed as "electronic technicians." The remaining twelve percent are, among others, aviation safety inspectors (3%), motor carrier and highway safety specialists (1%), railroad safety inspectors (1.1%), civil aviation security specialists (.9%), aircraft mechanics (.7%), and motor vehicle operators (.2%). *Id.*; *see also* DOT Order 3910.1, *supra* note 201, at J.A., p. 769-70.

209. DOT Order 3910.1, *supra* note 201, at Ch. III, § 4(D), p. III-3. As of June 1987, DOT classified 30,000 of its approximately 62,000 employees in Category I. *Id.* at J.A., p. 769.

210. *Id.* at Ch. III, § 3(B), p. III-2.

211. *Id.* at Ch. VI § 1(c). *See generally* Daniel P. Mazo, *Yellow Rows of Test Tubes: Due Process Constraints on Discharges of Public Employees Based on Drug Urinalysis Testing*, 135 U. PA. L. REV., 1623 (1987).

lished by the Department of Health and Human Services (HHS) and even supplements the National Institute on Drug Abuse regulations with additional safeguards to be followed in both the sample-collection process and in the chain of specimen custody.[212]

The HHS Regulations provide that, upon arriving at the collection site at an assigned time, the employee to be tested must remove any unnecessary outer garments and wash his/her hands. The employee is to "remain in the presence of the collection site person"[213] and provide a sample "in the privacy of a stall or otherwise partitioned area" unless there is reason to believe that a particular individual may alter or substitute the specimen to be provided.[214] The sample is then sent to an HHS-approved laboratory for testing.[215]

4. Reporting Procedures

In testing for the presence of marijuana, cocaine, PCP, opiates, amphetamines (or their metabolites), DOT considers a test positive only if positive in both an initial test using immunoassay methods and in the confirmatory test using gas chromatography/mass spectrometry techniques.[216] DOT procedures provide that "[a]ll specimens negative on [the] initial test or negative on the confirmatory test *shall be reported as negative*."[217]

Before any official action is taken, positive test results are first reported to the Medical Review Officer (MRO). The MRO, then, contacts the employee and gives the employee an opportunity to explain the test results. The MRO also reviews the employee's medical records as well as any other biomedical factors necessary to determine whether there is a legitimate medical explanation for the positive test result. If the MRO determines that a legitimate explanation for the positive result exists, the test result is reported as negative.

DOT's plan permits an employee who has tested positive to insist that the sample be tested again, either at the original test sight, or at another qualified laboratory at the employee's expense.[218] A Category I employee who tests positive may be assigned non-safety or non-security du-

212. DOT Order 3910.1, supra note 201, at Ch. III, §§ 1, 8-10 J.A., p. 32-39; *see also* Mandatory Guidelines for Federal Workplace Drug Testing Programs, 53 Fed. Reg. 11,970 (1988) [hereinafter HHS Regulations].

213. HHS Regulations, *supra* note 212, at 11,980.

214. *Id.* at 11,980-81.

215. *Id.* at 11,981.

216. DOT Order 3910.1, *supra* note 201, at Ch. III, 11(A)(1)-(5); *see also* HHS Regulations, *supra* note 212, at § 2(4)(e)-(f); *see generally* Mark Rust, *Drug Testing: The Legal Dilemma*, A.B.A. J., Nov. 1, 1986, at 50.

217. DOT Order 3910.1, *supra* note 201, at Ch. III, 9(B) (emphasis added).

218. *Id.* at Ch. III, 9(E).

ties; however, the employee may not be discharged based on a single positive test result.[219] No disciplinary action other than an offer of rehabilitation services can occur with a first-time positive random urinalysis. Absent additional circumstances, an employee will be removed from federal service only after a second positive test result.[220] Furthermore, no criminal use can be made of DOT's drug testing results.[221]

B. Federal Aviation Administration

1. FAA Drug Testing Program

The FAA initially proposed random drug testing in an advanced notice of proposed rulemaking published in 1986.[222] After receiving over 650 written comments, the FAA issued the notice of proposed rulemaking two years later and held a series of public hearings. The final rule was issued November 21, 1988.[223]

