The FAA Anti-Drug Program: A Constitutional Consideration

Mark Early
THE FAA ANTI-DRUG PROGRAM: A CONSTITUTIONAL CONSIDERATION

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I. INTRODUCTION

ON NOVEMBER 11, 1988, the Department of Transportation announced a drug testing program which will subject four million private sector workers to mandatory random urinalysis. The program is the first attempt by a federal agency to require random testing of non-government employees. It represents the second level of the government's response to President Reagan's Drug Free America crusade. The Department of Transportation program includes the Federal Aviation Administration's (FAA) "Anti-Drug Program for Personnel Engaged in Specified Aviation Activities." The FAA program will require mandatory random urinalysis for a majority of commercial aviation employees.

This comment will address the probable constitutional challenges to the FAA regulations. The first section

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1 See N.Y. Times, Nov. 15, 1988, § 1, at 1, col. 4.
2 Id. at 16, col. 5. The program will require testing of an estimated four million private sector workers at an expected cost of two billion dollars over the next 10 years. Id. at 1, col. 4, 16, col. 5.
5 FR, Anti-Drug Program, supra note 4, at 47,024; see infra notes 63-68 and accompanying text.
presents a brief history of drug testing in aviation. The second section outlines the FAA regulations and the constitutional issues addressed in the comments accompanying the announcement of the FAA program. Although drug testing has become an increasingly common practice, the Supreme Court has only recently ruled on the constitutional limits on drug testing by the government. Last term the Court granted certiorari and heard argument on two cases addressing the issue in order to resolve a split between the circuits. Its decisions establishing constitutional standards for permissible mandatory drug testing were issued in March, 1989. Unfortunately, neither of the cases before the Supreme Court addressed random drug testing or testing in the aviation industry. The third section of the comment analyzes the “special needs” test used by the Court in reviewing those drug testing programs and compares the challenged programs to the FAA tests. This analysis will concentrate on the standard adopted by the Supreme Court and how it might be applied to the FAA tests.

Mandatory drug tests for civilian aviation personnel mandated by the Department of Defense and the Department of Transportation have been challenged in the courts. Several cases addressing this issue were recently

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* See infra notes 20-52 and accompanying text.
* See infra notes 53-111 and accompanying text.
* See Burnley I, 839 F.2d at 575; Von Raab I, 816 F.2d at 170.
* See infra notes 110-225 and accompanying text.
* See infra note 166. The Ninth and Fifth Circuits relied on different tests to analyze the reasonableness of the drug testing programs. The Supreme Court affirmed the analysis relied on by the Fifth Circuit.
consolidated and heard by the D.C. Circuit. Part four examines this decision for issues specific to aviation which may not have been raised in the two cases before the Supreme Court. In September, 1989 the Ninth Circuit heard oral arguments in a suit brought by several labor groups representing aviation industry personnel. That case, Bluestein v. Skinner, will likely be the vehicle with which the constitutionality of the FAA testing program is ultimately challenged. The final section of this comment will briefly discuss the issues raised by the plaintiffs in Bluestein, and conclude with an analysis of various factors which must be incorporated in a "special needs" analysis of the FAA drug testing program.

I. HISTORY AND CURRENT STATUS OF DRUG TESTING IN AVIATION

The safety concerns raised by drug and alcohol abuse impact at least three areas of commercial airline transportation. Pilot impairment poses the most obvious threat. Any reduction in the pilot's capacity to safely operate a commercial airliner endangers the lives and safety of its crew and passengers. Maintenance and repair errors by mechanics and other pre- and post-flight support person-
nel resulting from drug or alcohol impairment also directly threaten air safety. In addition, the actions of government employees, such as air traffic controllers, directly affect the safety of air travel. Although addressed last, the potential for catastrophe resulting from errors by controllers is arguably the greatest.

Prior to the promulgation of the drug program, the dangers of drug and alcohol abuse by aviation personnel were addressed solely by general statutory prohibition. Certificate holders were not allowed to participate as crewmembers while under the influence of alcohol or drugs which would adversely affect their capabilities. Any involvement in drug trafficking was grounds for suspension, revocation or denial of a certificate. In addition, refusal to submit to a blood alcohol percentage test when requested by a law enforcement officer was also grounds for revocation or suspension of a certificate.

Concerns about the danger of drug and alcohol abuse in the aviation industry will undoubtedly lead to drug testing of employees in some form. Drug testing in the commercial aviation industry will occur in one of two ways. Either the mandated FAA testing will be affirmed or drug testing in some form will be initiated by employers. If FAA-mandated drug testing is found to be a government action, it must conform to constitutional guide-

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22 Id.
24 Id.
25 Alcohol or Drugs, 14 C.F.R. § 91.11 (1989); Carriage of Narcotic Drugs,Marihuana, and Depressant or Stimulant Drugs or Substances, id. § 91.12. For a discussion of the prior statutory scheme, see Advance Notice of Proposed Rulemaking, Control of Drug and Alcohol Use of Personnel Engaged in Commercial and General Aviation Activities, 51 Fed. Reg. 44,432 (1986).
27 Id. § 91.12.
28 See id. § 91.11.
29 See generally FR, Anti-Drug Program, supra note 4, at 47,025 (Discussion of Comments-General Overview). The entire spectrum of commentors to the NPRM acknowledged the need to keep the commercial aviation workplace drug free. Id.
30 See id. The discussion includes comments from several employers on their current anti-drug programs. Id.
Employer initiated testing must be analyzed within the scope of appropriate collective bargaining agreements. Several recent cases have considered whether an employer may institute a drug testing procedure under a collective bargaining agreement that generally prohibits alcohol and drug abuse. These cases involve both the railroad and aviation industries. The critical issue in all of these decisions has been whether the dispute was a "major" or "minor" dispute under the Railroad Labor Act. The primary distinction between these two terms is that while minor disputes are subject to binding arbitration, during a major dispute employees may turn to courts to enforce the status quo during the negotiating period.

The most recent decisions on drug testing by common carriers suggest that the inclusion of some drug testing programs is a minor dispute. In Consolidated Rail Corp. v. Railway Labor Executives Association the Supreme Court held that a dispute regarding the inclusion of periodic drug tests in physical examinations was a minor dispute. More recently, the Fifth Circuit reheard and vacated a decision which enjoined Southwest Airlines from initiating a drug testing program. As noted by the dissenting opinion in International Brotherhood of Teamsters v. Southwest Airlines Co., several aspects of the Southwest plan are

31 See infra notes 104-106 and accompanying text.
32 See infra notes 33-39 and accompanying text.
34 See Consolidated Rail, 109 S. Ct. at 2479-82. The Court explained the statutory basis for the distinction, 45 U.S.C. §§ 152 Seventh, 156 (1982), and the historical development of their analysis. Consolidated Rail, 109 S. Ct. at 2479-82.
35 Id. at 2480-81.
37 Id. at 2489. The court stated that a dispute is minor when the proposed change is "arguably justified" by the express terms of the contract or by implication in light of past practice. Id. at 2484-85.
38 Southwest Airlines, 875 F.2d at 1129.
39 Id.
incorporated in the FAA testing program, and any arbitration on those elements will be pre-empted if the FAA program is upheld.40

Government directed drug testing has been addressed by several circuits and the varying results have addressed numerous constitutional issues.41 The majority of these cases consider possible violations of the protections granted by the fourth amendment (search and seizure), fourteenth amendment (due process), fifth amendment (self-incrimination), and fundamental and penumbral rights of privacy.42 Although no current circuit level case directly addresses the airline industry, courts have considered testing for jockeys,43 railroad workers,44 city bus drivers,45 prison employees,46 and customs inspectors.47 The Supreme Court decided two of these cases last term, National Treasury Employees Union v. Von Raab,48 and Skinner v. Railway Labor Executives' Association.49

Government regulation is the most likely vehicle for mandatory drug testing in the commercial aviation industry. The FAA recently concluded formal rulemaking procedures which create a mandatory drug testing program for the commercial aviation industry.50 These rules are similar in format and purpose to the Federal Railroad Ad-

40 Id. at 1137-38 n.3, 1153 n.31.
44 Burnley I, 839 F.2d at 575.
45 Suscy, 538 F.2d at 1264.
46 Hunter, 809 F.2d at 1302 (allowing random urinalysis tests for Department of Corrections employees who have regular contact with inmates in medium and maximum security prisons).
47 Von Raab I, 816 F.2d at 170.
48 109 S. Ct. at 1384.
49 109 S. Ct. at 1402.
50 FR, Anti-Drug Program, supra note 4, at 47,024.
ministration (FRA) regulations which were challenged in *Skinner.* An analysis of the issues raised in that decision may provide an indication of the future challenges to the FAA regulations.

