Mandatory Random Drug-Testing in the United States Department of Transportation— A Fourth Amendment Analysis

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I. INTRODUCTION

Mandatory random drug-testing is one of the most controversial and perplexing issues facing the judicial system today. The advent of these drug-testing programs is due in part to the Reagan Administration's "war on drugs." Concern about drug use has now entered the American workplace where employers complain of decreased productivity, increased medical costs and the threat to employee safety as rationales for implementing mandatory random drug-testing programs.[1] While the Fourth Amendment does not place limits on employer conduct within the private sector,[2] when the employer is the government itself, the Fourth Amendment limits the employer's actions and provides protections to the employees.[3]

Drug-testing has only recently pushed its way to the forefront of judicial consideration. The majority of drug-testing cases have been decided within the past two years.[4] When the first series of cases were subjected

1. *See generally* Morikawa, *Implementation of Drug and Alcohol Testing in the Unionized Workplace*, 11 NOVA L. REV. 683 (1987); Recent Developments, *Constitutional Law: The Fourth Amendment and Drug Testing in the Workplace*, 10 HARV. J. OF LAW & PUB. POL. 762, 763 (1987).

2. United States v. Jacobson, 466 U.S. 109, 130 (1984) (holding that the Fourth Amendment is wholly inapplicable to a search or seizure conducted by a private individual unless he acts as an agent of the government).

3. *Id.*

4. *See, e.g.*, National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), *stay denied* — U.S. —, 107 S. Ct. 2479, 96 L. Ed. 2d 372; American Federation of Government Employees, AFL-CIO v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986); Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986) *rev'd in part, vacated in part*, 833 F.2d 335 (D.C. Cir.

to judicial scrutiny, many were unable to pass constitutional examination.[5] All courts addressing the issue have unanimously ruled that drug-testing by urinalysis constitutes a search and seizure within the meaning of the Fourth Amendment.[6] However, the Fourth Amendment prohibits only unreasonable searches and seizures.[7] So, the question then becomes: Does the mandatory random drug-testing by urinalysis constitute an "unreasonable" search and seizure?

This article does not doubt nor criticize the laudable goal which the "war on drugs" seeks to attain. Rather, it is the means through which that goal is pursued that is the subject of much concern. The traditional methodology utilized in analyzing the reasonableness of a search or seizure is currently in a state of flux. A majority of the Supreme Court has implicitly if not explicitly announced a new approach in the analysis of the Fourth Amendment.[8] This changing analysis of Fourth Amendment issues and how that change has affected or will affect mandatory random drug-testing programs is the primary focus of this article. In particular, this article will examine the program implemented by the United States Department of Transportation and the Federal Aviation Administration.[9]

1987); Capira v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986); Fraternal Order of Police, Lodge 5 v. City of Philadelphia, 812 F.2d 105 (3rd Cir. 1987); National Federation of Federal Employees v. Weinberger, 818 F.2d 935 (D.C. Cir. 1987); Shoemaker v. Handel, 619 F. Supp. 1089 (D.C.N.J. 1985), *aff'd* 795 F.2d 1136 (1986), *cert. denied* — U.S. —, 107 S. Ct. 577, 93 L. Ed. 2d 580; Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986); City of Palm Bay v. Bauman, 475 So. 2d 1322 (Fla. Dist. Ct. App. 1985); McDonell v. Hunter, 612 F. Supp. 1122 (D.C. Iowa 1985), *modified* 809 F.2d 1302 (8th Cir. 1987).

5. *McDonell*, 612 F. Supp. 1122, *modified* 809 F.2d 1302; AFGE v. Weinberger, 651 F. Supp. 726; Jones v. McKenzie, 628 F. Supp. 1500 (D.D.C. 1986).

6. *See supra* note 4.

7. Terry v. Ohio, 392 U.S. 1, 9 (1968).

8. *See* New Jersey v. T.L.O., 469 U.S. 325, 370 (1985) (Brennan, J., concurring in part, dissenting in part); *see also* O'Connor v. Ortega, — U.S. —, 107 S. Ct. 1492, 94 L. Ed. 2d 714 (1987).

9. The Department of Transportation has implemented its own Drug-Testing Program covering certain agency employees. *See infra* note 154.

Additionally, on March 15, 1988, the FAA published a proposed rule requiring airlines to test certain employees. In November of 1988, the FAA unveiled its final rule (53 Fed. Reg. 47023 Nov. 21, 1988) which covers approximately 538,000 employees in the aviation industry. The rule deals with random drug-testing of commercial pilots, flight navigators, aircraft dispatchers, mechanics, repairmen, flight engineers, ground instructors, flight attendants, non-governmental controllers, security screening personnel and ground security coordinators. Non-commercial general aviation pilots are not subject to the regulation. See *Aviation Daily*, November 15, 1988 at 233.

This article addresses random drug-testing programs which, by definition, call for the testing of individuals in the absence of individualized suspicion. This article will examine some of the most recent urinalysis testing cases and the variety of approaches courts have taken to address the issue.

II. THE FOURTH AMENDMENT

A. TRADITIONAL ANALYSIS

The Fourth Amendment was adopted in order to safeguard the privacy and security interest of the individual against the arbitrary intervention of government.[10] The Fourth Amendment specifically provides:

> The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and persons or things to be seized.[11]

This Amendment can be broken down into two clauses. The first guarantees the right to be free from unreasonable searches and seizures while the second provides that no warrant shall be issued without probable cause. These two clauses are intertwined with the second phrase modifying the first thus giving content to the word "unreasonable."[12] Absent any authorized exceptions, a search and seizure conducted without either a warrant or probable cause is per se unreasonable.[13] The Framers of the Amendment themselves previously balanced the opposing interests of the state and individual and concluded that "reasonableness" would be measured by the presence of a warrant issued upon probable cause.[14] This probable cause-warrant requirement provides the means by which the reasonableness of searches and seizures have traditionally been measured. As is evidenced, the application of this probable cause-warrant standard of reasonableness is explicitly mandated by the language of the Fourth Amendment.

In undertaking an analysis of a particular search and seizure, it must first be determined whether the individual searched is cloaked with Fourth Amendment protection.[15] The guard against unreasonable searches and seizures applies in the civil as well as criminal arena.[16] Thus, even though an individual is not subject to criminal prosecution, he is still protected against unreasonable governmental intrusions.

Additionally, a search within the meaning of the Fourth Amendment

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10. Brinegar v. United States, 338 U.S. 160, 175-76 (1949) *reh'g denied*, 338 U.S. 839.

11. *U.S. Const.*, amend. IV.

12. *T.L.O.*, 469 U.S. at 359 (Brennan, J., concurring in part and dissenting in part); *see generally* Jonson v. United States, 333 U.S. 10 (1948).

13. *T.L.O.*, 469 U.S. at 354 (Brennan, J., concurring in part and dissenting in part); Katz v. United States, 389 U.S. 347, 357 (1967); *McDonell*, 809 F.2d at 1306.

14. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

15. *Terry*, 392 U.S. at 9.

16. Camara v. Municipal Court, 387 U.S. 523, 530 (1967) (stating that "it is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior"); *see also McDonell*, 612 F. Supp. at 1127, *modified*, 809 F.2d 1302.

takes place only when the government infringes on an expectation of privacy that society is prepared to recognize as reasonable.[17] This expectation of privacy is measured by both an objective and subjective standard.[18] Where an individual has a subjective expectation of privacy in his person, place, or the thing searched, which is not a privacy interest society is prepared to recognize as reasonable, then the Fourth Amendment affords no protection. However, when subjective and objective expectations co-exist, the Fourth Amendment then extends its protection to the individual.[19]

The intrusion into one's privacy must be justified not only at its inception, but also in its scope.[20] Not only must there be a basis for subjecting the individual to the search in the first place, the methods used in the search must be reasonably related to the objective of the search and to the evidence it seeks to attain. It is the warrant requirement which limits the scope of the intrusion. A warrant is normally issued by a neutral and detached magistrate in an effort to prevent standardless intrusions into citizen privacy.[21]

In keeping with the traditional standard requiring both probable cause and a warrant, the reasonableness of a full-scale search is contingent upon the presence of both requirements. Where the invasion is substantially less than a full-blown search, the intrusion may be legitimate even in the absence of probable cause or a warrant as long as the privacy interests are sufficiently protected.[22] However, even in this situation the Fourth Amendment mandates that the limited search be reasonable.[23] The "reasonableness" of a minimally intrusive search is determined by balancing the privacy interests of the individual against the state's interest in conducting the limited search,[24] and the balance struck must give sufficient weight to the privacy interests of the individual.[25]

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17. *Katz*, 389 U.S. at 361 (Harlan, J., concurring); *Jacobsen*, 466 U.S. at 113; *Von Raab*, 816 F.2d at 175.