While recognizing that drug use is not "widespread" among commercial aviation personnel nor is there an "overwhelming" drug problem in the industry, the FAA nevertheless found "concrete evidence of drug use in the commercial aviation sector" and, therefore, implemented random drug testing "[i]n order to ensure that aviation safety is not compromised by a failure to detect drug users in the aviation industry."[224] The FAA subsequently adopted regulations requiring every Part 121 and 135 certificate holder (most commercial air carriers) and each air traffic control facility to conduct employee drug testing for marijuana, cocaine, opiates, phencyclidine (PCP) and amphetamines.[225]

2. Subject Employees

According to the FAA regulations, the following employees must be tested: (a) flight crew members; (b) flight attendants; (c) flight instructors or ground instructors; (d) flight testing personnel; (e) aircraft dispatchers; (f) aviation security or screening personnel; and (g) air traffic controllers.[226]

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219. *Id.* at Ch. IV, § 6, J.A., p. 42, 45, § 1(B).

220. All disciplinary actions pursuant to further testing are subject to the Civil Service Reform Act of 1978. 5 U.S.C. §§ 1101-9101 (1988 & Supp. III 1991).

221. HHS Regulations, *supra* note 212, at § 2.8; *see also* Pub. L. No. 100-71, § 503(e), 101 Stat. 471 (1987); American Fed'n of Gov't Employees v. Skinner, 885 F.2d 884, 889 (D.C. Cir. 1989), *cert. denied*, 495 U.S. 923 (1990).

222. *See* Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities, 51 Fed. Reg. 44,432 (1986).

223. *See* Anti-Drug Program for Personnel Engaged in Specific Aviation Activities, 53 Fed. Reg. 47,024 (1988).

224. 53 Fed. Reg. 47,025, 47,029, 47,030.

225. 53 Fed. Reg. 47,057-58.

226. 53 Fed. Reg. 47,058 (App. I & III) (air traffic control facilities operated by, or under con-

Additionally, FAA regulations require six types of testing: (1) pre-employment, (2) periodic, during the employee's first medical examination (for those employees required to take a Part 67 medical examination), (3) post-accident, (4) reasonable suspicion, (5) return-to-duty[227] following a positive test result or a refusal to test, and (6) random.[228] Following the first year of testing, employers are required to conduct random tests of 50% of their employees each year.[229]

3. *FAA Testing Procedures*

Like DOT's procedures, the FAA closely follows HHS's drug testing procedures for government employees.[230] Upon arriving at the "collection site," the employee must present photographic identification or be identified by a representative of the employer, and must remove any outer garments. The employee may choose to provide the required urine specimen in a stall or otherwise partitioned area. The toilet water is tinted with blue dye to prevent the water from being used to adulterate the specimen. An observer, of the same gender as the employee, must remain in the area, but outside the stall or partitioned area. After receiving the specimen, the observer must inspect it to ensure that it is of proper quantity, temperature, and color. The observer must then arrange, following specified chain-of-custody procedures, to ship the specimen to an HHS-certified drug testing laboratory.

As with DOT testing, the laboratory to which the specimen is sent must perform an immunoassay test. If the specimen tests positive, the test must be confirmed using gas chromatography/mass spectrometry techniques. If the initial positive test is confirmed, the employer's Medical Review Officer (who must be a qualified physician) determines whether there is an "alternative medical explanation" and in that connection must provide the employee with an opportunity to discuss the result and submit any medical records regarding legally prescribed medication. The employee may also demand a retest of the original specimen at the original

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tract with, the FAA or the military are exempt). 53 Fed. Reg. 47,057 (App. I) (for the most part, controllers at these facilities are covered by other drug testing programs).

227. 53 Fed. Reg. 47,043-44, 47,058 (App. I & V) (return to duty testing is authorized if the employee has completed drug rehabilitation and the medical review officer approves the employee's return to work).

228. To eliminate any supervisory discretion in selecting employees to be tested and to avoid "potential bias toward and selective harassment of an employee," 53 Fed. Reg. 8,375 (1988), selection of employees to be tested is made using a random number table or a computer-based number generator that is matched with an employee's social security number, payroll identification number, or any other alternative method approved by the FAA. 53 Fed. Reg. 47,058, § V.C. (1988).

229. 53 Fed. Reg. 47,058, § V.C. (1988).