II. **Anti-Drug Program Personnel Engaged in Specified Aviation Activities**

The FAA drug program began with an Advanced Notice of Proposed Rulemaking (ANPRM) on December 9, 1986. This was followed by a Notice of Proposed Rulemaking (NPRM) on March 14, 1988. The NPRM discussed the main issues addressed by the final rule. The NPRM also emphasized the growing national drug problem, proposed substances and personnel to be tested, and outlined the mechanics and goals of the program. Open meetings were held in several locations to give the public an opportunity to comment.

The FAA program was announced on November 1, 1988. It incorporated several changes which resulted from industry comments and judicial decisions that occurred during the comment period. This section briefly outlines the program, concentrating on the who, how,
why and when of testing. It also addresses the significant differences between the NPRM and the final rule and includes a comment on the FAA’s analysis of the possible constitutional challenges to the final rule.

A. Who, How, Why and When

The FAA program requires domestic, flag and supplemental air carriers, air taxi and commuter operators and commercial operators of large aircraft to implement an anti-drug program which meets with FAA approval. Private air-traffic controllers are also required to implement drug testing programs. Testing is required of all employees in sensitive safety or security related positions.

The positions to be tested include flight personnel, instructors, dispatchers, maintenance and security personnel and air traffic controllers. These employees are to be tested in accordance with Department of Transportation guidelines, and the test results are to be analyzed only by laboratories approved by the Department of Health and Human Services.

Testing occurs in six separate instances. Employers may not hire an individual to fill a covered position unless the applicant passes a drug test. Current employees

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60 See infra notes 63-82 and accompanying text.
61 See infra notes 83-98 and accompanying text.
62 See infra notes 98-111 and accompanying text.
63 FR, Anti-Drug Program, supra note 4, at 47,055 (Conclusion). The final rule amends 14 C.F.R. parts 61, 65, 69, 121 and 135. Id. (List of Subjects).
64 14 C.F.R. pt. 121 app. I (II) (1989) (Definitions). In addition, employees of contractors who perform covered services for FAA certificate holders are to be tested as employees of the certificate holder. Id.
65 Id.
66 Id. at (III) (Employees Who Must be Tested).
67 Id. at (I) (DOT Procedures) (testing is to be conducted in accordance with the “Procedures for Transportation Workplace Drug Testing Programs,” 49 C.F.R. pt. 40 (1989)).
68 Id. (certified laboratories must conform to the Department of Health and Human Services “Mandatory Guidelines for Federal Workplace Drug Testing Programs,” 53 Fed. Reg. 11,970 (1988)).
69 Id. at (V)(A) (Preemployment Testing). Employers are required to inform applicants that they will be tested for the five prohibited substances and their metabolites. Id.
must submit to an annual drug test, at least during the first year of the program. After the initial year of the program this component is replaced by random testing. All subject employees must be included in a random number pool, from which a number equal to fifty percent of the total population must be tested annually. The level of random testing was reduced from an initial proposed rate of one hundred twenty-five percent to fifty percent in the final rule.

In addition to the three general classes of testing, there are three types of testing specific to either the situation or the employee. First, in the event of an accident, all employees whose performance could have contributed to the accident are to be tested within thirty-two hours of the accident. Second, on the recommendation, or absent the recommendation, at a minimum with the support of two supervisors, employers may require employees to submit to urine tests based on a reasonable suspicion of drug use. Finally, for those employees who have failed drug tests and later returned to work, employers are required

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70 Id. at (V)(B) (Periodic Testing). All covered employees must be tested during their first medical examination in the initial year of the program. These annual tests may be discontinued after the employer has conducted random tests for one year. Id.

71 Id. at (V)(C) (Random Testing). Random testing is to be conducted at regular intervals, for example, once a month. At the final random test in the initial year of the program, the number of employees tested must be equal to 1/12th of fifty percent of the total population of covered employees. In the first year of the program, the total number of employees tested randomly must equal at least twenty-five percent of the covered population. In subsequent years the total number of employees tested must equal at least fifty percent of the population. Id.

72 See FR, Anti-Drug Program, supra note 4, at 47,034-35 (Comments on Random Testing and FAA Response).

73 14 C.F.R. pt. 121 app. I (II) (1989) (Definitions). An accident is defined as "an occurrence . . . in which any person suffers death or serious injury, or in which the aircraft receives substantial damage." Id. (this is the National Transportation Safety Board definition of "accident," codified at 49 C.F.R. § 830.2 (1988))

74 Id. at (V)(D) (Post-accident Testing). An employer may elect not to require a post-accident test only if it is determined, "using the best information available at the time of the accident, that the employee's performance could not have contributed to the accident." Id.

75 Id. at (V)(E) (Testing Based on Reasonable Cause). The employer's decision to test "must be based on a reasonable and articulable belief that the employee is
to implement a program of unannounced testing for a period of up to sixty months after the employee’s return.\textsuperscript{76}

The program also establishes guidelines for Employee Assistance Programs.\textsuperscript{77} These guidelines require the employer to provide drug education and drug training programs.\textsuperscript{78} The drug training section is intended to address the effects and consequences of drug use, and to assist supervisory personnel in making decisions concerning for-cause testing.\textsuperscript{79}

Test results are reviewed by an employer designated Medical Review Officer (MRO).\textsuperscript{80} The MRO must be a licensed physician who is knowledgeable about drug use and related problems.\textsuperscript{81} The MRO’s duties include: receiving confirmed positive test results; notifying employees of positive results; verifying laboratory reports and reviewing possible legitimate medical reasons for positive results; and determining what action should be taken after an employee tests positive.\textsuperscript{82}

B. Evolution of the Final Rule

Several elements of the proposed Appendix I to Part 121 were changed between the NPRM and the final rule. The majority of these changes were technical corrections of little impact.\textsuperscript{83} However, three of the changes address

\textsuperscript{76} Id. at (V)(F) (Testing After Return to Duty).

\textsuperscript{77} Id. at (VIII) (Employee Assistance Program ("EAP"); see infra notes 94-98 and accompanying text.

\textsuperscript{78} 14 C.F.R. pt. 121 app. I (VIII) (1989) (EAP). The drug education program must display and distribute basic information materials, a community drug assistance hot-line number, and materials covering the employer's drug use policy. Id.

\textsuperscript{79} Id. The supervisory personnel given the responsibility for making decisions to test for cause must receive at least sixty minutes of training. Id.

\textsuperscript{80} See id. at (VII) (Review of Drug Testing Results). The MRO may be either an employee or a physician retained on a contract basis. Id.

\textsuperscript{81} Id. at (VII) (A) (MRO qualifications).

\textsuperscript{82} Id. at (VII) (B) (MRO Duties); see also FR, Anti-Drug Program, supra note 4, at 47,043-45 (Comments, Medical Review Officer and FAA Response) (discussing the changes made in the final rule regarding MROs).