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

19. *Id.*

20. *Terry*, 392 U.S. at 19-20.

21. Johnson v. United States, 333 U.S. 10, 13-14 (1948) (stating that "the point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime"); United States v. Lefkowitz, 285 U.S. 452, 464 (1932).

22. *T.L.O.*, 469 U.S. at 355 (Brennan, J., concurring in part and dissenting in part).

23. *Id.; see also* Dunaway v. New York, 442 U.S. 200, 209-210 (1979).

24. *T.L.O.*, 469 U.S. at 355 (Brennan, J., concurring in part and dissenting in part) (Compare with majority opinion which balanced the interests even when the search was minimally intrusive).

25. *Id.*

It is imperative to note that the probable cause-warrant standard is surrendered only when the intrusion is less than a full-scale search[26] and the special needs of law enforcement make the probable cause-warrant model impractical in its application.[27] Only then does a balancing of competing interests take place. In all Fourth Amendment situations, the probable cause-warrant standard is at least the starting point in the analysis.

The traditional model does have a few well recognized exceptions to the warrant requirement.[28] Most of these exceptions occur where the exigency of the situation makes the obtaining of a warrant impractical due to time constraints.[29] One of the more unique and perplexing issues concerning the warrant requirement is the warrantless administrative search exception,[30] and its impact on mandatory random drug-testing. The rationales for its inception should first be examined generally.

The pioneering opinion in the administrative search area is *Camara v. Municipal Court*.[31] The *Camara* court unequivocally held that an area search of a premises pursuant to the enforcement of a Housing Code requires a warrant and probable cause.[32] The type of probable cause required is admittedly a somewhat modified version. As the court stated:

> Where considerations of health and safety are involved, the facts that would justify an inference of 'probable cause' to make an inspection are clearly different from those that would justify such an inference where a criminal investigation has been undertaken. Experience may show the need for periodic inspections of certain facilities without a further showing of cause to believe that substandard conditions dangerous to the public are being maintained. The passage of a certain period without inspection might of itself be sufficient in a given situation to justify the issuance of a warrant. The test of "probable cause" required by the Fourth Amendment can take into account the nature of the search that is being sought.[33]

One of the fundamental reasons for allowing a modified version of the

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26. *Id.*

27. *Id.* at 351 (Blackmun, J., concurring); *see also O'Connor*, — U.S. at —, 107 S. Ct. at 1511, 94 L. Ed. 2d 1492 (Blackmun, J., dissenting).

28. Chimel v. California, 395 U.S. 752 (1969); United States v. Robinson, 414 U.S. 218 (1973) (search incident to a lawful arrest); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (plain view doctrine); Carroll v. United States, 267 U.S. 132 (1925) (automobile exception); Donovan v. Dewey, 452 U.S. 594 (1981) (coal mine inspection exception), *see infra* note 47 and accompanying text.

29. S. SALTZBURG, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY, 258-259 (2d ed. 1984).

30. *Dewey*, 452 U.S. 594 (coal mines); United States v. Biswell, 406 U.S. 311 (1972) (gun selling); Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (liquor industry); New York v. Burger, — U.S. —, 107 S. Ct. 2636 (1987) (vehicle dismantling industry); *But* compare, Marshall v. Barlow's, Inc., 436 U.S. 307 (1978).

31. *Camara*, 387 U.S. 523.

32. *Id.* at 540.

33. *Id.* at 538 (quoting Douglas, J., dissent in Frank v. Maryland, 359 U.S. at 383).

probable cause standard is that the inspections themselves are not personal in nature.[34] Additionally, the *Camara* court emphasized the need for a warrant even for an administrative search. The Fourth Amendment mandates a warrant unless to require one would frustrate the purpose behind the search.[35] As evidenced by *Camara*, administrative searches must comply with the traditional probable cause—warrant model. Notwithstanding this traditional model, the Supreme Court has provided a few narrowly tailored exceptions to the warrant requirement in administrative inspection schemes.[36] The rationale for these exceptions was clearly addressed in *Donovan v. Dewey*.[37] Justice Marshall, writing for the majority, opined:

> [U]nlike searches of private homes, which generally must be conducted pursuant to a warrant in order to be reasonable under the Fourth Amendment, legislative schemes authorizing warrant-less administrative searches of commercial property do not necessarily violate the Fourth Amendment.[38]

The court specifically limits this exception to the search of commercial property conducted pursuant to a legislative scheme in a highly regulated industry. This reasoning reflects the notion that an individual's expectation of privacy in his home and personal effects is substantially different and higher than the privacy interest in commercial property.[39] This is not to say that all warrantless inspections of commercial property are reasonable. A warrant is required where the inspections occur in a random, infrequent or unpredictable manner, to the extent that the property owner has no real notice that his property is subject to such inspections.[40] The duty of a warrant is to protect against the unbridled discretion of the inspecting agent.[41] Where the regularity, predictability and standards of inspections are assured through legislative regulations and the search is not subject to the discretion of field officers, however, a warrant is not necessarily required.[42] Such is the case in the pervasively regulated industries of guns,[43] liquor,[44] coal mining,[45] and vehicle dismantling.[46] In order to avoid the warrant requirement, it is imperative that the search of the commercial premise be exercised pursuant to set stan-

34. *Id.* at 537.
35. *Terry*, 392 U.S. at 10-12; *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).
36. *See supra* note 28 and accompanying text.
37. 452 U.S. 594.
38. *Id.* at 598.
39. *Id.* at 598-99.
40. *Id.* at 599; *Barlow's, Inc.*, 436 U.S. at 314-15.
41. *Dewey*, 452 U.S. at 599; *Barlow's, Inc.*, 436 U.S. at 312.
42. *Dewey*, 452 U.S. at 599, 603.
43. *Biswell*, 406 U.S. 311.
44. *Colonade Catering Corp.*, 397 U.S. 72.
45. *Dewey*, 452 U.S. 594.
46. New York v. Burger, — U.S. —, 107 S. Ct. 2636 (1987).

dards which establish the scope and frequency of the inspections. Similarly, the standards should guide the field inspectors in the selection of the premises to be searched.[47] The *Dewey* court emphasized that the statutory schemes not requiring a warrant were addressed to industries notorious for serious accidents and unhealthy working conditions.[48]

These exceptions to the *Camara* warrant requirement are narrow in scope and limited to the search of commercial premises in the liquor, gun, mining, and vehicle dismantling industries and have, until now, extended no further.

The Supreme Court is currently in the process of altering its analysis of Fourth Amendment issues and has shifted away from the traditional probable cause-warrant standard. The balancing of interests which has traditionally been performed only where the intrusion was significantly less than a full-scale search is becoming the rule rather than exception. The Court has begun to immediately engage in a balancing of privacy and security interests to determine the reasonableness of the intrusions.[49] Where the court engages in a balancing of interests, it necessarily substitutes its determination of reasonableness for that of the Framers.[50] The second clause of the Fourth Amendment then has no bearing on the "reasonableness" of the search and the probable cause-warrant standard is given no effect.

Yet, this balancing is traditionally employed only when the search is minimally intrusive[51] and where the special need for law enforcement makes the warrant requirement impractical.[52] When the Court chooses to engage in a balancing approach, it weighs the individual's privacy and security interests against the government's need to conduct a particular

47. As long as the legislatively imposed standards provide certainty and regularity to the search process, the field officer has only limited discretion and consequently, the rationale for a warrant no longer exists. *See, e.g., Dewey*, 452 U.S. 594; *Biswell*, 406 U.S. 311; *Colonade Catering Corp.*, 397 U.S. 72, *Burger*, — U.S. —, 107 S. Ct. 2636 (1987). These cases are extensively cited herein because they are the only warrantless administrative search exceptions which the United States Supreme Court has recognized thus far.

48. *Dewey*, 452 U.S. at 603-04.

49. *See, e.g., T.L.O.*, 469 U.S. 325; *O'Connor*, — U.S. —, 107 S. Ct. 1492; Bell v. Wolfish, 441 U.S. 520 (1979).

50. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring). *But compare, O'Connor*, — U.S. at —, 107 S. Ct. at 1497 (plurality opinion) (The Court takes into consideration the intention of the Framers of the Fourth Amendment when balancing competing interests to determine what constitutes a "reasonable" search).