230. *See* Procedures for Transportation Workplace Drug Testing, 53 Fed. Reg. 47,002 (1988) (describing FAA's testing procedures); *see also* HHS Regulations, *supra* note 212.

laboratory or another HHS-certified laboratory. In addition, there is an absolute prohibition against the release of drug test results to third parties without the specific, written consent of the employee.

Employees who test positive for prohibited drugs and are unable to offer a satisfactory alternative explanation must be removed from their positions, and may not return to duty except upon the recommendation of a Medical Review Officer or the Federal Air Surgeon.

V. THE OMNIBUS TRANSPORTATION EMPLOYEE TESTING ACT OF 1991

A. ORIGINS OF THE LEGISLATION

Despite recent Supreme Court cases upholding the constitutionality of federal drug testing programs and in the face of overwhelming evidence that there is *not* a drug problem in the aviation industry, Congress proposed legislation to expand the scope of existing drug testing regulations to include tests for alcohol abuse as well. The Omnibus Transportation Employee Testing Act of 1991, introduced by Senator Ernest Hollings (D-SC) on March 14, 1991, and co-sponsored by 24 other senators was designed to require testing for alcohol abuse for "safety-sensitive" jobs in civil aviation, rail, motor carrier, and mass transit.[231] The Senate drug testing bill required regulations within one year of enactment to require airlines (including foreign carriers) to conduct pre-employment, periodic recurring, random, post-accident, and "reasonable suspicion" testing of pilots, crew members, airport security screening contract personnel, and other air carrier and FAA employees responsible for safety-sensitive functions.[232] Airlines were not required to reinstate employees testing positive following successful rehabilitation and could not reinstate to their previous positions employees who had performed their duties while impaired. The legislation required pre-employment, reasonable suspicion, post-accident, and random testing.[233] Fearing challenges to DOT's authority to implement drug testing requirements, Senator Hollings explained, "We want to set a national policy and not leave it to the whims of DOT later on."[234]

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231. S.561, 102d Cong., 1st Sess. (1991) *see Senate Passes Transportation Drug and Alcohol Testing Bill*, AVIATION DAILY, June 21, 1991, at 568; *see also* AVIATION WK., Mar. 16, 1989, at 1.

232. *See Transportation Drug-Testing Bill Reintroduced*, AVIATION DAILY, Mar. 16, 1989.

233. *See Sens. Hollings and Danforth Again Introduce Drug Testing Bills*, AVIATION DAILY, Mar. 18, 1991, at 498; *see also* AVIATION WKLY., Mar. 25, 1991.

234. *See Transportation Drug-Testing Bill Reintroduced*, *supra* note 232. Although Senators Danforth and Hollings sought to give existing drug testing regulations strength through legislation, these same regulations have consistently withstood constitutional and statutory challenges all the way to the Supreme Court. *Id.*; *see* Editorial, *Improved Drug Testing*, J. COM., Sept. 20, 1991, at 4A.

The Senate approved the legislation requiring alcohol as well as drug testing for all employees in safety-risk jobs in transportation and the bill was sent to conference with the House.[235] The House of Representatives had previously refused to include alcohol testing in its legislation and the Senate, which had passed similar legislation 11 times in the past four years, declined to pass legislation that did not include it.[236] House members had argued that alcohol testing should be "performance-related" and that there should be some determination whether the alcohol used impairs a worker's ability to do his job.[237] Transportation Secretary Samuel K. Skinner had expressed concern that alcohol testing programs not linked to an employee's job performance could be vulnerable to charges that testing for legal substances violates the Fourth Amendment's ban on unreasonable search and seizure.[238]

Reacting to a New York subway derailment which killed 5 people and injured approximately 200, the House altered its position regarding the inclusion of mandatory alcohol tests for transportation workers. The motorman in that subway accident had a blood alcohol level of 0.21 and empty vials of cocaine were found in the driver's cab.[239] The accident prompted renewed calls for federal drug and alcohol testing legislation.

In an attempt to promulgate compromise legislation, the House and Senate conferees also dropped the provision that would have required a nexus between job performance and suspected alcohol use before allowing alcohol testing and paved the way for future challenges regarding the constitutionality of alcohol testing. The bill was then sent to President Bush, who signed it on October 28, 1991, exactly two months after the New York subway accident involving drugs and alcohol.