\textsuperscript{83} See FR, Anti-Drug Program, supra note 4, at 47,050-51 (Changes from the Proposed Rule).
significant differences between the proposed rule and the final rule.84

The definition of "failing a drug test" was expanded to include the presence of drug metabolites as a test failure.85 This change reflects the broader goals of the final testing program,86 and appears to be a reaction to judicial decisions which have turned on the ability of current testing technology to distinguish between on and off duty drug use.87 The final rule also includes the presence of drug metabolites in the definition of "positive evidence."88

The second major change in the final rule is the reduction in the maximum annual testing rate.89 The proposed rule suggested an annual rate equal to one hundred twenty-five percent of an employer's covered employee population.90 The final rule requires an annualized rate equal to fifty percent of the population.91 Commentators felt the increased cost of the larger sample size was not justified by an equivalent increase in deterrence.92 In addition to reducing the total annual rate, the FAA created a phased start up period and made allowances for employ-
ers with fewer than fifty covered employees.93

The third significant revision in the final rule concerns employee rehabilitation.94 The proposed rule suggested three options covering a range of employees for whom employers would be required to offer rehabilitation.95 The final rule makes no provision for employee rehabilitation.96 The decision not to require rehabilitation was based on two main concerns raised by employers. The FAA recognized that rehabilitation is not neatly defined and that requiring an employer to hold a position open for an indefinite period could be burdensome.97 The FAA was also concerned with removing an employer's discretion in firing employees for drug use.98

C. Constitutional Issues Recognized by the FAA

In the extensive commentary which accompanied the final rule, the FAA acknowledged the constitutional concerns regarding mandatory drug testing.99 The discussion focused exclusively on the issues raised by the fourth amendment.100 The agency noted that the FAA mandated tests must be found to be both a search and a governmental action to be covered by the fourth amend-

93 14 C.F.R. pt. 121 app. I(V)(C) (1989) (Random Testing). Employers with less than 50 employees are given additional time to submit their testing programs and are allowed to pool employees in joint testing plans. Id.
95 NPRM, Anti-Drug Program, supra note 54, at 8386 app. I (VIII)(A) (EAP Rehabilitation Program). The proposed rule suggested three rehabilitation program options. Option 1 provided rehabilitation for employees who voluntarily enrolled or employees whose drug use was detected by periodic, random, postaccident or for cause testing. Option 2 provided rehabilitation only for those employees who voluntarily enrolled or whose drug use was detected by random or periodic testing. Option 3 only provided rehabilitation for employees who volunteered. Id.; 14 C.F.R. pt. 121 app. I (VIII) (1989).
97 FR, Anti-Drug Program, supra note 4, at 47,038-41 (Comments to Employee Assistance Programs, Rehabilitation and FAA Response).
98 Id.
99 Id. at 47,027 (Discussion of Constitutional Issues).
100 Id.
ment.\textsuperscript{101} A brief outline of the agency's fourth amendment position is helpful in analyzing the recent Supreme Court decisions and comparing them to the FAA drug program.

The FAA began by citing Supreme Court decisions which held that reasonable searches may be constitutional, even in the absence of a warrant.\textsuperscript{102} The agency pointed out that reasonableness is established by balancing the invasion of the subject's privacy interest against the public interest protected by the search.\textsuperscript{103} In this instance the FAA argued that the overwhelming public interest in aviation safety outweighed the "minimal" intrusion into the employee's privacy.\textsuperscript{104}

This intrusion was even less significant in light of what the FAA termed the indisputably pervasive regulation of aviation employees, by both the government and their employers.\textsuperscript{105} The agency analogized the regulation of aviation employees to that of horse racing jockeys.\textsuperscript{106} In Shoemaker v. Handel, the Third Circuit held that extensive regulation reduced the jockeys' reasonable expectations

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\textsuperscript{101} Id. The Supreme Court held that tests conducted under the Federal Railroad Administration's Drug Program were both searches and government actions. Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1412-13 (1989); see also infra notes 159-163 and accompanying text.

\textsuperscript{102} FR, Anti-Drug Program, supra note 4, at 47,027-29 (Discussion of Constitutional Issues).

\textsuperscript{103} Id. (citing New Jersey v. T.L.O., 469 U.S. 325, 340 (1985) (holding the warrantless search of public school student's purse was reasonable based on a reasonable suspicion that it contained cigarettes in violation of school policy); Almeida-Sanchez v. United States, 413 U.S. 266, 277 (1973) (Powell, J., concurring) (in which the majority held roving searches of automobiles twenty miles north of the Mexican border unreasonable); Camara v. Municipal Court, 387 U.S. 523, 533 (1967)(prohibiting prosecution for refusal to allow a warrantless non-emergency housing code inspection)).

\textsuperscript{104} Id. (citing United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985) (the majority upheld the border detention of a woman who was smuggling 88 balloons of cocaine in her alimentary canal, based on a reasonable and articulable suspicion)).

\textsuperscript{105} Id. The agency did not cite specific existing regulation of aviation employees. See supra notes 25-28 and accompanying text.

\textsuperscript{106} FR, Anti-Drug Program, supra note 4, at 47,027 (Discussion of Constitutional Issues).
Balancing these reduced privacy expectations against the public interest in assuring the integrity of the horse racing industry, the Third Circuit held that mandatory testing of jockeys was reasonable.108

The agency also compared its program to other administrative searches which have been held constitutional.109 It argued that the Fifth Circuit test in Von Raab I was the appropriate balancing test110 and concluded that, under that standard, the final rule would withstand any constitutional challenges.111

III. THE SUPREME COURT DECISIONS

A. Skinner v. Railway Labor Executives' Association

The Ninth Circuit found the drug testing program required by the Federal Railroad Administration (FRA) to be an unreasonable search in Railway Labor Executives' Association v. Burnley.112 This judgment was reversed by the Supreme Court in Skinner v. Railway Labor Executives' Association.113 Although the Supreme Court’s analysis of the FRA regulation will obviously control any challenges to the FAA testing program, a brief review of the Burnley decision may be helpful in understanding the Supreme Court’s fourth amendment analysis. The Burnley opinion also considered other constitutional issues raised by drug testing which were not presented to the Supreme Court in Skinner.114

107 795 F.2d 1136 (3rd Cir.) (allowing the New Jersey Racing Commission to require jockeys to submit to random breath and urine tests), cert. denied, 479 U.S. 986 (1986).
108 Id. at 1142-43. The court discussed both the state’s licensing requirements for jockeys and regulations which authorized warrantless searches of stables as evidence of the high level of regulation in the industry. Id. at 1141-42.
109 FR, Anti-Drug Program, supra note 4, at 47,027 (Discussion of Constitutional Issues).
110 Id.
111 Id.
114 Burnley I, 839 F.2d at 591-92; see infra notes 139-152 and accompanying text
1. *The Ninth Circuit Decision*

Based on the government's involvement in promulgating the regulations, the Ninth Circuit found that the testing program was a government action even though the actual testing was performed by the railroads. The court also held that the testing required by the FRA regulations was a search within the meaning of the fourth amendment. The final element in the court's analysis was an inquiry into whether the testing program was reasonable.

The court's examination began by noting that the traditional test of the reasonableness of a search is whether it was authorized by the issuance of a warrant. The independent judicial review required to obtain a warrant insures that the government had probable cause and therefore that the search was reasonable. Although a warrant is the traditional guaranty of reasonableness, the court discussed a long list of established exceptions to the requirement. The exception which has been carved out for administrative searches in closely regulated industries was found to be the most applicable to the FRA testing program. However, the Ninth Circuit distinguished the

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115 *Burnley I*, 839 F.2d at 579-80.
116 *Id.* at 580-82. The FAA testing program, like the FRA program, is not actually conducted by the government. The Ninth Circuit cited the analysis of airport security searches in United States v. Davis, 482 F.2d 893, 896-904 (9th Cir. 1983) (holding that searches by airport personnel instigated to prevent hijackings were government actions when "the government participates in any significant way in a total course of conduct . . ." *Id.* at 897).
117 *Burnley I*, 839 F.2d at 582-589.
118 *Id.* at 582.
119 *Id.*
120 *Id.* at 583 n.11. The exceptions considered by the court included "(1) searches incident to lawful arrest, Weeks v. United States, 232 U.S. 383 (1914); (2) the 'automobile exception,' Carroll v. United States, 267 U.S. 132 (1925); (3) hot pursuit, Warden v. Hayden, 387 U.S. 294 (1967); (4) stop and frisk, Terry v. Ohio, 392 U.S. 1 (1968); (5) plain view, Co[ol]idge v. New Hampshire, 403 U.S. 443 (1971) . . . ." *Burnley I*, 839 F.2d at 583 n.11.
121 *Burnley I*, 839 F.2d at 583-84. The justification for the exception is articulated in New York v. Burger, 482 U.S. 691 (1987) (upholding a New York statute

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previously permitted administrative searches from the
FRA testing program based on the personal nature of the
search and the greater degree of intrusiveness involved in
urinalysis.122

After rejecting the proposed analogies to existing ex-
ceptions to the warrant requirement, the court analyzed
the testing program to determine if it satisfied the stan-
dard of reasonableness on its own.123 The Ninth Circuit
relied on a balancing test originally stated by the Supreme
Court in United States v. Place.124 The test required
"balanc[ing] the nature and quality of the intrusion on the
individual's Fourth Amendment interests against the im-
portance of the governmental interests alleged to justify
the intrusion."125 Noting the strong government interest
in public safety, the court held that a finding of probable
cause would not be required to justify the search.126 In-
stead, the Ninth Circuit relied on a test articulated in Terry
v. Ohio127 to determine whether the government interest
justified the intrusion.128 The Terry test required a finding
that the search was "justified at its inception" and "rea-
sonably related in scope to the circumstances which justi-
fied the interference in the first place."129

