Skinner v. Railway Labor Executives' Association and the Fourth Amendment Warrant-Probable Cause Requirement: Special Needs Exception Creating a Shakedown Inspection?

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NOTES

SKINNER v. RAILWAY LABOR EXECUTIVES’ ASSOCIATION AND THE FOURTH AMENDMENT WARRANT-PROBABLE CAUSE REQUIREMENT: SPECIAL NEEDS EXCEPTION CREATING A SHAKEDOWN INSPECTION?

The fourth amendment to the United States Constitution1 protects persons from government intrusion in two manners. First, the government cannot perform unreasonable searches or seizures.2 Second, the government can obtain a search warrant only after demonstrating probable cause to believe that the person or thing to be seized is in the place to be searched.3 By limiting the government’s ability to search, the fourth amendment protects persons from arbitrary, and therefore unreasonable, intrusions.4 To qualify

1. U.S. CONST. amend. IV. The fourth amendment protects “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures ....” Id. A full-scale search requires a search warrant issued “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Id.

2. Id. The Constitution does not define what constitutes an “unreasonable” search, however, creating problems in validating a government intrusion. See Note, California v. Greenwood: Discarding the Traditional Approach to the Search and Seizure of Garbage, 38 CATH. U.L. REV. 543 (1989) (citing to Tomkovicz, Beyond Secrecy for Secrecy’s Sake: Toward an Expanded Vision of the Fourth Amendment Privacy Province, 36 HASTINGS L.J. 645, 687 (1985)).

3. U.S. CONST. amend. IV. The Supreme Court uses some “quantum of evidence” to determine probable cause, regardless of whether the probable cause deals with a search or an arrest. Thus, when courts rely on previous case holdings, they do so without concern for whether the case deals with probable cause to arrest or probable cause to search. 1 W.R. LAFAVE, SEARCH AND SEIZURE § 3.1(b) (2d ed. 1987). Just as it does not define the term “reasonable,” the Constitution does not define what constitutes “probable cause.” One explanation of probable cause is a “substantial probability that the invasions involved in the search will be justified by discovery of offending items.” Comment, Search and Seizure in The Supreme Court: Shadows on the Fourth Amendment, 28 U. CHI. L. REV. 664, 687 (1961).

4. U.S. CONST. amend. IV; see FED. R. CRIM. P. 41(c) (requiring that a search warrant be issued by a federal magistrate or state judge only on a showing of probable cause); see also Johnson v. United States, 333 U.S. 10 (1948) (the Court explained the importance of a neutral and detached magistrate). The officer preoccupied with the crime detection profession is too involved in the government’s right to search to adequately guard the individual’s right to privacy, thus resulting in the proverbial fox guarding the henhouse. See id. at 14; see also United States v. Lefkowitz, 285 U.S. 452, 464 (1932) (officers actively engaged in capturing suspected
for fourth amendment protection, however, a person must be the subject of a government search.\(^5\) Thus, courts must determine that there is, in fact, a search and that the government is sufficiently involved before constitutional questions may be raised.\(^6\)

The protections the fourth amendment provides against unreasonable searches remain viable only as long as courts continue to observe them. Historically, however, courts have found special exceptions to these fourth amendment protections. In particular, courts have encroached upon some of these constitutional protections during crisis situations.\(^7\) A contemporary example of this phenomenon developed as a result of the American public's growing awareness of the nation's drug crisis. In fact, Congress has referred to the drug crisis as a "war".\(^8\) The United States Supreme Court, which often defers to Congress' power to implement wartime legislation,\(^9\) appears to be moving toward extending this deference to the "war on drugs" by upholding laws seemingly necessary and reasonable to combat this social prob-

\(^5\) See Weeks v. United States, 232 U.S. 383 (1914). The Weeks Court found that a United States Marshal's warrantless entry into Weeks' home and seizure of his personal papers violated Weeks' fourth amendment privacy rights. Id. at 398. The Court held that the fourth amendment restricts United States courts and federal officials, thereby protecting individuals from "unreasonable searches and seizures under the guise of law." Id. at 392. The Weeks decision protected people only from the Federal Government and federal agencies, and not from local officers. Id. at 398. The Supreme Court broadened the scope of the fourth amendment to include protection against unreasonable searches and seizures by state officials in Mapp v. Ohio, 367 U.S. 643 (1961).

\(^6\) The Supreme Court determined that drug testing private employees in an industry heavily regulated by the government constitutes a search requiring fourth amendment protection. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 613-18 (1989). Similarly, where the government acts as an employer, drug testing its employees is a search requiring fourth amendment protection. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989); see also Comment, The Constitutionality of Federal Employee Drug Testing: National Treasury Employees Union v. Von Raab, 38 AM. U.L. REV. 109, 111-12, 115-17 (1988) (courts have found drug testing, via urine and blood testing, to be a fourth amendment search; presidential attention to the national drug problem and executive order to federal agencies equates to sufficient government action); Exec. Order No. 12,564, 51 Fed. Reg. 32,889 (1986) (requiring all federal agencies to develop drug-elimination programs, including mandatory testing of federal employees).