B. LEGISLATION AS ENACTED

Attached to a $31.8 billion transportation appropriations bill, the Omnibus Transportation Employee Testing Act of 1991 finds that the use of alcohol and illegal drugs has been proven to have been a critical factor in

235. The Testing program was originally included in a $14.4 billion appropriation bill for DOT and was approved 95-3. *See* AIR SAFETY WK., Sept. 9, 1991, at 6.

236. *See* Mark B. Solomon, *Alcohol Testing Likely to Pass Hill Hurdle*, J. COM., Oct. 3, 1991, at 1A. Prior to the New York subway accident, the legislation had encountered solid opposition from the House Energy and Commerce Committee, which oversees railroads, and from the House Public Works and Transportation Committee, which has jurisdiction over airline, trucking, and mass transit employees. *Id.*

237. Mark B. Solomon, *Conferees Back Alcohol Testing in Transportation*, J. COM., Oct. 4, 1991, at 1A.

238. *Id.*

239. *See* AIR SAFETY WK., Sept. 23, 1991, at 6.

transportation accidents[240] and amends § 3(a) Title VI of the Federal Aviation Act of 1958[241] by mandating pre-employment, reasonable suspicion, random, post-accident, and periodic recurring testing for air carrier and Federal Aviation Administration employees involved in safety-sensitive positions.[242] The legislation also essentially codifies existing DOT testing rules.[243]

The airline industry opposed the alcohol testing provisions as costly and unnecessary, explaining that alcohol-related incidents are isolated and have not affected the performance of most of the airline work force.[244] Airline spokesmen believed the current practice of testing workers for alcohol following an accident or if reasonable cause exists was sufficient.[245] Labor leaders predicted a flurry of lawsuits challenging the new law because, unlike drugs, a certain level of alcohol consumption is legal.[246]

VI. EXORBITANT COST WITH MINIMAL RESULTS

As noted earlier, federal drug testing programs are extraordinarily expensive to implement. DOT estimates that compliance with drug testing programs will cost aviation employers $1.34 billion over 10 years.[247] The Air Line Pilots Association has complained that the cost of drug testing is "astronomical" and will go higher even though "not even one-hundredth of one percent" of pilots tested positive.[248] Costs may well double for the second year of testing when airlines must randomly test 50% instead of only 25% of their employees.[249]

240. Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, § 2(4), 105 Stat. 917, 952 (1991).

241. Pub. L. No. 85-726, § 3(a), 72 Stat. 731 (1958); *see also* 49 U.S.C. §§ 1421-32 (1988).

242. Omnibus Transportation Employee Testing Act of 1991, Pub. L. No. 102-143, § 3(A), 105 Stat. 917, 953-54 (1991). The legislation directs the FAA Administrator to promulgate regulations establishing drug and alcohol testing for domestic and foreign air carrier crew members, airport security screening contract personnel, and other employees responsible for safety-sensitive functions. *Id.* The legislation further directs the Administrator to establish a similar program applicable to employees of the Federal Aviation Administration. *Id.*

243. *Id.*, 105 Stat. at 956.

244. William DiBenedetto and Mark B. Solomon, *Coast Guard, Aviation Industry Query Need for Alcohol Testing*, J. COM., Oct. 7, 1991, at 12B.

245. *Id.*

246. Mark B. Solomon, *Senate Clears Bill on Alcohol Testing*, J. COM., Oct. 17, 1991, at 3B; *see also* Solomon, *supra* note 236, at 1A.

247. Paul Proctor, *Pilots Union Plans Court Challenge of FAA's Random Drug Testing Rules*, AVIATION WK. & SPACE TECH., Nov. 21, 1988, at 142. The Air Transport Association reported that 12 member carriers in 10 months spent $7.3 million drug testing 25% of their employees. *See Air Transport Association May Follow Pilots in Asking for Fewer Drug Tests*, AVIATION DAILY, Mar. 5, 1991, at 415.

248. *Air Transport Association*, *supra* note 247, at 415.

249. *Id.*

The staggering costs of these programs are strangling financially burdened airlines while uncovering positive results in less than 1/2 percent of those tested. The fact that 61.5% of these positives were detected in pre-employment testing illustrates the infinitesimal amount of drug usage in the employed aviation community. If enhancing safety through drug tests was the goal of drug testing regulations, it seems there is little drug usage in the aviation industry to detect or deter.