51. *T.L.O.*, 469 U.S. at 355 (Brennan, J., concurring in part and dissenting in part); *see also Terry*, 392 U.S. 1 (A stop and frisk, while it is a search and seizure, it is minimally intrusive and may be conducted in the absence of a warrant as long as there is reasonable suspicion to believe the criminal activity is afoot).

52. *O'Connor*, — U.S. at —, 107 S. Ct. at 1511 (Blackmun, J., dissenting). *See also T.L.O.*, 469 U.S. at 351-53 (Blackmun, J., concurring).

search.[53] In so doing, the Court considers the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which the invasion takes place.[54]

In two recent cases,[55] a divided Supreme Court exemplifies the clash between the traditional probable cause-warrant standard and the new balancing standard. *New Jersey v. T.L.O.*[56] involves the search of a student's purse by school officials in the absence of probable cause. As with all Fourth Amendment issues, the question was whether the search was "reasonable." Justice White, writing for the majority, clearly evidences that there is a new approach to measuring the reasonableness of a particular intrusion. "The determination of the standard of reasonableness governing any specific class of searches requires 'balancing the need to search against the invasion which the search entails.' "[57] The competing interests involved in *T.L.O.* were the student's legitimate expectation of privacy and the state's interest in maintaining classroom discipline.[58]

Justice Brennan, with whom Justice Marshall joined, agreed with the majority that a warrant was not mandated by the circumstances of the case. The "exigency" of the circumstances made the warrant impractical.[59] The real debate centered on the standard of individualized suspicion required before the school officials could conduct a search of the student's purse. The Majority, by immediately engaging in a balancing of interests, opined that public interest is best served by adopting a standard

53. U.S. v. Place, 462 U.S. 696, 703 (1983); *O'Connor*, — U.S. at —, 107 S. Ct. at 1499, 94 L. Ed. 2d at 724 (plurality opinion); *Camara*, 387 U.S. at 536-537; *Bell*, 441 U.S. at 559.

54. *Bell*, 441 U.S. at 599; *Von Raab*, 816 F.2d at 176; *O'Connor*, — U.S. at —, 107 S. Ct. at 1512-13, n.8, 94 L. Ed. 2d at 740 (Blackmun, J., concurring) ("This part of the analysis is related to the 'special need' step. Courts turn to the balancing test only when they conclude that the traditional warrant and probable-cause requirements are not a practical alternative. Through the balancing test, they then try to identify a standard of reasonableness, other than the traditional one, suitable for the circumstances. The warrant and probable-cause requirements, however, continue to serve as a model in the formation of the new standard. It is conceivable, moreover, that a court, having initially decided that it is faced with a situation of 'special need' that calls for balancing, may conclude after application of the balancing test that the traditional standard is a suitable one for the context after all.")

55. *O'Connor*, — U.S. —, 107 S. Ct. 1492, 94 L. Ed. 2d at 714 (O'Connor, J., announced the judgment of the Court with Rehnquist, C.J., White and Powell, J.J., with Scalia, J., concurring in judgment and Blackmun, J., with whom Brennan, Marshall, and Stevens, J.J., joined, dissented.); *T.L.O.*, 469 U.S. 325 (White, J., announced the opinion of the court with Powell and O'Connor, J.J., concurring, and Blackmun, J., concurring in judgment, Brennan and Marshall, J.J., concurring in part and dissenting in part and Stevens, J., dissenting).

56. 469 U.S. 325.

57. *T.L.O.*, 469 U.S. at 337 (quoting *Camara*, 387 U.S. at 536-37).

58. *Id.* at 339.

59. *Id.* at 355-56 (Brennan, J., concurring in part and dissenting in part).

of reasonableness that stops short of probable cause.[60] The Court proceeds even further and suggests that the search of an individual might sustain constitutional attack even when conducted in the complete absence of individualized suspicion.[61]

In rebuttal, Justice Brennan wrote a separate opinion emphatically rejecting the Court's new found "balancing test."[62] Justice Brennan explained:

> [F]ull-scale searches—whether conducted in accordance with the warrant requirement or pursuant to one of its exceptions—are 'reasonable' in Fourth Amendment terms only on a showing of probable cause to believe that a crime has been committed and that evidence of the crime will be found in the place to be searched.[63]

Furthermore:

> The Court's decision jettisons the probable-cause standard—the only standard that finds support in the text of the Fourth Amendment—on the basis of its Rorschach-like 'balancing test.' Use of such a 'balancing test' to determine the standard for evaluating the validity of a full-scale search represents a sizable innovation in Fourth Amendment analysis. This innovation finds support neither in precedent nor policy and portends a dangerous weakening of the purpose of the Fourth Amendment to protect the privacy and security of our citizens.[64]

Justice Brennan stoutly adheres to the proposition that balancing competing interests is justifiable only where the intrusion itself is substantially less than a full-scale search and the balancing approach adequately protects the interests infringed upon.[65] In order to correct the majority's error, Justice Brennan addresses three basic principles underlying Fourth Amendment jurisprudence. First, subject to some specifically delineated exceptions, warrantless searches are per se unreasonable. Secondly, where there is a full-scale search, probable cause is mandated. Thirdly, only where the search is significantly less than full-scale, may a balancing test be used to determine reasonableness.[66]

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60. *Id.* at 343.

61. *Id.* at 342, n.8 ("We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure [,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.' United States v. Martinez-Fuerte, 428 U.S. 543, 560-61, 96 S. Ct. 3074, 3084, 49 L. Ed. 2d 1116 (1976).")

62. The phrase "balancing test" is itself a misnomer. The test under the Fourth Amendment is whether a search or seizure is "reasonable." "Balancing test" refers to the shifting majority's new approach in determining what is "reasonable." Contrast this with the traditional method of determining "reasonableness." i.e. the probable cause-warrant model.

63. *T.L.O.*, 469 U.S. at 354-55 (Brennan, J., concurring in part and dissenting in part).

64. *Id.* at 357-58.

65. *Id.* at 355.

66. *Id.* at 354-55.

In *O'Connor v. Ortega*,[67] a plurality of the Court once again subscribed to the new balancing approach as the method of analyzing the reasonableness of a search. In *O'Connor*, the Court held that a public employer's search of an employee's office, desk and file cabinets in the absence of probable cause or a warrant could be reasonable.[68] The plurality, reiterating its holding in *T.L.O.*, adopted the "balancing test." Again, the Court refrained from passing judgment on whether individualized suspicion is an essential element in the new standard of reasonableness. The Court announced in dicta:

> Because the petitioners had an 'individualized suspicion' of misconduct by Dr. Ortega, we need not decide whether individualized suspicion is an essential element of the standard of reasonableness that we adopt today.[69]

Additionally, the Court limited its decision to the search of workplace premises, and expressly refrained from passing judgment on the appropriate standard for evaluating the reasonableness of a search of personal items.[70]

Justice Blackmun, dissenting, attempts to battle back the onslaught of the new approach to "reasonableness." Borrowing from his concurring opinion in *T.L.O.*, Justice Blackmun expounded:

> Under traditional Fourth Amendment jurisprudence, however, courts abandon the warrant and probable cause requirements, which constitute the standard of reasonableness for a government search that the Framers established, only in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical.[71]

He emphatically rejects the majority's flawed analysis.

> The plurality repeats here the *T.L.O.* court's error in analysis. Although the plurality mentions the 'special need' step [citations omitted], it turns immediately to a balancing test to formulate its standard of reasonableness. This error is significant because, given the facts of this case, no 'special need' exists here to justify dispensing with the warrant and probable cause requirements.[72]

By immediately balancing competing interests without first applying the traditional standard, the Court supplants the Framer's intent and effectively eradicates any predictability which the traditional standard lent to the determination of reasonableness. If this new approach to the law of search and seizure should continue, not only will the language of the

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67. — U.S. —, 107 S. Ct. 1492, 49 L. Ed. 2d 714 (1987).

68. *Id.* at —, 107 S. Ct. at 1504, 49 L. Ed. 2d at 730-31 (The Court remanded to the District Court to evaluate the reasonableness of the search at its inception and in its scope based on the guidelines enumerated in the opinion).

69. *Id.* at —, 107 S. Ct. at 1503, 94 L. Ed. 2d at 729.

70. *Id.* at —, 107 S. Ct. at 1504, 94 L. Ed. 2d at 730-31.