122 Id. at 584-85. The court noted that previous administrative search decisions
had addressed the owner's privacy expectations with regard to the business prem-
ises, not an employee's personal privacy expectations. Id. at 585.
123 Id. at 586-89. The fourth amendment only prohibits searches which are un-
reasonable. U.S. CONST. amend IV. See supra notes 112-122.
125 Terry v. Ohio, 392 U.S. 1 (1968) (upholding a patrolman's stop and frisk search based on
the officer's suspicions).
126 Burnley I, 839 F.2d at 587.
127 Burnley I, 839 F.2d at 587. This is also the balancing test adopted in the
second Supreme Court decision recognizing the "special needs" exception. See
employee's desk based on a suspicion of misconduct).
128 Id. The "justified at inception" prong of the test was the key factor in the
Ninth Circuit analysis. The court cited five federal cases in support of its position
In applying this test the Ninth Circuit discounted the government's assertion that a link existed between rail accidents and drug or alcohol abuse. Finding no inherent link between drugs and accidents, the court decided that, to be reasonable, the FRA tests would have to be based on individualized suspicion. Since the post-accident testing did not require individualized suspicion, the Ninth Circuit held that the regulations constituted an unreasonable search.

**Consent**

The FRA also argued that the language of the regulations created an implied consent on the part of railroad employees. A valid consent would remove the need for a warrant. In the same vein, the FRA argued that a search which has been consented to is reasonable by definition. The *Burnley I* court found that when a search has been held unreasonable, it may not be validated on the basis of implied consent. The determination was based that this standard required a finding of individualized suspicion: Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F. Supp. 1560, 1568 (C.D. Cal. 1987) (testing of city bus drivers and maintenance workers); Feliciano v. City of Cleveland, 661 F. Supp. 578, 589 (N.D. Ohio 1987) (testing of police academy cadets); American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (testing of civilian police officers); Lovvorn v. City of Chattanooga, 647 F. Supp. 875 (E.D. Tenn. 1986) (testing of firemen); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (testing of firemen and policemen).

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130 *Burnley I*, 839 F.2d at 587. "Accidents, incidents or rules violations, by themselves, do not create reasonable grounds for suspecting that tests will demonstrate alcohol or drug impairment in any one railroad employee, much less an entire crew." *Id.*

131 *Id.* at 587-88.

132 *Id.* at 588.

133 *Id.* at 589; see 49 C.F.R. § 219.11(a) (1988). "Any employee who performs covered service for a railroad . . . shall be deemed to have consented to testing . . . ." *Id.*


135 *Id.*

136 *Id.*
on the nature and timing of the consent.\textsuperscript{137} The court held that "advance consent to future unreasonable searches is not a reasonable condition of employment."\textsuperscript{138}

After finding the FRA drug tests in conflict with the protection provided by the fourth amendment, and dispensing with the FRA\textquotesingle s consent defense, the court addressed the remaining constitutional objections raised by the RLEA. Having already held the tests unconstitutional, this analysis is dicta. It may, however, be of some value in predicting the fate of the FAA regulations.

Privacy

The Railway Executives claimed that mandatory drug tests abridged those fundamental rights of privacy recognized in \textit{Roe v. Wade}.\textsuperscript{139} The court\textquotesingle s analysis outlined the areas to which these privacy rights have been extended. These include family planning,\textsuperscript{140} abortion,\textsuperscript{141} marriage,\textsuperscript{142} and certain family living arrangements.\textsuperscript{143} Although no right to personal autonomy in drug and alcohol use is presently recognized,\textsuperscript{144} the court held that a

\textsuperscript{137} Id. (citing National Fed'n of Fed. Employees v. Weinberger, 818 F.2d 935, 943 (D.C. Cir. 1987)).

\textsuperscript{138} Id. (quoting McDonell v. Hunter, 612 F. Supp. 1122, 1127 (S.D. Iowa 1985), aff'd as modified, 809 F.2d 1302 (8th Cir. 1987)). The court noted that consent was implied by the regulation and that the employees had only two options, consent to the tests or seek new employment. Id.

\textsuperscript{139} Id. at 591. The Supreme Court\textquotesingle s opinion in \textit{Roe} recognized a woman\textquotesingle s privacy rights in the decision to have an abortion. 410 U.S. 113 (1973). The \textit{Roe} decision relied in part on the recognition by Justice Douglas, in Griswold v. Connecticut, 381 U.S. 479 (1965), of penumbral privacy rights which emanated from the specific protections of the Bill of Rights.


\textsuperscript{141} Roe, 410 U.S. at 113.

\textsuperscript{142} Zablocki v. Redhail, 434 U.S. 374 (1978).

\textsuperscript{143} Moore v. City of East Cleveland, 431 U.S. 494 (1977) (plurality opinion).

\textsuperscript{144} Burnley I, 839 F.2d at 591 (9th Cir. 1988), rev'd sub nom. Skinner v. Railway Labor Executives\textquotesingle s Ass'n, 109 S. Ct. 1402 (1989). The Supreme Court decision in Bowers v. Hardwick, 478 U.S. 186 (1986), may confront an analogous issue. The Court emphasized the relationship between recognized privacy rights and family decision making in holding no fundamental right to engage in homosexual sodomy existed because there was no connection between family decision making and homosexual activity.
right to keep such information private exists. Although the court noted that the FRA regulations made no provision for protecting employees from potential disclosure of tests results, they chose not to consider the issue on ripeness grounds.

**Equal Protection**

The final constitutional challenge brought by the Railway Executives was that the statute was under-inclusive and therefore discriminated against certain classes of railroad employees. The RLEA argued that the discriminatory nature of the regulations violated the equal protection clause of the fourteenth amendment. Specifically, the RLEA argued that the failure to include supervisory personnel, who might also be responsible for accidents, in the group of employees subject to testing was discriminatory. The court noted that the equal protection clause only required that there be a "rational relationship between a classification scheme and the government objective." Further, the group selected for testing was the same group of employees for whom Congress had designated specific limitations on work hours for safety purposes. The court held this relationship was sufficiently rational to justify the selection of the same employees for drug testing. The court also noted that

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145 *Burnley I*, 839 F.2d at 591; see *Whalen v. Roe*, 429 U.S. 589 (1977) (although recognizing a right to keep information about drug use private, the decision upheld a New York statute which required pharmacists to report prescriptions of certain drugs to a central data base on the grounds that the statute provided sufficient safeguards against disclosure).


147 *Id.*

148 *Id.; see also Bolling v. Sharpe*, 347 U.S. 497 (1954). *Bolling* challenged racial segregation in District of Columbia private schools. The Court held that "equal protection of the laws" was a more explicit safeguard of prohibited unfairness than due process. *Id.* at 499.

149 *Burnley I*, 839 F.2d at 592.

150 *Id.; see Hours of Service Act, 45 U.S.C. §§ 61-64b* (1982) (limiting the hours railroad employees may work without a rest period).

151 *Burnley I*, 839 F.2d at 592. The court observed that "[i]t makes sense to mandate drug and alcohol testing of the same group for the same reasons." *Id.*
supervisory personnel are subject to discretionary drug testing under existing regulations.\textsuperscript{152}

2. The Supreme Court Decision

The majority opinion in the Supreme Court’s decision in \textit{Skinner} began with a discussion of the history of alcohol abuse in the railroad industry.\textsuperscript{153} This pointed answer to the Ninth Circuit’s inability to discern a justifiable link between rail accidents and drug or alcohol abuse set the tone for the seven justice majority’s analysis of the FRA regulations.\textsuperscript{154}

The opinion continued with a review of the historical development of alcohol related regulations in the railroad industry culminating with the challenged FRA regulations.\textsuperscript{155} After outlining the specific provisions of the testing program, which involved blood tests, breath tests and urinalysis, the Court recited the findings of the district and appellate courts.\textsuperscript{156} The district court held the employee’s privacy interests were outweighed by the government’s safety concerns.\textsuperscript{157} As discussed above, the Ninth Circuit found that, absent an individualized suspicion as to particular employees, the tests were unreasonable searches.\textsuperscript{158}

The only issue before the Supreme Court was whether the testing program violated the employees’ fourth amendment rights. The Court began with a traditional

\textsuperscript{152} Id.