\(^8\) See United States Senate News Release (Aug. 1, 1989) (discussing approval of McConnell/Kerry amendment to expand the air war on drugs); see also THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY (Sept. 1989) (discussing strategy for the war against illegal drug use).

\(^9\) See Korematsu, 323 U.S. at 219-20; Hirabayashi, 320 U.S. at 95.
Perceptions that the national drug crisis infiltrates virtually every type of business in both the public and private sectors have led to an increase in governmental searches through drug testing.

In *Skinner v. Railway Labor Executives' Association*, the United States Supreme Court addressed the constitutionality of employee drug testing when an employer has not first obtained a warrant and established probable cause or reasonable suspicion. *Skinner* involved a suit by railroad labor unions to enjoin employers from testing railroad employees, via blood, urine, and breath samples, for the presence of drugs and alcohol. Although railroad employees work in private industry, they are subject to heavy governmental regulation. This heavy regulation functions as the requisite governmental involvement opening the door to constitutional challenges concerning violations of the fourth amendment.

Congress initially authorized drug and alcohol testing of private railroad employees by empowering the Secretary of Transportation to draft regulations promoting railroad safety. Based on the results of the Federal Railroad Administration's (FRA) study of drug and alcohol abuse by railroad personnel, the FRA published regulations mandating post-accident testing and authorizing railroads to test employees where reasonable suspicion of

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10. *Skinner*, 489 U.S. at 633. Historically, exercises of legislative war powers have involved temporary emergency measures employed to protect from outside invasions. *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 141 (1948) (power to control rent). "[T]he war power includes the power to 'remedy the evils which have arisen from its rise and progress.'" *Id.* (quoting *Hamilton v. Kentucky Distilleries & Warehouse Co.*, 251 U.S. 146, 161 (1919) (post World War I prohibition law)). Here, the drug war deals with a perceived permanent measure against an inside invasion.


13. *Id.* at 637-41 (Marshall, J., dissenting). Although addressing the constitutionality of employer drug testing of employees for the first time, the United States Supreme Court had previously addressed the search of a person. See *infra* note 83.


15. See *id.* at 614-16. On the same day, the Supreme Court dealt with the search of a government employee in the companion case, *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), and upheld the drug testing in both cases.

16. See *supra* notes 5-6 and accompanying text.


drug or alcohol abuse exists.\textsuperscript{19} The regulations provide that reasonable suspicion is necessary for authorized testing.\textsuperscript{20} Mandatory testing, as prescribed in the regulations, does not require an antecedent finding of probable cause or reasonable suspicion.\textsuperscript{21}

The Railway Labor Executives' Association (RLEA), a railroad workers' association created to represent railroad employees, filed suit against the Secretary of Transportation in the United States District Court for the Northern District of California to enjoin enforcement of the regulations.\textsuperscript{22} In particular, the RLEA challenged subpart C of the regulations requiring post-accident testing, and subpart D authorizing testing for cause.\textsuperscript{23} RLEA's basis for challenging the constitutionality of the regulations was that the regulations violated the fourth amendment's protection against unreasonable searches and seizures.\textsuperscript{24} The district court granted summary judgment in favor of the Secretary of Transportation.\textsuperscript{25} Although agreeing that railroad employees have a fourth amendment right to protect their bodies against government intrusion, the court held that the government's interest in public safety outweighed the personal interests of the employees.\textsuperscript{26} RLEA lost its suit in the district court, but the lower court's decision was stayed pending appeal to the United States Court of Appeals for the Ninth Circuit.\textsuperscript{27} At the government's request, however, the Supreme Court vacated the stay\textsuperscript{28} and the regulations became effective in February of 1986, two years before the Ninth Circuit was able to hear the case.\textsuperscript{29}

\textsuperscript{19} 49 C.F.R. § 219 (1989). Subpart C mandates post-accident testing by way of taking blood and urine samples from all crew members involved with a train having a specified train accident or fatal incident within the definitions of the regulations. \textit{Id.} § 219.210. Sanctions for refusing to give such samples include a presumption of impairment. \textit{Id.} §§ 219.203, 219.213, 219.309(b) (1989). Subpart D authorizes the railroads to require particular employees to submit to breath or urine tests when there is reasonable suspicion of alcohol or drug abuse, involvement in other types of railroad accidents, or in violating a railroad operating rule. \textit{Id.} § 219.301. The FRA proposes to rely primarily on the blood samples under subpart C, but must also rely on urine samples where employees cannot be transported quickly enough to a medical facility before presence of certain drugs is totally eliminated from the blood. 49 Fed. Reg. 24,291 (1984).

\textsuperscript{20} 49 C.F.R. § 219.301.

\textsuperscript{21} \textit{Id.} § 219.201.


\textsuperscript{23} \textit{Id.} at 577; \textit{see supra} note 19.

\textsuperscript{24} \textit{Burnley}, 839 F.2d at 579.

\textsuperscript{25} \textit{Id.} at 577.

\textsuperscript{26} \textit{Skinner}, 489 U.S. at 612.

\textsuperscript{27} \textit{Burnley}, 839 F.2d at 577.