71. *Id.* at —, 107 S. Ct. at 1510-11, 94 L. Ed. 2d at 738 (Blackmun, J., dissenting).

72. *Id.* at —, 107 S. Ct. at 1511, 94 L. Ed. 2d at 739 (Blackmun, J., dissenting).

Fourth Amendment requiring probable cause and a warrant become obsolete, but the courts will be flooded with cases asking it to "balance" the interests and rule that a particular search is reasonable in the absence of probable cause. In *O'Connor*, Justice Blackmun explicitly warned a plurality of the Court that the new method of analysis would present problems in dealing with such issues as drug-testing.[73]

III. DRUG TESTING

President Reagan has called on all executive agencies to develop a plan for the purpose of attaining a drug-free workplace.[74] The Presidential directive seeks to test those employees in "sensitive" positions which affect public health and safety or national security.[75] The drug-testing programs are to be conducted in accordance with the procedures outlined by the Secretary of Health and Human Services.[76]

On June 29, 1987, the United States Department of Transportation became the first executive agency to implement President Reagan's Executive Order.[77] To more fully analyze the constitutional validity of the Department's program, a look at some of the recent drug-testing cases will be helpful. The most vital portion of this analysis will concern itself with the type of Fourth Amendment analysis the courts employ in measuring the "reasonableness" of an intrusive search.

With a changing majority of the Supreme Court placing less emphasis on the traditional probable cause-warrant standard, the lower courts have also begun to ignore the traditional standard and engage in a "balancing" approach to "reasonableness." This is particularly true in the drug-testing area where *T.L.O.* and *O'Connor* are extensively cited as authority for using the "balancing" standard.[78] As will be seen, the traditional probable cause-warrant model is a perishing standard.

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73. *Id.* at —, 107 S. Ct. at 1514, n.15, 94 L. Ed. 2d at 742 (Blackmun, J., dissenting).

74. EXEC. ORDER NO. 12564, 51 Fed. Reg. 32889 (1986).

75. *See supra* note 74 at 32890. Mandatory random testing is not mandated by the Order. *See generally* M. PAYSON AND P. ROSEN, SUBSTANCE ABUSE: A CRISIS IN THE WORKPLACE, TRIAL at 25 (July 1987); *But compare*, American Federation of Gov. Employees v. Weinberger, 651 F. Supp. at 731, n.4 (S.D. Ga. 1986).

76. SCIENTIFIC AND TECHNICAL GUIDELINES FOR DRUG TESTING PROGRAMS, ALCOHOL, DRUG ABUSE AND MENTAL HEALTH ADMINISTRATION, Department of Health and Human Services, February 14, 1987 (changed language July 20, 1987) 52 Fed. Reg. 30638 (1987).

77. DRUG-FREE DEPARTMENTAL WORKPLACE, U.S. Dep't of Transportation, June 29, 1987; *see also* AVIATION DAILY, June 30, 1987 at 506.

78. *See generally Lovvorn*, 647 F. Supp. at 882; American Federation of Gov. Employees v. Weinberger, 651 F. Supp. at 733 (S.D. Ga. 1986); Nat. Federation of Fed. Employees v. Weinberger, 818 F.2d at 942 (D.C. Cir. 1987); *Capua*, 643 F. Supp. at 1513, National Treasury Employees Union v. Van Raab, 816 F.2d at 175-180 (5th Cir. 1987); *McDonell*, 809 F.2d at 1305.

A. Drug-Testing by Urinalysis Constitutes a Search and Seizure Within the Meaning of the Fourth Amendment

Courts faced with the issue of drug-testing have unanimously held that drug-testing through urinalysis by a governmental entity constitutes a search and seizure within the meaning of the Fourth Amendment.[79] Since the Fourth Amendment protects only against *unreasonable* search and seizures,[80] we must determine whether a particular drug-testing program is in fact *unreasonable*.

Many types of privacy interests are intruded upon when an individual is required to undergo urinalysis testing. Individual employees enjoy a legitimate expectation of privacy not only in the act of passing urine,[81] but also in the information that urine contains.[82] Many drug-testing programs call for direct observation of the individual submitting to the test.[83] One might be required to perform a private bodily function in the presence of others. But even if a program calls for indirect observation and allows the individual to provide a sample in private, the program remains highly intrusive.[84] An examination of one's urine may disclose numerous private medical facts other than whether the individual has ingested drugs, such as whether an individual is under treatment for depression or is epileptic or diabetic,[85] or has a venereal disease, sickle cell anemia or schizophrenia,[86] or in the case of a female, whether she is pregnant.

The testing of one's urine constitutes a full-scale search warranting the protection afforded by the probable cause-warrant standard of reasonableness.[87] However, where the court engages in the *T.L.O.* type balancing approach, the probable cause-warrant standard is never given

79. *See supra* note 4 and accompanying text.

80. *See supra* note 11 and accompanying text.

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

82. *McDonell*, 809 F.2d at 1307; Jones v. McKinzie, 628 F. Supp. 1500, 1508 (D.D.C. 1986); *Capua*, 643 F. Supp. at 1515; *Fraternal Order of Police, Lodge 5*, 812 F.2d 105, 113 (Medical information is generally entitled to privacy protection).

83. *Capua*, 643 F. Supp. at 1514 ("Bodily surveillance is considered essential and standard operating procedure in the administration of urine drug tests, . . . thus heightening the intrusiveness of these searches") (footnote omitted).

84. AFGE v. Weinberger, 651 F. Supp. at 732; Whalen v. Roe, 429 U.S. 589, 602 (1977) (recognizing a right to privacy in medical information); United States v. Westinghouse Electric Corp., 638 F.2d 570, 577 (3rd Cir. 1980).

85. National Treasury Employees Union v. Von Raab, 816 F.2d at 175-76.

86. Recent Developments, *Constitutional Law: The Fourth Amendment and Drug Testing in the Workplace*, 10 HARV. J. OF LAW & PUB. POL., 762, 764 (1987).

87. *See generally* Schmerber v. California, 384 U.S. 757 (1966) (holding that blood testing for presence of alcohol constitutes a search and seizure and cannot be conducted in the absence of probable cause). *See also* Rwy. Labor Executives Assoc. v. Buraley, 839 F.2d 575 (9th Cir. 1988) (where court equated testing by urinalysis with body cavity searches in terms of invasion of privacy).

effect.[88]

B. An Analysis of Recent Case Law

1. National Treasury Employees Union v. Von Raab

National Treasury Employees Union v. Von Raab[89] provides a fundamental illustration of how the recent change in Fourth Amendment analysis has had a detrimental impact on individual rights guaranteed by the traditional probable cause-warrant standard of reasonableness.

In 1986, the United States Customs Service implemented a drug-testing program which required employees who sought promotion into certain identified "covered positions" to submit to a drug test through urinalysis.[90] Those who failed the test[91] were denied promotion and subject to discharge.[92] This program is slightly different from mandatory random testing in that the only individuals tested are those seeking promotion to a "covered position."

In determining whether the drug-testing constituted a full-scale search meriting application of the traditional standard, the District Court specifically found:

> Drug testing of Customs workers' bodily wastes is even more intrusive than a search of a home. When analyzing urine specimens, the defendant is searching for evidence of illicit drug usage. The drug testing plan is no minor frisk or pat-down. It is rather a full-scale search that triggers application of Fourth Amendment protections.[93]

The Court applied the traditional standard measuring reasonableness and held that the testing of employees absent probable cause or reasonable suspicion was "repugnant to the United States Constitution."[94] On appeal however, the Fifth Circuit inexplicably ignored the traditional method of analysis and immediately engaged in a balancing of interests reminiscent of *T.L.O.*[95] The Court of Appeals failed to give effect to the District

88. *T.L.O.*, 469 U.S. at 352 (Blackmun, J., concurring).

89. 816 F.2d 170.

90. *Id.* at 172.

91. The test covers only those who seek transfer into one of three types of positions: (1) positions that either directly involve the interdiction of illicit drugs, (2) positions which require the carrying of a firearm, or (3) positions which involve access to classified information. *Id.* at 173.

The urine samples are tested for marijuana, cocaine, opiates, amphetamines, and P.C.P. Two testing techniques are used. First, an enzyme-multiplied-immunoassor technique (EMIT) is used on the sample. But because it yields a high rate of false positive results, all positive samples are tested by gas chromatography/mass spectrometry (GC/MS), which is a much more reliable test. *Id.* at 174.