\textsuperscript{154} Id. The Ninth Circuit held that absent an individualized suspicion concerning an employee the FRA drug testing program was an unreasonable search. \textit{Burnley I}, 839 at 575, 588, \textit{rev’d} sub nom. \textit{Skinner} v. Railway Labor Executives’ Ass’n, 109 S. Ct. 1402 (1989); see also supra notes 130-132 and accompanying text.  

\textsuperscript{155} \textit{Skinner}, 109 S. Ct. at 1407. The Court noted that the industry has had regulations prohibiting on the job alcohol consumption for over one hundred years. \textit{Id.}

\textsuperscript{156} \textit{Id.} at 1410-11.

\textsuperscript{157} \textit{Id.} at 1410.

\textsuperscript{158} See supra notes 112-151 and accompanying text for a discussion of the Ninth Circuit decision.
fourth amendment analysis, considering whether the program was a government action and, if so, whether it was a search or seizure. First, the Court rejected the government's argument that the tests were a private action, noting the degree of government participation and the regulation's pre-emption of the state law. Then citing the seminal case on body fluid testing, Schmerber v. California, the Court held the proposed blood tests were searches. The Court also determined that the breath tests and urinalysis were searches covered by the fourth amendment.

Reasonableness

The next element in the traditional fourth amendment analysis is an inquiry into the reasonableness of the search and seizure. The fourth amendment only prohibits unreasonable searches and seizures. The "permissibility" of a search is established "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Although this balancing is usually performed prior to the search through the issuance of a warrant based on prob-

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160 Id. at 1411. The Court stated that railroad compliance with subpart C, Post-Accident Toxicological Testing, was required by law. The Court rejected the argument that because testing under subpart D, Authorization to Test for Cause, was discretionary it was not also a government action. Id.
161 384 U.S. 757, 767-68 (1966) (holding blood tests administered to determine alcohol content were searches under the fourth amendment).
162 Skinner, 109 S. Ct. at 1412.
163 Id. at 1412-13. The Court cited California v. Trombeta, 467 U.S. 479, 481 (1984), as authority for its finding on breath tests. The Court also noted that the federal courts of appeal have unanimously held urine tests to be searches. Skinner, 109 S. Ct. at 1413 n.4.
164 U.S. Const. amend IV. "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." Id.
able cause, the Court cited five cases as precedent for its holding that in certain non-criminal situations, a "special need" may "make the warrant and probable cause requirement impractical."\(^{166}\)

It is on this point and its application to FRA regulations that the majority and the dissent parted company. Relying on the diminished privacy expectations of workers in highly regulated industries,\(^{167}\) and the powerful government interest in public safety,\(^{168}\) the majority cited the prior opinions as support for its holding.\(^{169}\) The dissent distinguished the "special needs" cases, citing the personal nature of the search and the absence of individualized suspicion, and by questioning the validity of the program's deterrent effect relative to the government objective of enhanced public safety.\(^{170}\)

**Special Needs**

The five "special needs" cases cited by the majority represent the development of the newest exception to the warrant requirement.\(^{171}\) All of the searches held reasonable based on the government's "special needs" were non-criminal.\(^{172}\) In each case the Court found that a

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168 Id. at 1419.

169 Id. at 1421.

170 Id. at 1432.


strong government interest outweighed the individual’s reduced privacy expectations, making the search reason-
able despite the absence of either a warrant or probable cause.\textsuperscript{173}

Noting that the rail employees covered by the testing program performed “safety-sensitive tasks” and were already regulated by the Hours of Service Act,\textsuperscript{174} the majority determined that post-accident testing would not be unreasonable even without the presence of an individualized suspicion concerning the subject employee.\textsuperscript{175} The tests were reasonable because the employees’ reduced expectations of privacy were outweighed by the government’s interest in increasing public safety.\textsuperscript{176} The tests were found to increase public safety both by deterring drug and alcohol abuse by covered employees, and by providing information about the causes of rail accidents which might help prevent future accidents.\textsuperscript{177} The Court was not persuaded by the RLEA’s argument that the scope of the information provided by the tests went beyond the government’s justifiable concerns with on the job drug or alcohol abuse.\textsuperscript{178} The Court also found that

\begin{footnotes}
\item[173] The previous government interests included: a state’s operation of its probation system, Griffin v. Wisconsin, 483 U.S. 868, 873 (1989); a state’s interest in detecting and deterring automobile theft, New York v. Burger, 482 U.S. 691, 708 (1987); the “efficient and proper” operation of a government workplace, O’Connor v. Ortega, 480 U.S. 709, 723 (1987); the need to maintain discipline in schools, T.L.O., 469 U.S. at 339; and the maintenance of prison security, Bell v. Wolfish, 441 U.S. 520, 559 (1979).
\item[174] Skinner, 109 S. Ct. at 1414; see Hours of Service Act, 45 U.S.C. §§ 61-64b (1982) (limiting the hours certain railroad employees may work without a rest period).
\item[175] Skinner, 109 S. Ct. at 1414-21. The Court also noted that the requirement of a warrant would undermine the effectiveness of the search given the short time periods involved and the fact that the tests were to be administered by supervisors unfamiliar with the warrant process. Id. at 1416-17.
\item[176] Id. at 1419-21.
\item[177] Id. at 1419-20.
\item[178] Id. at 1420-21. The Court held that the presence of drug metabolites in an employee’s urine sample, indicating prior drug use, was relevant to the issue of the employee’s on-the-job impairment. The Court decided that the connection was sufficient to justify the use of urinalysis. For a discussion of the metabolism of drugs and its relevance to drug testing, see Dubowski, Drug-Use Testing: Scientific Perspectives, 11 Nova L. Rev. 415, 432-35 (1987).
\end{footnotes}
the safeguard provisions of the regulations governing the collection of urine samples adequately diminished the intrusive nature of this procedure.  

The Dissent

The dissent, written by Justice Marshall and joined by Justice Brennan, argued that the majority had extended the scope of the “special needs” exception, both as to the personal nature of the search and the requirement of individualized suspicion, without any justification or explanation. Justice Marshall’s discussion began with an examination of the express textual requirements of the fourth amendment, suggesting that no support for the “special needs” exception can be found in the Constitution. The balance of his discussion of the majority’s opinion examined the manner in which the decision increased the scope of the exception. The dissent argued that the application of this exception to historically private areas, absent any individualized suspicion, went well beyond the rationales justifying the search of a student’s purse or an employee’s desk.

Justice Marshall also took issue with the position that the tests will have a sufficient deterrent effect on employee drug use to justify considering that effect as a factor in the balancing test. This point was also raised by Justice Stevens in his concurring opinion, although he ultimately agreed with the result reached by the majority. Their point was that the potential for death from a drug related accident was a greater deterrent than the possibility of failing a drug test.

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179 Skinner, 109 S. Ct. at 1418.
180 Id. at 1425.
181 Id. at 1423-26.
182 Id. at 1426-30. Justice Marshall pointed out that the extension of a “special needs” exception to mass drug tests increased the scope of intrusion previously permitted under the exception and, at the same time, decreased to zero the amount of suspicion required to justify a search. Id.
183 Id. at 1432.
184 Id. at 1422.
185 Id. at 1432. Marshall compared the majority’s analysis to the position that
Analysis

The *Skinner* decision establishes three major points which may be relevant in challenges to the FAA testing program. First, and most important, the decision rejects the Ninth Circuit's restrictive fourth amendment analysis, and relies on the more general "special needs" balancing test.186 Second, the decision affirms the government's right to require drug testing of private sector employees.187 Finally, the Court approves deterrence as a justification for mass searches.188

There are, however, several factors which distinguish the railroad industry and the FRA testing program from the aviation industry and the FAA program. In *Skinner* the government presented substantial documentation of the history of substance abuse among railroad workers.189 As evidenced by the comments to the FAA program, there is virtually no evidence of a drug problem in aviation.190 Also, the program upheld by the Supreme Court in *Skinner* provided only for post-accident and for-cause testing.191 The FAA program, however, provides for random testing on a large scale.192 It is possible that given the less intrusive tests required by the FAA program (i.e., post-accident and for-cause testing), the inclusion of random tests may not provide sufficient additional safety assurance to justify the increased intrusion on employees' privacy expectations. A final distinction between the two

"people who skip school or work to spend a sunny day at the zoo will not taunt the lions because their truancy or absenteeism might be discovered in the event they are mauled." 1d.