VII. CONCLUSION

Existing alcohol and drug testing legislation and regulations in the aviation industry are based on questionable constitutional analysis, inapposite industry comparisons, and inaccurate assumptions regarding the professionals to be tested. The Omnibus Transportation Employee Testing Act of 1991, with its constitutionally suspect provision mandating random tests for alcohol use as well, was enacted on the heels of a tragic subway accident in which the driver was found drunk with drugs in his possession. Despite the New York accident, test results consistently show that alcohol and drug abuse is not a problem in the aviation industry. Furthermore, the two pre-eminent drug testing regulations in the aviation industry seek to achieve the common goals of prevention, deterrence, and investigation, yet differentiate based on the occupational classification of the individual to be tested.

In expanding permissible Fourth Amendment searches to allow the types of intrusions contemplated by the Customs Service in *Von Raab*, the Supreme Court emphasized the "voluntariness" involved in the employee's decision to seek a job transfer and subsequently submit to a drug test. Unlike with aviation personnel, Customs drew no negative inference from an employee's decision to withdraw his application for a transfer. Those in the aviation sector who refuse to be tested are either fired or relegated to "non-sensitive" positions. Although a certain element of voluntariness appears where the FAA transmits the NTSB's request for toxicological samples to the relevant air traffic controller, no such voluntariness exists with regard to the FAA's mandating tests for its employees or with regard to drug testing pilots or other flight crew personnel.

In rationalizing drug tests, the Court in *Von Raab* also focused on the consensual nature of the tests involved by emphasizing that a Customs' employee was not subject to the discretion of an official in the field. Yet, this is precisely the standard utilized when determining whether to test air traffic controllers who may have contributed to an accident. The Supreme Court in *Skinner* noted that the aftermath of a transportation accident is often chaotic and that investigators arriving at the scene might find it diffi-

cult to determine which individuals contributed to the accident. The Northwest, USAir, and Avianca accidents illustrate the difficulty of determining "in the field" who may have contributed to an accident.

Furthermore, the post-violation and post-accident drug testing regulations in *Skinner* were promulgated in response to an acknowledged industry-wide substance abuse problem. The Supreme Court expressly declined to extend this presumption to all regulated industries. As noted, the aviation industry is not riddled with substance abusers causing deadly accidents at an alarming rate. In numerous, successive tests, only one-half a percent of test results for aviation personnel were positive, and a great majority of those involved pre-employment drug testing. While pre-employment screening is valuable for weeding out drug users and post-accident drug testing could be an important accident investigation tool, the facts do not support, nor do the results justify, the exorbitant expense necessary to continue other phases of drug testing, random testing in particular.

In permitting drug testing regulations to be extended to commercial aviation employees, the Ninth Circuit in *Bluestein* relied on both *Von Raab* and *Skinner* yet found neither an acknowledged and pervasive industry-wide drug problem, a post-accident justification, nor an element of "voluntariness" relied upon by the Supreme Court. The Court of Appeals instead focused on the prevention and deterrence rationale. While well-intended, these regulations do not recognize the virtually non-existent drug usage in the aviation industry nor are they applied on a truly classless basis. As the Avianca, USAir, and Northwest accidents demonstrated, the FAA's drug testing regulations require mandatory post-accident drug and alcohol testing for private sector employees while the regulations are discretionary for FAA air traffic controllers. The result: pilots are often subjected to mandatory post-accident drug and alcohol tests while "some", i.e., FAA or military, air traffic controllers are not, unless their contribution to the accident is clear.

This disparity of treatment leaves the NTSB without comprehensive and valuable information concerning the potential impairment of all possible actors. Despite the Supreme Court's sanctioning of drug testing, the NTSB lacks independent authority to require drug and alcohol tests. The NTSB must rely on FAA management personnel to select the appropriate air traffic controllers to be tested, or must hope that air traffic personnel will volunteer to be tested or have their records released to the NTSB. Since drug testing has survived Supreme Court scrutiny and the declared goal behind implementing post-accident drug and alcohol testing is to deter people from using drugs and alcohol and aid investigators when accidents occur, post-accident testing should be applied uniformly to all potential accident contributors regardless of their employer or their gov-

erning regulations. The bottom line, therefore, is why doesn't Congress provide the NTSB with the statutory authority to mandate such tests for appropriate individuals involved in the aftermath of an accident in the interest of aviation safety and protection of the traveling public?