92. National Treasury Employees Union v. Von Raab, 649 F. Supp. 381, 382 (E.D. La. 1986), *vacated*, 816 F.2d 170.

93. *Id.* at 386.

94. *Id.* at 387.

95. *NTEU*, 816 F.2d at 176.

Court's finding that the drug-testing was a highly intrusive full-scale search and seizure which triggered the probable cause-warrant standard of reasonableness.

In balancing the interests, the Fifth Circuit took into consideration (1) the scope of the intrusion, (2) the manner in which it was conducted, (3) the justification for the intrusion and (4) the place where the intrusion occurred.[96] After balancing the interests, the court held that an employee may be subjected to a urinalysis test despite the absence of any type of individualized suspicion. The Court offered no explanation of why the warrant-probable cause standard was not utilized, nor why this case presents a situation where absolutely no individualized suspicion is required.[97] The Fifth Circuit's approach is in direct contradiction to the explicit language of the Fourth Amendment. The Court succeeded in substituting its judgment of what constitutes "reasonable" within Fourth Amendment context for that of the Framers. The U.S. Supreme Court has granted certiorai in this case and will thus take up the matter of whether mandatory drug testing of federal employees violates the Fourth Amendment.[98]

2. SHOEMAKER V. HANDEL

When the New Jersey Racing Commission implemented regulations calling for officials, jockeys, and trainers to submit to random urinalysis testing, the jockeys brought their challenge to court, arguing that the regulations violated the Fourth and Fourteenth Amendments to the Constitution.[99] Specifically, they argued that the random selection method for testing was inconsistent with the requirements of the Fourth Amendment.[100]

The *Shoemaker v. Handel*[101] Court takes a unique and unprecedented approach to the issue of random drug testing in the horse-racing industry. Unlike most drug-testing cases, the *Shoemaker* Court recognized that the Fourth Amendment traditionally requires a warrant based upon probable cause.[102] But in a remarkable leap in reasoning, the Court attempts to extend the warrantless administrative search exception[103] to a situation where it has never before been applied. As the Court explains:

> Although it it [sic] clear that the New Jersey horseracing industry is closely

96. *Id.* (quoting *Wolfish*, 441 U.S. at 559).
97. *Id.* at 183, n.1 (Hill, J., dissenting).
98. 108 S. Ct. 1072, 99 L. Ed. 2d 232 (1988).
99. *Shoemaker*, 795 F.2d 1136.
100. *Id.* at 1138-40. The plaintiffs additionally challenged the testing program on Due Process and Equal Protection claims.
101. 795 F.2d 1136.
102. *Id.* at 1142.
103. *See supra* note 47 and accompanying text.

> regulated, the question that arises in this case is whether the administrative search exception extends to the warrantless testing of persons engaged in the regulated activity.[104]

Prior to this case, the warrantless administrative search was strictly limited to the inspection of commercial property in highly regulated industries such as liquor, guns, and coal mining,[105] and where such inspections were conducted pursuant to some legislative scheme which specifically defined the standards and limits of the inspection.[106] Never had the exception been applied to the search of an individual. To do so undermines the rationale of the exception which is in part based upon the fact that the search of commercial property is in no way similar to the search of an individual or his home.[107]

The *Shoemaker* Court extended the exception to the urinalysis testing of jockeys engaged in the regulated industry of horse-racing. The Third Circuit held that there were only two interrelated requirements which needed to be met in order to extend the exception to the drug-testing of jockeys in the horse-racing industry. First, the state must have a strong interest in conducting an unannounced search.[108] Secondly, "the pervasive regulation of the industry must have reduced the justifiable privacy expectation of the subject of the search."[109]

The state's interest in horse-racing is of a financial nature due to parimutuel betting. The state receives revenue from such wagering. The extent of wagering is dependent upon the public perception of the integrity of the horse-racing industry.[110] One way to assure the public of the honesty of the sport is to institute a random drug-testing program. The Court states:

> It is the public's perception, not the known suspicion, that triggers the state's strong interest in conducting warrantless testing.[111]

According to the Court, this financial interest is sufficient to allow the state to conduct an unannounced search.[112] Additionally, the *Shoemaker* Court found that in the horse-racing industry, the search of a jockey's urine was not that different than the search of commercial property:

> While there are distinctions between searches of premises and searches of persons, in the intensely regulated field of horse racing, where the persons engaged in the regulated activity are the principal regulatory concern, the

104. *Shoemaker*, 795 F.2d at 1142.
105. *See supra* notes 43-46 and accompanying text.
106. *See supra* note 47 and accompanying text.
107. *Dewey*, 452 U.S. at 598-99.
108. *Shoemaker*, 795 F.2d at 1142.
109. *Id.*
110. *Id.* at 1138.
111. *Id.* at 1142.
112. *Id.*

> distinctions are not so significant that warrantless testing for alcohol and drug use can be said to be constitutionally unreasonable.[113]

Shoemaker's rationale for extending the warrantless administrative search exception is premised on the finding that the jockeys themselves are the principal regulatory concern. The *Shoemaker* conclusion is truly a unique and unprecedented extension of the warrantless administrative search exception.

3. RAILWAY LABOR EXECUTIVES' ASSOCIATION V. BURNLEY

The United States Court of Appeals for the Ninth Circuit recently analyzed the misapplication of the warrantless administrative search exception in the area of drug-testing. The Court in *Railway Labor Executives' Association v. Burnley*[114] reversed the District Court for the Northern District of California which had granted summary judgment for the government. At issue were Federal Railroad Administration (FRA) regulations mandating blood and urine tests after major train accidents and fatal incidents.[115]

The Ninth Circuit, Justice Tang writing for the majority, addressed the warrantless administrative search exception:

> The most recent articulation of this exception to the warrant requirement emphasizes that warrant and probable cause requirements which fulfill the traditional [F]ourth Amendment Standard of reasonableness have lessened application in the context of a closely regulated industry because the owner or operator of commercial premises in such an industry has a reduced expectation of privacy.[116]

Unlike the *Shoemaker* Court, Justice Tang explicitly declined to extend the exception to the search of one's person or his urine. The Court specifically noted that all cases prior to *Shoemaker* which had upheld a warrantless administrative search applied to the search of property and not of persons.[117]

Justice Tang then addressed the District Court's conclusion that due to the pervasive regulation of the railroad industry, the employees within that industry have a *reduced* expectation of privacy. Justice Tang viewed the District Court's analysis as seriously flawed.[118] The highly regulated nature of the industry has "diminished the owners' and managers' expectation of privacy in railroad premises"[119] but it certainly has not diminished the employees' expectation of privacy in personal information

113. *Id.*
114. 839 F.2d 575 (9th Cir. 1988).
115. 49 C.F.R. §§ 219.201, 219.203 (1986).
116. *Railway Labor Executives' Ass'n* at 584.
117. *Id.*
118. *Id.* at 585-86.
119. *Id.*

contained within his urine.[120] The Appellate Court particularly observed that the vast majority of safety regulations were directed at the owners and managers of the railroads and not their employees.[121]

This is to be compared with *Shoemaker* where the jockeys themselves were principal objects of industry regulation because of the state's interest in assuring public confidence in the integrity of racing.[122] The Court finally sets out what it perceives to be the general rule of law:

> Thus we conclude that the administrative inspection standard, which allows warrantless searches of the premises of pervasively regulated industries, is not applicable to searches of persons even when they are employed in those industries, unless the employees are the principal concern of the industry regulation.[123]

After the Court rejected the warrantless administrative inspection exception, it addressed the "reasonableness" of the drug testing program under the Fourth Amendment. In so doing, the new "balancing" standard was once again applied. The Court made brief reference to the probable cause requirement but refused to follow it, once again citing *T.L.O.*[124] However, some degree of individualized suspicion was required and the District Court was reversed. Had the traditional standard been applied, probable cause would have been required due to the Court's finding that urinalysis is equivalent in degree to a body cavity search.[125] Such a full-scale search mandates probable cause.

4. McDONELL v. HUNTER

McDonell v. Hunter[126] exemplifies the inevitable effect of applying a "balancing test" rather than the traditional probable cause-warrant standard in the area of urinalysis testing. The Iowa Department of Corrections implemented a policy authorizing urinalysis testing. Both the District Court and the Court of Appeals, presented with the same exact factual setting, applied the "balancing test" and came to vastly different conclusions.