186 See supra notes 166-178 and accompanying text for a discussion of the Court's fourth amendment analysis.


188 See supra notes 175-177.

189 *Skinner*, 109 S. Ct. at 1407 n.1; see supra note 153 and accompanying text.

190 FR, Anti-Drug Program, supra note 4, at 47,029 (Lack of Evidence of a Drug Problem in the Aviation Industry). The FAA did note that the investigation of the Continental Air Express crash on January 19, 1988 revealed the presence of cocaine and cocaine metabolites in the pilot's system. *Id.*

191 *Skinner*, 109 S. Ct. at 1408-10; see supra note 160 and accompanying text.

192 See supra notes 71-72 and accompanying text.
testing programs is the absence of any testing for alcohol in the FAA program. This shortcoming may subject the program to challenge on the grounds that it is underinclusive and does not sufficiently increase public safety and is therefore an unjustifiable intrusion.193

B. National Treasury Employees Union v. Von Raab

_Von Raab II_, the companion case to _Skinner_, involved a challenge to a U.S. Customs Service drug testing program which required employees to submit to drug tests in order to qualify for specified sensitive positions.194 The facts and circumstances surrounding the program differ from both the FRA and FAA testing programs in two significant aspects: the union members' status as government employees and their direct involvement in the national war on drugs.195 As a result, the decision relied on factors supporting the government's interest in preventing drug use which are not present in either the FRA or the FAA testing programs. Despite these distinctions, the majority's "special needs" analysis and the four-justice dissent, written by Justice Scalia, may both be helpful in analyzing the FAA program.

1. The Fifth Circuit

In _Von Raab I_, the Fifth Circuit found that the Customs Service program was a reasonable search for the purposes of the fourth amendment.196 The appellate court decision

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193 _Skinner_, 109 S. Ct. at 1432. The _Skinner_ dissent advanced a similar argument regarding the deterrent effect of the FRA program. _Id_. The application of this reasoning to the FAA program hinges on the safety risks which the FAA program does not address, specifically, alcohol and prescription drug abuse. If there is any significant risk of harm to the public arising out of employee abuse of those substances, one can argue that the government's safety concerns are not adequately served by the existing program, and that, therefore, the resulting intrusion into the employee's privacy outweighs the government's safety concerns.

194 National Treasury Employees Union v. Von Raab, 109 S. Ct. 1384 (1989) (_Von Raab II_).

195 _Id_. at 1392-93.

focused on the government’s interest in employing non-drug users in its drug enforcement program, the reduced privacy expectations of government employees and the program’s efforts to minimize the inherent intrusiveness of mandatory urinalysis.\textsuperscript{197} One significant aspect of the Customs tests, discussed by both the Fifth Circuit and the Supreme Court, was the fact that the tests were not in response to an actual or even a perceived drug problem among employees.\textsuperscript{198}

In finding the testing program reasonable, the Fifth Circuit first noted that it was a government action and that the testing program was a search.\textsuperscript{199} The court began its analysis of the reasonableness of the search by reviewing the factors cited by the Supreme Court in \textit{Bell v. Wolfish},\textsuperscript{200} the first Supreme Court decision recognizing the “special needs” exception. In addition to those factors, the court considered the voluntary and administrative nature of the search, the availability of less intrusive alternatives and the impact of the employment relationship on privacy expectations.\textsuperscript{201} Balancing all these factors, the court found the searches reasonable based on the significant government interest and the reduced privacy expectations of those employees seeking transfers to sensitive positions.\textsuperscript{202}

The union had also challenged the testing program as an infringement on the employees’ fifth amendment protection against self-incrimination, their penumbral privacy rights and for being so unreliable that they violated due

\textsuperscript{197} Id. at 176-80.

\textsuperscript{198} \textit{Von Raab II}, 109 S. Ct. at 1387-88; \textit{Von Raab I}, 816 F.2d at 173.

\textsuperscript{199} \textit{Von Raab I}, 816 F.2d at 173.

\textsuperscript{200} Id. at 176 (citing \textit{Bell v. Wolfish}, 441 U.S. 520 (1979)). The \textit{Bell} decision listed the scope and manner of search, the justification for the search, and the place where the search took place as factors to be considered in determining the reasonableness of the search. \textit{Bell}, 441 U.S. at 520.

\textsuperscript{201} \textit{Von Raab I}, 816 F.2d at 178-80.

\textsuperscript{202} Id. at 173. The dissent took the position that because employees currently holding sensitive positions were not tested, and transferees were not subsequently tested, the tests were an ineffective means of achieving their stated objectives and were therefore unreasonable. Id. at 182-84.
process. The union elected not to rely on the privacy argument on appeal, and the court rejected both the self-incrimination and due process arguments.

2. The Supreme Court Decision

Justice Kennedy writing for a five-justice majority affirmed the judgment of the Fifth Circuit. The Court held that the program was a reasonable search under the "special needs" exception because the government's interests in the integrity of its drug enforcement work force and public safety outweighed the intrusion on the employees' privacy expectations. The sections of the opinion which may be particularly relevant to the FAA testing program focused on the justifications for a testing program despite the absence of any indication of a drug problem among the covered employees, and the related proposition that drug tests may be reasonable searches even when undertaken with little or no expectation of uncovering drug use.

Deterrence as Justification

The union argued that the testing program was unreasonable because it was not founded on a belief that drug tests would ferret out drug using employees. Although it was not addressed by the majority, the basis of this argument appears to be that deterrence is an unreasonable justification for a search. In considering this point, the Court noted the seriousness of our national drug problem and argued that it was unreasonable to assume that any

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203 Id. at 181-82.
204 Id. at 181.
205 Von Raab II, 109 S. Ct. at 1397-98.
206 Id. at 1394.
207 Id. at 1392. The Court rejected this position citing several cases upholding searches and inspections undertaken to prevent either certain activities or the development of certain conditions. Id. (citing United States v. Martinez-Fuerte, 428 U.S. 543, 557 (1976) (border area traffic stops); Camara v. Municipal Court, 387 U.S. 523, 535-36 (1967) (building code inspections)).
segment of the work force was insulated from its effect.\textsuperscript{208} The Court also emphasized the importance of the Customs Service’s need to keep drug users out of drug enforcement.\textsuperscript{209} Dismissing the imposition on the vast majority of employees who do not use drugs, the Court noted that the large ratio of searches to violations had not made building inspections or border checkpoints unreasonable in prior cases.\textsuperscript{210}

\textit{The Dissent}

\textit{[A]}ll this contains much that is obviously true, and much that is relevant; unfortunately, what is obviously true is not relevant, and what is relevant is not obviously true.\textsuperscript{211}

Justice Scalia’s paraphrase of Mr. Churchill suggests the elements of the majority’s opinion which left him unconvinced. The dissent is based on three points. First, the government produced no evidence of a drug problem within the Customs Service.\textsuperscript{212} Second, the argument that Customs officials who use drugs will be either less willing to enforce the law, or more likely to be bribed or compromised, was unpersuasive.\textsuperscript{213} Finally, the employees’ natural concerns about performing hazardous tasks, such as engaging in gun battles with drug smugglers while under the influence of drugs, will be more effective deterrents than concerns about failing a drug test.\textsuperscript{214}

Unpersuaded by the government’s deterence and safety arguments, Justice Scalia argued that the function of the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1395.
\item Id.
\item Id. The union pointed out during oral argument that only five of the 3600 employees tested failed drug tests. Id. at 1394; see also supra note 207.
\item Id. Von Raab II, 109 S. Ct. at 1399 (1989).
\item Id. at 1399-1400. Justice Scalia also noted that the government was unable to point to any instance in which drug use by a Customs Services employee had resulted in “bribe-taking,” “poor aim,” or “unsympathetic law enforcement.” Id. at 1400.
\item Id. at 1400-01.
\item Id. at 1399. This is the same point made in Justice Steven’s concurrence and Justice Marshall’s dissent in \textit{Skinner}; see supra notes 183-185 and accompanying text.
\end{enumerate}
\end{footnotesize}
testing program was to set an example for the nation in the war on drugs.\textsuperscript{215} He condemned this justification as an example of an "ends justifying the means" analysis.\textsuperscript{216} Emphasizing the danger of this approach, his dissent concluded with a quotation from Justice Brandeis' famous dissent in \textit{Olmstead v. United States}\textsuperscript{217}: "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."\textsuperscript{218}