In 1983, three employees at the Iowa Department of Corrections were asked to sign search consent forms. Two of the three plaintiffs refused to sign and no official action was taken at that time.[127] Then, in January of 1984, McDonell was asked by his supervisor to undergo urinalysis based on the fact that he had been seen the week before with

120. *Id.* at 586.
121. *Id.* at 585.
122. *Shoemaker*, 795 F.2d at 1142.
123. *Railway Labor Executives' Association*, 839 F.2d at 585.
124. *Id.* at 587.
125. *Id.* at 586.
126. 612 F. Supp. 1122, *modified* 809 F.2d 1302.
127. *Id.* at 1126.

two individuals being investigated for drug related activities. When McDonell refused, he was automatically discharged.[128] While there was a department policy concerning urinalysis, the policy was deficient of standards concerning the manner in which the testing was to be implemented.[129] While this case does not involve a mandatory random drug-testing program, the appellate court decision did address the issue.[130]

The District Court and Court of Appeals chose to substitute their own opinion of what constituted "reasonableness" for that of the Framers of the Fourth Amendment. Both came to drastically different conclusions. Upon balancing the interests, the District Court concluded that drug-testing by urinalysis could only be conducted on the basis of reasonable suspicion that the employee was presently intoxicated with alcohol or under the influence of some controlled substance.[131] The demand on McDonell that he submit to urinalysis testing was not based on reasonable suspicion and therefore it violated the Fourth Amendment.[132] The District Court's opinion is the foundation upon which a number of drug-testing cases have been decided.[133]

On appeal, the Eighth Circuit modified the District Court's decision, and, in balancing the interests itself, held that urinalysis may be performed uniformly or by systematic random selection of employees who have regular contact with the prisoners as long as selection is not arbitrary or discriminatory.[134] In so ruling, the Eighth Circuit approved the *Shoemaker* rationale concerning the warrantless administration search exception[135] and held that the state's interest in the security of the correctional facility was at least as strong as New Jersey's interest in safeguarding the integrity of the horse-racing industry.[136]

A significant aspect of the Court's decision is based on the finding

128. *Id.*

129. *Id.* at 1128, n.4, *modified* 809 F.2d 1302.

130. McDonell, 809 F.2d at 1307-08.

131. *McDonell*, 612 F. Supp. at 1131, modified 809 F.2d 1302.

132. *Id.*

133. *See generally* D. Miller, *Mandatory Urinalysis Testing and the Privacy Rights of Subject Employees: Toward a General Rule of Legality Under the Fourth Amendment*, 48 U. PITT. L. REV. 201, 221-25 (1986).

134. *McDonell*, 809 F.2d 1308. In a sense, there are four standards upon which a search may take place: (1) Probable cause, (2) Reasonable suspicion, (3) Mere suspicion, and (4) Where safeguards and predetermined standards ensure that an intrusion into one's privacy is not subject to the unbridled discretion of field officers. *See* D. Miller, *supra* note 133, at 215. Of course, the primary distinction is that the first three require at least some type of individualized suspicion while the fourth does not. Additionally, it seems logical that the fourth standard is more of a reason to abdicate the warrant requirement rather than the individualized suspicion requirement since the rationale for a warrant is that the magistrate issue it so as to guard against a field officer's unbridled discretion.

135. *McDonell*, 809 F.2d at 1308.

136. *Id.*

that urinalysis testing is not as intrusive as a strip search or a blood test.[137] This is in apparent conflict with the Court's previous finding that both blood and urinalysis tests involve the intense examination of one's bodily fluids and the discovery of numerous physiological facts about the individual tested.[138] The only explanation for the apparent conflict is that a blood test involves the actual intrusion of a needle into one's body. But such an explanation plainly ignores the fact that the chemical analysis of one's bodily fluids is the privacy interest which is invaded.

What the Circuit Court accomplished was to create two levels upon which urinalysis testing could take place. First, as long as random selection of employees to be tested was pursuant to set standards and not subject to the arbitrary discretion of field officers, then the testing could be conducted in the absence of individualized suspicion.[139] Secondly, absent a systematic random or uniform selection, testing could be conducted only on the basis of reasonable suspicion.[140] The Court again modified the District Court's decision and announced that the reasonable suspicion standard was not limited to the testing of those suspected of being under the influence, but was extended to include those reasonably suspected to have used a controlled substance within a twenty-four hour period prior to the required test.[141] The effect of this modification is that an employee may be required to take the test even though he is not presently impaired.

The overriding significance of *McDonell* is that it is illustrative of the problems encountered when a court does not comply with the probable cause-warrant standard. When using the "balancing test," different courts will reach opposing conclusions when presented with the same set of facts. The traditional model lent at least some predictability to Fourth Amendment analysis. The balancing approach has replaced predictability and brought chaos to the law of search and seizure. While it is true that the "test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application,"[142] the traditional standard provides some stability and guidance to the analysis.

5. American Federation of Government Employees v. Weinberger

In *American Federation of Government Employees v. Weinberger*[143] the Department of Defense ("DOD") directive called for the mandatory

137. *Id.*
138. *Id.* at 1307.
139. *Id.* at 1308.
140. *Id.*
141. *Id.* at 1309.
142. *Wolfish*, 441 U.S. at 559.
143. 651 F. Supp. 726 (S.D. Ga. 1986).

periodic drug-testing of civilian DOD employees positioned in "critical" jobs.[144] Choosing not to follow the *Shoemaker* lead, the District Court for the Southern District of Georgia held the reasonable suspicion standard governed urinalysis testing:

> [I]t generally has been accepted that an employee does have an expectation of privacy upon taking a position with the government that is diminished in comparison with that reasonably held by members of the public at large. Thus, where a governmental employee's position is such that the employee's drug use could endanger the public safety or welfare, it has been held that it is not necessary to adhere to the probable cause standard, and the employee may be subject to mandatory testing upon a showing or reasonable suspicion that he has used drugs.[145]

Where an individual accepts government employment affecting public safety, his justifiable expectation of privacy is diminished and a reasonable suspicion rather than probable cause will suffice. The only way the Court was able to reach the "reasonable suspicion" standard was by immediately balancing the competing interests. Had it applied the traditional standard, since the intrusion was a full-scale search, probable cause would have been required. However, if the Court meant to imply by accepting government employment the intrusion itself is substantially less than a full-scale search, then the requisite balancing test would apply whether the traditional model was used or not. But even then, some type of individualized suspicion is required.

IV. MANDATORY RANDOM DRUG-TESTING BY THE UNITED STATES DEPARTMENT OF TRANSPORTATION

On December 9, 1986, less than three months after president Reagan issued his Executive Order,[146] the Department of Transportation ("DOT") issued an Advanced Notice of Proposed Rulemaking ("ANPRM") seeking public comment as to what type of considerations should be addressed in comprising a Drug Abuse Program.[147] As envisioned by DOT, and in particular by the Federal Aviation Administration ("FAA"), a basic program would include the testing of all pilots and flight personnel, including flight attendants, flight engineers, navigators, dispatchers, mechanics, repairmen and ground instructors who are employed by any Part 121 or Part 135 certificate holders.[148]

In March of 1988, the FAA published a proposed rule requiring commercial airlines to test employees in safety or security-related jobs for

144. *Id.* at 728.
145. *Id.* at 733.
146. *See supra* note 74 and accompanying text.
147. *Control of Drug and Alcohol Use for Personnel Engaged in Commercial and General Aviation Activities*, ANPRM No. 86-20, 51 Fed. Reg. 44432 (Dec. 9, 1986).
148. *Id.* at 44434.

drug use.[149] The Final rule was announced in November of 1988 and will include random testing of pilots, flight engineers, flight navigators, aircraft dispatchers, mechanics and repair personnel, flight attendants, non-governmental controllers, ground security coordinators, and aviation security screeners.[150] Employers must conduct pre-employment, periodic, post-accident, reasonable cause and random testing for amphetamines, cocaine, marijuana, opiates and PCP. Prior to the enactment of the new rule, pilots, flight attendants, flight engineers and flight navigators could be tested only when there was a reasonable basis to suspect that they were under the influence of drugs or alcohol.[151] At the present time, flight service specialists and other designated employees in critical safety positions are tested during their annual physical examinations.[152] If the test proves positive, that employee will be offered the opportunity for drug rehabilitation and will also be reassigned to a non-safety-related job. Additionally, the employee who tests positive is subject to random testing for one year.[153]

The DOT instituted a random drug-testing program which is limited to civilian employees within the agency working in positions affecting safety and security.[154] The group includes aviation inspectors, flight test pilots, aviation security specialists, railroad safety inspectors, Coast Guard drug enforcement officers, fire fighters, air traffic controllers and DOT employees with top secret security clearance.[155]

The Department wasted no time in implementing its program. On August 6, 1987, approximately 30,000 DOT employees were notified that they were subject to the possible random selection of the test procedure.[156] Ninety-four percent of those notified were involved in some aspect of the aviation industry.[157] The program itself is not a part of any promulgated regulations and in fact was not subject to any formal rule-making proceedings because the program relates to matters concerning agency management and personnel.[158]

Those selected to participate who choose not to comply are subject to immediate discharge.[159] Similarly, those who test positive and are ac-

149. 53 Fed. Reg. 8368 (Mar. 14, 1988).
150. 53 Fed. Reg. 47023 (Nov. 21, 1988).
151. 14 C.F.R. § 91.11 (1984).
152. AVIATION DAILY, March 19, 1987 at 411.
153. AVIATION DAILY, April 1, 1987 at 2.
154. DRUG-FREE DEPARTMENTAL WORKPLACE, U.S. Dep't of Transportation, June 29, 1987.
155. AVIATION DAILY, August 12, 1987 at 235.
156. AVIATION DAILY, June 30, 1987 at 506.
157. American Federation of Government Employees v. Dole, 670 F. Supp. 445, 446 (D.D.C. 1987) (hereinafter "AFGE").
158. *Id.* at 447, n.7; *see* 5 U.S.C. § 553(a)(2) (1982).
159. AVIATION DAILY, August 12, 1987 at 235.

tively impaired at the time of testing may also be discharged.[160] Those who test positive but are not actively impaired may be reassigned to a non-safety related position pending completion of a rehabilitation program.[161] However, prior to any official action, an employee who tests positive is provided an opportunity to explain the test results.[162] If a satisfactory explanation is forthcoming, no official action is taken.[163] In any case, evidence of drug use which is obtained through the testing procedure is not required to be reported to the Attorney General for investigation or prosecution.[164]

The program was met with adamant resistance. Only eight days after the DOT program was implemented, the American Federation of Government Employees ("AFGE") brought suit against DOT Secretary Dole challenging the program in the United States District Court for the District of Columbia.[165] The DOT moved for summary judgment and AFGE moved for a preliminary injunction. After hearing oral argument, the court ordered DOT's motion granted.[166] In the brief opinion written by Judge Gesell, the program was adjudged reasonable on its face[167] and justified at its inception. However, the Court expressly left open the opportunity for a more specific challenge at a later date directed at any particular job category or at the ineffective nature of the testing program.[168]

The opinion ignores completely the traditional analysis mandated by the Fourth Amendment and proceeds to immediately "balance factors bearing on reasonableness."[169] Thus, the District Court joined those cases which forego the traditional analysis in favor of the *T.L.O.* approach. Had the traditional approach been used, the outcome would have differed significantly.

A. *Analysis of* Dole

Under the new "balancing of interests" test enunciated in *T.L.O.* and *O'Connor*, "[to] hold that the Fourth Amendment applies to searches conducted by [public employers] is only to begin the inquiry into the standards governing such searches."[170] To determine the standard of

160. *Id.*
161. *Id.*
162. *AFGE*, 670 F. Supp. at 447.
163. *Id.*
164. *See supra* note 74 at 32892.
165. *AFGE*, 670 F. Supp. 445.
166. *Id.* at 449.
167. *Id.* The Court seemingly admonished AFGE for the "premature nature of the attack," citing the "sparse record" as a factor in its decision. *Id.*
168. *Id.*
169. *Id.* at 447.
170. *O'Connor*, — U.S. at —, 107 S. Ct. at 1499 (quoting *T.L.O.*, 469 U.S. at 337).

reasonableness applicable to a particular search, the Framers' intent is cast aside and the nature and quality of the intrusion into one's privacy is balanced against the importance of the governmental interest which the search seeks to fulfill.[171]

Such an approach does not comport with the long-standing tradition and recognition that the Fourth Amendment mandates the application of the probable cause-warrant analysis. Only where the intrusion is significantly less than a full-scale search and the special needs beyond the normal need for law enforcement are present is a "balancing of interests" test utilized.[172] In the words of Justice Brennan,

> For me, the finding that the Fourth Amendment applies, coupled with the observation that what is at issue is a full-scale search, is the end of the inquiry.[173]

1. Traditional Approach: Probable Cause Required

In *AFGE*, the District Court's failure to provide the traditional protections required by the Fourth Amendment proved fatal to AFGE's claim. Had the Court applied the traditional analysis, the court would have been required to apply the probable cause-warrant standard first as long as the intrusion constituted a full-scale search.

While there are those who would suggest that a urinalysis test is minimally intrusive and less than a full-scale search,[174] the better reasoned approach is that such a test constitutes a substantial invasion into one's privacy.[175] There are two privacy interests which are subject to intrusion by urinalysis testing. First, the individual has a privacy interest in the act of urination. As found by one court:

> 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 by social custom.[176]

The second privacy interest is the interest one possesses in the information contained in his bodily fluids.[177] The urine sample is subjected to close chemical analysis by the employer and numerous private physiological details other than mere drug use may be detected. Even the Federal Rules of Civil Procedure recognize the high level of privacy in one's

171. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

172. *Id.*

173. *Id.* at 362 (Brennan, J., concurring in part and dissenting in part).

174. *McDonell*, 809 F.2d at 1308; *NTEU*, 816 F.2d at 177 (holding that chemical analysis of one's urine is not as intrusive as an invasion into one's home.)

175. *Capua*, 643 F. Supp. 1507.

176. *NTEU*, 816 F.2d at 175.

177. *Id.*

medical information.[178]

DOT's program sufficiently minimizes the intrusion into the former privacy interest. The program allows the employee to provide the urine sample without direct observation. But such a provision does nothing to limit the intrusion into the privacy interest regarding the "information" contained within the sample. The sample is still subjected to close scrutiny.

Even if the employer (DOT) is notified only when the results are positive, the degree of intrusion has not been limited in the traditional sense. An example may aid the analysis. Suppose a police officer approaches a citizen and without probable cause or even reasonable suspicion, reaches inside the citizen's shirt or pants pockets and finds a piece of paper on which is written numerous private physiological facts concerning the citizen. The police officer reads the note and then proceeds on his way, never telling anyone what was contained in the note. Would anyone argue that such an intrusion fell short of a full-scale search? Surely not.[179]

This is the precise situation faced in analyzing random drug-testing cases. The results of the search are irrelevant. It is the testing which constitutes a full-scale search.

How the privacy interest is defined weighs heavily in the determination of whether urinalysis testing constitutes a full-scale search. Where the privacy interest is defined as the interest in the information contained in one's urine, a urinalysis test constitutes a full-scale search. Under the traditional analysis, this ends the inquiry and probable cause is required.[180]

Some courts, such as the one in *American Federation of Government Employees v. Weinberger*,[181] accept the argument that an employee, by accepting government employment, has a reduced expectation of privacy in the information contained in his bodily fluid. While such an argument may have merit where the court conducts its own "balancing test," in that government employment may weigh in the balance of what constitutes a "reasonable" search, it has no application in the traditional analysis. Under the traditional standard, once the court finds that the Fourth Amendment applies and the search at issue is a full-scale one, this ends the inquiry. If a government employee had less protection from the Fourth Amendment than an ordinary citizen simply because he accepted govern-

178. Fed. R. Civ. P. 35; *See also*, Fraternal Order of Police, Lodge 5, 812 F.2d at 113.

179. In fact, in Railway Labor Executives Assoc. v. Burnley, 839 F.2d 575 (9th Cir. 1988) the court equated the intrusion into one's privacy by means of urinalysis with that of a body cavity search.

180. *See T.L.O.*, 469 U.S. 325.