3. \textit{Analysis}

The \textit{Von Raab II} decision indicates two factors in the circumstances surrounding the Customs Service tests which may be used in support of the FAA program. First, the Supreme Court found that the lack of evidence of a drug problem did not prevent mandatory drug testing from being a reasonable means of addressing the problems which would result from a drug problem.\textsuperscript{219} The second point, closely related to the first, is that even in the absence of a drug problem, deterrence is a valid justification for large scale drug testing programs.\textsuperscript{220}

Like the FRA program which was the subject of the \textit{Skinner} decision, there are also several distinctions between the Customs Service program and the FAA program. The most obvious distinction is that those subject to testing are government employees. The Court noted that this acts both to increase the government's interest in ensuring that its employees are not drug users\textsuperscript{221} and to reduce the employees' reasonable privacy expectations.\textsuperscript{222} The employees tested under the FAA program, however,
are private sector workers. On the other hand, the highly regulated nature of the aviation industry may sufficiently reduce their privacy expectations even without the element of government employment. The second significant distinction is the involvement in drug enforcement. This nexus is clearly not present for aviation employees. A final distinction is the employees’ discretion in being tested. Customs Service employees may elect not to apply for the covered positions or may decline promotion without being subject to tests. These options are not available to airline personnel under the FAA program.

IV. Drug Testing of Aviation Personnel

Skinner and Von Raab II taken together consider almost all of the factors which must be evaluated to analyze the FAA program under the “specific needs” exception. However, they also consider factors not present in aviation. Where one element which supports aviation testing is present in these decisions, such as the public concerns surrounding an accident, another factor, not found in aviation, such as a history of substance abuse, is also present. A recent decision by the D.C. Circuit analyzing a challenge to Department of Defense and Department of Transportation testing of civilian employees, including aviation personnel, sheds some light on the importance to be given the various factors.

The testing programs challenged in National Federation of Federal Employees v. Cheney called for mandatory random urinalysis of civilian Defense Department employees working in aviation, chemical munitions, nuclear reactors

223 This position is an extension of the exception to the warrant requirement for administrative searches in highly regulated industries. Id.; see supra notes 105-107 and accompanying text.
224 Von Raab II, 109 S. Ct. at 1393-94. The majority emphasized this nexus and argued it enhanced the government’s interest in preventing drug use. Id.
226 884 F.2d 603 (D.C. Cir. 1989). The case combined six suits by various government labor organizations challenging Department of Defense and Department of Transportation testing programs. Id.
and law enforcement.227 In analyzing the tests the court elected to follow the Von Raab II analysis because the program did not involve either blood or breath tests.228 This approach may also be more appropriate based on the employees’ status as government workers.229

The court first considered the additional element of random testing to determine if it precluded analysis under the Supreme Court’s new balancing test.230 Citing its earlier decision in Harmon v. Thornburgh,231 the D.C. Circuit held that the inclusion of random testing was relevant to the analysis but was not so significant that the “special needs” analysis outlined in Skinner and Von Raab II was not appropriate.232 The union also challenged the testing program as overly broad because it would discover both on-duty and off-duty drug use.233 This argument was rejected on two grounds. First, Skinner suggested that a search can be reasonable even if the evidence it produced only demonstrated an increased probability of the ultimate fact.234 Second, Von Raab II held that off-duty drug use can create serious risks which the government has a “broad interest” in preventing.235

The most important issue in Cheney, for the purposes of analyzing the FAA program, is the court’s analysis of the

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227 Id.
228 Id. at 609. The court noted that the Skinner decision arguably relied on the inclusion of blood and breath tests in finding the urine tests reasonable. Id.
229 Id. at 615. The reduced privacy expectations of government employees and the government’s increased interest in supervising its own employees are not specifically addressed by the D.C. Circuit. However, the Supreme Court’s Von Raab opinion discussed them at some length. Von Raab II, 109 S. Ct. at 1393-94.
230 Cheney, 884 F.2d at 607-08.
231 878 F.2d 484, 498 (D.C. Cir. 1989). The decision found that the random aspect of a challenged Department of Justice drug testing program was not a “difference in kind,” but merely an additional factor to be considered in the balancing test. Id.
232 Cheney, 884 F.2d at 608-09.
233 Id. at 609.
235 Cheney, 884 F.2d at 609; see Von Raab II, 109 S. Ct. at 1398. The Von Raab analysis related to government concerns about bribe taking and “unsympathetic” law enforcement, however, and not to its public safety concerns. Id.
safety concerns raised by drug use in aviation. The court compared the drug tests to the airport magnetometer searches approved by the Second Circuit in United States v. Edwards. In that case the court, in an opinion written by Judge Friendly, held that the risks involved in commercial aviation accidents, standing alone, met the reasonableness standard. The importance of the magnitude of risk as a factor was also recognized by Justice Scalia in his Von Raab II dissent. Commenting on the government's reliance on generalizations about the severity of the drug problem despite the absence of any showing of drug use by Customs agents, Justice Scalia said: "Perhaps such a generalization would suffice if the workplace at issue could produce such catastrophic social harm that no risk whatever is tolerable . . . ." Although the work place he referred to was a nuclear power plant, it is clear that the degree of risk created by drug use in the aviation industry is considerable and may justify significant intrusions into employees' expectations of privacy.

Another important aspect of the Cheney decision is the court's willingness to question the need to test certain employees while approving the testing of others. Following its decision in Harmon v. Thornburgh, the D.C. Circuit remanded for more factual development the decision concerning the testing of nuclear workers, employees handling chemical munitions and laboratory personnel. The court rejected the Army's assertion that the testing of employees involved in the execution of its drug testing

236 Cheney, 884 F.2d at 610, citing United States v. Edwards, 498 F.2d 496 (2d Cir. 1974).
237 Edwards, 498 F.2d at 500. "When the risk is the jeopardy of hundreds of human lives and millions of dollars of property . . . that danger alone meets the test of reasonableness . . . ." Id.
238 Von Raab II, 109 S. Ct. at 1400 (Scalia, J., dissenting).
239 Id.
240 Cheney, 884 F.2d at 611. The Supreme Court also distinguished between different job descriptions in Von Raab, remanding for further consideration the testing of employees who handle classified material. Von Raab II, 109 S. Ct. at 1396-97.
program was reasonable.²⁴¹

Analysis

In descending order of importance, the three most important issues discussed by the D.C. Circuit in Cheney are: the risks created by possible drug use in the aviation industry; the importance, as a balancing factor, of random testing; and the willingness to uphold testing of certain employee groups but reject the testing of others.

The potential for harm resulting from drug use in aviation is the most important issue because it is the critical factor on the government interest side of the scale.²⁴² If the potential harm is not mitigated by a consideration of the likelihood of its occurrence, the "special needs" of the government appear to outweigh the employees' expectations of privacy. However, if consideration is given to the minimal evidence of a drug problem in the aviation industry, then the government's need may not be so urgent.

The remaining two issues discussed in Cheney may also factor in the analysis of the FAA program. First, the element of random testing, particularly of the scope required by the FAA program, may be viewed as significantly increasing the intrusiveness of the testing program.²⁴³ Second, the willingness of the courts to evaluate the need to test covered employees on a position by position basis may mean that the risks involved in less sensitive positions will be found not to justify drug testing.²⁴⁴ For example,

²⁴¹ Cheney, 884 F.2d at 614-15. This finding relied on the Von Raab nexus argument. Id.
²⁴² See FR, Anti-Drug Program, supra note 4, at 47,027 (Discussion of Constitutional Issues). "The impairing effects of illegal drugs and the substantial risks to public safety posed by aviation employees who use illegal drugs underlies the compelling governmental interests in promulgating this final rule." Id.; see supra note 104 and accompanying text.
²⁴³ This issue is raised by the labor groups representing aviation employees in their petition for review pending in the Ninth Circuit. Bluestein v. Skinner, No. 88-7503 (9th Cir. argued Sept. 15, 1989); see infra notes 253-256.
²⁴⁴ Individual review of specific positions has resulted in testing programs being remanded for more factual development on invalidated outright for those categories found not to satisfy the "special needs" analysis. See Von Raab II, 109 S. Ct. at 1396-97; National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 613-15
although the concerns created by drug impaired pilots or mechanics are obvious, the courts may determine that the threat to public safety created by an impaired flight attendant does not justify the intrusiveness of drug testing.