181. 651 F. Supp. 726, 733.

ment employment, the situation would be analogous to conditioning a government benefit on a waiver of one's constitutional rights. Such an approach has been expressly rejected.[182]

2. Balancing Approach: Probable Cause Not Required

Contrary to the above conclusion that probable cause is required, many courts have allowed testing on a "reasonable suspicion" standard.[183] However, this determination can be made only when the traditional standard of reasonableness is bypassed and the court immediately engages in a balancing of interests. This is the approach which the District Court in *AFGE* chose to follow. Judge Gesell particularly found:

> However, the Amendment only prohibits 'unreasonable' searches, and accordingly the focus of the drug testing case, like other Fourth Amendment testing cases, is factual, requiring the Court to balance factors bearing on reasonableness.[184]

The Court, looking to guidance from *National Federation of Federal Employees v. Weinberger*,[185] balanced the employee's reasonable expectation of privacy against the government's interest in the efficient operation of the workplace.[186] In balancing the interests, the Court came to the conclusion that individualized suspicion was not required, thus supplanting the Framers' determination of where the proper balance should stand. Many courts which also use the balancing approach have come to a different conclusion and found that testing could be conducted on the basis of reasonable suspicion.[187] In fact, while *AFGE* cited and relied on the opinion of the United States Court of Appeals for the District of Columbia in *NFFE v. Weinberger*, the District Court in *Weinberger*, on remand, refused to follow *AFGE*.[188] The District Court issued a preliminary injunction against the random testing of civilian employees by the Department of the Army.[189] Reasonable suspicion was required.[190]

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182. Connick v. Myers, 461 U.S. 138, 142 (1983); AFGE v. Weinberger, 651 F. Supp. at 736 (S.D. Ga. 1986); *But compare*, W. LaFane, *Search and Seizure: A Treatise on the Fourth Amendment* § 10.2(c) (2d ed. 1987); *see also O'Connor*, — U.S. —, 107 S. Ct. at 1498 (plurality opinion) ("The operational realities of the work place, however, may make *some* employees' expectation of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official").

183. AFGE v. Weinberger, 651 F. Supp. 726, 733 (S.D. Ga. 1986); *McDonell*, 612 F. Supp. 1122, *modified*, 809 F.2d 1302; *Capua*, 643 F. Supp. 1507.

184. *AFGE*, 670 F. Supp. at 447.

185. 818 F.2d 935 (D.C. Cir. 1987).

186. *AFGE*, 670 F. Supp. at 447.

187. *See supra* note 183 and accompanying text.

188. National Fed. of Fed. Employees v. Carlucci, 680 F. Supp. 416 (D.C. Cir. 1988) (This case involves the consolidation of three cases, all of which concern random drug-testing. NFFE v. Weinberger was renamed NFFE v. Carlucci on remand).

189. *Id.* at 436.

Due to the substantial importance of the case, Judge Hogan made a special appeal:

> The Court invites the defendants to appeal this decision pursuant to 28 U.S.C. § 1292(a)(1) (1982); additionally, the Court respectfully suggests that the Court of Appeals consolidate the appeal in this action with that in [*AFGE*] and consider scheduling the cases for en banc hearing as presenting a question of exceptional importance.[191]

The *AFGE* Court, without explanation, determined that, upon balance, drug testing by DOT could be conducted in the complete absence of individual suspicion.[192] This occurred in spite of the fact the Court found there must be "reasonable grounds to suspect work related drug use will be uncovered."[193] Under the Court's analysis, "reasonable grounds to suspect" is not directed at a particular individual, but rather, at the "group" to be tested. In fact, the FAA proposed rules specifically state that the FAA has no evidence to suggest that the aviation community differs significantly from the overall population in terms of drug abuse.[194] *Dole*, like some other court's addressing the issue, used the "balancing test" to abdicate the requirement of individualized suspicion. Traditionally, this has only been done in the context of border searches[195] and in limited administrative searches.[196] But an analysis of these two situations evidences that the rationales supporting the abrogation of the individualized suspicion requirement in those cases do not support its extension to mandatory random drug testing.

a. BORDER SEARCHES

Some drug-testing cases rely upon *United States v. Martinez-Fuerte*[197] for the proposition that individualized suspicion is not required.[198] However, that case is not applicable outside the context of border patrol searches and should be limited to that extent. The case involved the practice of stopping vehicles at fixed check points near the border in the absence of individualized suspicion. One year after that decision was handed down, the Supreme Court, in *United States v. Ramsey*[199] ana-

190. *Id.*
191. *Id.* at 418.
192. *AFGE*, 670 F. Supp. at 448-449.
193. *Id.* at 448.
194. 53 Fed. Reg. 8,369 (1988) (to be codified at 14 C.F.R. § 61, 63, 65, 121, and 135).
195. United States v. Ramsey, 431 U.S. 606 (1977); *see also* United States v. Martinez-Fuerte, 428 U.S. 543 (1976).
196. *See supra* note 47. *But compare*, Bell v. Wolfish, 441 U.S. 520 (2nd Cir. 1979), (A search of prison inmates may be conducted without individualized suspicion).
197. 428 U.S. 543 (1976).
198. *NTEU*, 816 F.2d at 176-177. *See also T.L.O.*, 469 U.S. 325 for a general discussion of the lessening of the traditional individualized suspicion standard.
199. 431 U.S. 606.

lyzed the nature of border searches. The Court announced:

> That searches made at the border pursuant to the long standing right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, are reasonable simply by virtue of the fact that they occur at the border, should, by now, require no extended demonstration.[200]

The conclusion that the probable cause-warrant model is inapplicable to border searches is premised on the fact that the same Congress which proposed the Fourth Amendment also passed the first customs statute providing for searches in the absence of individualized suspicion:

> As this act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that members of that body did not regard searches and seizures of this kind as "unreasonable," and they are not embraced within the prohibition of the amendment.[201]

b. APPLICABILITY OF THE WARRANTLESS ADMINISTRATIVE SEARCH

The *Shoemaker* Court took an unprecedented and unwarranted jump in reasoning when it extended the warrantless administrative search exception to a situation where it had never before been applied. That exception allows an inspection to be conducted in the absence of a warrant or individualized suspicion only when (1) it is conducted pursuant to a legislative scheme which sets the standards, frequency, scope and procedures of the inspection and leaves nothing to the discretion of the enforcing officer, (2) it is a highly regulated industry, and (3) it is the inspection of commercial property.[202] Until now the exception was limited to the liquor, gun, coal mining and vehicle dismantling industries.[203]

The DOT and FAA programs comply with only the second of these requirements. The DOT & FAA certainly deal with highly regulated industries but that fact alone is not sufficient to support random drug-testing. With regard to the first requirement, neither the DOT or FAA drug-testing program is part of any legislative scheme. There are no promulgated regulations governing the "inspection" process. There are only "rules" which govern internal policy. As a matter of fact, calls for random testing have been met with tremendous resistance in Congress.[204]

Additionally, there is a vast difference between the inspection of commercial property and the chemical analysis of an employee's urine. The *Camara* case, which is the authority on administrative searches, specifically drew a distinction between a search which is personal in nature and

200. *Id.* at 616.

201. *Id.* at 617; *see also* M. Herman, *Recent Developments in the Law of Border Searches*, 9 Search and Seizure L. Rep. No. 11 (1982).

202. *See supra* note 47 and accompanying text.

203. *See supra* notes 43-46 and accompanying text.

204. AVIATION DAILY, December 7, 1987, at 345.

one which is of commercial property.[205]

The rationales of the warrantless administrative search exception unequivocally reject its extension to the issue of mandatory random drug-testing. Now that the Supreme Court has accepted certiorari in *NTEU v. Van Raab*, a definitive ruling dealing with random drug testing of employees absent individualized suspicion where conducted in accordance with standards which limit the discretion of the enforcing officer may be forthcoming.

Since *AFGE* failed to follow the traditional analysis of the Fourth Amendment, the Court concluded that drug-testing could be conducted without probable cause and without individualized suspicion. By engaging in a *T.L.O.* balancing approach, *AFGE*, like other courts addressing the issue, failed to follow the explicit language of the Fourth Amendment. When each court decides for itself where the balance lies, the predictability which the traditional standard lends to the analysis is destroyed. Drug-testing decisions range from requiring individualized suspicion of the probable cause nature to allowing an agency to randomly select its targets as long as target selection is in accord with *Dewey* standards. Until the Supreme Court rules on the issue of random drug-testing, courts will continue to render decisions which differ on the issue of where the balance should lie. Such decisions will have to be made on a case-by-case determination. The false analogy to the warrantless administrative search exceptions should be recognized and urine testing should at the very least be conducted only in the presence of individualized suspicion.

V. SUMMARY

The goal which the "war on drugs" seeks to attain is a laudable one indeed. But let us not fight the battle by means which decrease the protections traditionally afforded by the Fourth Amendment. The traditional standard has served the Constitution well thus far and it can continue to do so.

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205. *Camara*, 387 U.S. at 537. See also Railway Labor Executives' Assoc. v. Burnly, 839 F.2d 575, (9th Cir. 1988), *cert. granted*, __ U.S. __, 108 S. Ct. 2033 (1988).