V. CURRENT CHALLENGES — BLUESTEIN V. SKINNER

The Ninth Circuit recently heard argument in six consolidated cases petitioning for review of the FAA’s final rule establishing the drug testing program.245 The suits were brought by individuals affected by the program and by several labor groups representing aviation personnel.246 The plaintiffs presented issues challenging the final rule as an unreasonable search and seizure247 and for violating the Administrative Procedure Act.248 This discussion will focus on the fourth amendment challenges.

The Bluestein plaintiffs challenged the FAA testing program as an unreasonable search and seizure for three reasons.249 First, they argued that the testing program was not a minimal intrusion and therefore could not be evaluated under the “special needs” exception.250 Second, the plaintiffs alleged that the testing program called for an impermissibly high degree of employer discretion.251 Finally, they contended that the government’s “special need” did not require random or unannounced testing.252

The basis for the first challenge centered on the distinctions between the FAA program and FRA and Customs Service programs upheld in Skinner and Von Raab II. The plaintiffs argued that the FAA program was not a minimal intrusion because it called for continuing, random, unann-

(D.C. Cir. 1989); Harmon v. Thornburgh, 878 F.2d 484, 409-93 (D.C. Cir. 1989);

245 See DiNunno, supra note 16, at 11.
246 Id.
247 Brief for Petitioners at 1, Bluestein v. Skinner, No. 88-7503 (9th Cir. argued Sept. 15, 1989).
248 Id.
249 Petitioners Reply Brief at 1, 11, 15, Bluestein.
250 Id. at 1-11.
251 Id. at 12-15.
252 Id. at 15-22.
nounced testing of covered employees.253 Relying on the Supreme Court's statement that suspicionless testing can not be valid unless the "privacy interests implicated . . . are minimal,"254 the unions contended that the cited differences in the FAA program precluded its being considered minimally intrusive.255 Therefore, they argued that the random testing component of the program could not be evaluated under the "special needs" analysis and should be held invalid.

Citing New Jersey v. T.L.O., the plaintiffs argued that suspicionless testing is invalid if the employee's expectations of privacy are subject to the discretion of the employer. Four areas in which employers retained potentially abusive levels of discretion were addressed.257 Two of these issues were related to the time and place of testing. The unions contended there were no limits on the timing of tests or the physical surroundings in which samples must be submitted.258 The union also noted that an employer was not required to state whether the test being administered was the result of random selection or was being administered because the employee was suspected of drug use.259 The final complaint was that because the program did not specify whether testing should be done individually or in groups, the potential for abuse by singling out individuals was significant.

The third challenge to the FAA program questioned the need for random testing when the program also provided

253 Id. at 2. The petitioners noted that the testing is not triggered by an identifiable event, that it requires a "continuing regime of repeated testing" and that all tests must be unannounced. Id.
254 Id. at 1 (quoting Skinner v. Railway Labor Executives' Ass'n, 109 S. Ct. 1402, 1417 (1989)).
255 Reply Brief at 2, Bluestein.
256 Id. at 2. This point follows the Supreme Court's discussion in Skinner, which stated that where minimal privacy interests were balanced against a significant government interest, suspicionless searches could be reasonable. Skinner, 109 S. Ct. at 1417.
257 Reply Brief at 12 n.6, Bluestein.
258 Id.
259 Id.
260 Id.
for periodic, post-accident and for-cause testing.\textsuperscript{261} The plaintiffs' argument noted the lack of evidence of drug use in the industry.\textsuperscript{262} The union argued that each element of the testing program must satisfy the "special needs" analysis. Where the vast majority of the government's "need" is satisfied by the less intrusive components of the program, the incremental benefit achieved through additional random testing can not justify the increased intrusion into the employees' privacy.\textsuperscript{263}

VI. Conclusion

As this comment goes to press the Ninth Circuit has not issued a decision in the Bluestein case. Several major commercial carriers initiated their testing programs in December, 1989.\textsuperscript{264} The Bluestein plaintiffs requested a stay of these tests pending the Ninth Circuit's decision, however, the court denied their motion.

The Ninth Circuit's analysis of the FAA program and any subsequent appeal to the Supreme Court, must consider several factors in determining whether the government's "special needs" justify the intrusiveness of random urine testing. Although the factors indicating the searches are an unreasonable intrusion appear more numerous, this does not necessarily mean that they should be given more weight in the "special needs" balancing test.\textsuperscript{265}

The most significant factors supporting the aviation employees' position are the increased intrusiveness of ran-

\textsuperscript{261} Id. at 15-16.
\textsuperscript{262} Id. at 16-19; see supra note 189 and accompanying text.
\textsuperscript{263} Reply Brief at 16, Bluestein.
\textsuperscript{264} DiNunno, supra note 16 at 10-11. Testing plans submitted by United Airlines and American Airlines were approved by the FAA. These airlines were scheduled to begin testing Dec. 18, 1989. Id. at 11.
\textsuperscript{265} The only discussion of the appropriate weight to be given the various factors was made by the D.C. Circuit in Cheney. The court suggested that risks involved in aviation made testing reasonable by definition. National Fed'n of Fed. Employees v. Cheney, 884 F.2d 603, 610 (D.C. Cir. 1989); see supra notes 236-239 and accompanying text.
dom testing, the virtual absence of evidence suggesting a drug problem in the aviation industry, the lack of employee discretion, and the absence of any mandated rehabilitation programs. Somewhat less significant issues include: The employees' status as private sector workers; the absence of testing for alcohol or prescription drugs; the presence of periodic and for-cause testing; and the validity of the deterrent effect of the tests, given the natural deterrent effect of the employees' fear of injury or death due to drug impairment.

The impact of random testing on the "special needs" evaluation is addressed by the D.C. Circuit in Cheney. Although that court held it is merely a factor to be considered, the case addressed testing of government employees, not private section workers. Von Raab II holds that evidence of drug use is not a requirement for a finding that testing is reasonable. The decision, however, addresses employees involved in drug interdiction, and does not involve random testing. Finally, all of the cases which have found urine testing programs reasonable in the absence of individualized suspicion have either permitted employees to avoid testing or in case of employees who failed tests provided for rehabilitation or transfer to

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266 See supra notes 253-256 and accompanying text for a discussion of this issue in Bluestein v. Skinner, No. 887503 (9th Cir. argued Sept. 15, 1989).
267 See supra note 190 and accompanying text, comparing the history of alcohol abuse in the railroad industry to the lack of evidence of drug abuse in aviation; but see notes 219-220 and accompanying text, discussing the lack of evidence of drug use among customs employees.
268 See supra note 225 and accompanying text.
269 See supra notes 94-98 and accompanying text.
270 See supra note 221 and accompanying text.
271 See supra note 193 and accompanying text.
272 See supra notes 191-192 and accompanying text; see also notes 261-263 and accompanying text.
273 See supra notes 183-185 and accompanying text; see also note 214 and accompanying text. This issue was addressed by the dissents in both Skinner and Von Raab II. Id.
274 See supra notes 230-232 and accompanying text.
275 See supra note 227.
276 See supra note 209 and accompanying text. The absence of this nexus requirement was given as justification for holding drug testing unreasonable in Cheney. See supra note 241 and accompanying text.
less sensitive positions.\textsuperscript{277}

Balanced against these factors are several factors supporting the government's significant interest in testing aviation workers. Clearly the most significant is the potential for harm resulting from drug impaired employees.\textsuperscript{278} A second factor is the enhanced deterrent effect of random testing as opposed to periodic and for-cause tests.\textsuperscript{279} Finally, aviation industry employees are presently subject to significant regulation.\textsuperscript{280} This factor reduces their reasonable expectations of privacy and may result in a finding that random drug testing is not unreasonable in light of the strong government interest in public safety.\textsuperscript{281}

On the basis of the arguments made in the majority and dissenting opinions in \textit{Skinner} and \textit{Von Raab II}, the author feels that the inclusion of random urine testing in the FAA program is an unreasonable intrusion into the reasonable privacy expectations of employees. However, given the current national fervor, and the apparent belief that greater regulation is the solution to our current drug problem, the author is not optimistic that this opinion will prevail.


\textsuperscript{278} \textit{See supra} notes 237-239 and accompanying text.

\textsuperscript{279} \textit{See supra} notes 223, \textit{see also supra} notes 105-108 and accompanying text.

\textsuperscript{280} \textit{Id.}