\textsuperscript{28} Dole v. Railway Labor Executives' Ass'n, 474 U.S. 1099 (1986).

\textsuperscript{29} \textit{Burnley}, 839 F.2d at 577; \textit{see American Fed'n of Gov't Employees v. Weinberger, 651 F. Supp. 726 (S.D. Ga. 1986) (reasonable suspicion required to test federal police officers);
A divided panel of the Ninth Circuit Court of Appeals, relying on recent lower court decisions concerning employee testing\(^{30}\) and on recent Supreme Court precedent,\(^ {31}\) reversed the district court's decision.\(^ {32}\) The Ninth Circuit applied a two-pronged reasonableness test to determine whether the blood and urine testing authorized by the regulations was reasonable within the meaning of the fourth amendment.\(^ {33}\) In applying this standard to the FRA authorized testing, the Ninth Circuit first determined that the fourth amendment required particularized suspicion for the search to be "justified at its inception."\(^ {34}\) Second, the court indicated that blood and urine testing to establish drug use was not "reasonably related in scope to the circumstances which justified the interference."\(^ {35}\)

The United States Supreme Court granted certiorari and reversed the Ninth Circuit's decision.\(^ {36}\) The majority,\(^ {37}\) finding a "special needs" exception to the warrant and probable cause requirements, held that the regulations were reasonable under the fourth amendment, notwithstanding the absence of both probable cause and reasonable or particularized suspicion.\(^ {38}\) Justice Kennedy, writing for the majority, opined that the government's compelling safety interest outweighed the individual's privacy interest.\(^ {39}\) Moreover, the majority found that the employees' diminished expectations


\(^ {32}\) Id. at 592.

\(^ {33}\) Id. at 587.

\(^ {34}\) Id. (quoting Terry v. Ohio, 392 U.S. 1, 20).

\(^ {35}\) Id. at 588 (quoting Terry, 392 U.S. at 20).


\(^ {37}\) Justice Kennedy delivered the majority opinion, which was joined by Chief Justice Rehnquist and Justices White, Blackmun, O'Connor, and Scalia. Id. at 605. Justice Stevens joined in the majority opinion except for the portions of Part III that found the regulation a significant deterrent to drug and alcohol use. Id. at 634-35 (Stevens, J., concurring); see infra note 253 and accompanying text (discussing Justice Stevens' concurring opinion).

\(^ {38}\) The Court has recently recognized "special needs" to justify abolishing the probable cause requirement. See Griffin v. Wisconsin, 483 U.S. 868, 878 (1987) (the need to preserve the probation system's deterrent effect); O'Connor v. Ortega, 480 U.S. 709, 725 (1987) (the need for efficiency in the workplace); New Jersey v. T.L.O., 469 U.S. 325, 341 (1985) (the need to maintain order and safety in schools). For a discussion of the special needs exception, see infra notes 165-200 and accompanying text.

\(^ {39}\) Skinner, 489 U.S. at 624, 633-34.

\(^ {40}\) Id. at 633.
of privacy, stemming from their involvement in a heavily regulated industry, further minimized individual privacy interests.\(^4\) Also, the Court asserted that the railroads' standard practice of requiring periodic physical examinations for specific employees as a continuing safety goal diminished the railroad employees' expectations of privacy.\(^4\)

Justice Marshall, joined by Justice Brennan, issued an elaborate dissent on the evils of "allow[ing] basic constitutional rights to fall prey to momentary emergencies."\(^4\) Justice Marshall pointed to historical instances where war emergencies prompted the government to dispense with constitutional rights only to regret such actions later.\(^4\) Although Justice Marshall acknowledged that some cases have upheld searches without particularized suspicion,\(^4\) Justice Marshall distinguished those cases as never intruding on the person.\(^4\) Justice Marshall adamantly rejected the majority's special needs exception to the warrant and probable cause requirements, criticizing the majority's finding that some special need beyond ordinary law enforcement makes the warrant and probable cause requirements impractical.\(^4\)

This Note reviews the constitutional underpinnings of the fourth amendment search and seizure clause and the historical setting at the time of its adoption. Next, this Note traces the Supreme Court's interpretation of both the fourth amendment's reasonableness requirement and its probable cause and search warrant requirements. The Note examines the exceptions to the search warrant and probable cause requirements that have developed, particularly the administrative search exception and the recent extrapolation of the special needs exception. Further, this Note reviews the special needs exception to the fourth amendment which, coupled with the perceived national drug crisis, paved the way for employee drug testing and culminated in the United States Supreme Court's decision in *Skinner v. Railway Labor Executives' Association*.\(^4\) Finally, this Note analyzes the *Skinner* opinion and its impact on government and private sector employees. This Note concludes that although an employee drug testing program may be conducted in a reasonable manner consistent with fourth amendment safeguards, the FRA's drug testing regulations do not pass traditional fourth amendment scrutiny.

\(^{41}\) *Id.* at 627.
\(^{43}\) *Skinner*, 489 U.S. at 635 (Marshall, J., dissenting).
\(^{44}\) *Id.*
\(^{45}\) The Court has upheld brief, routine, administrative, and nonintrusive searches as reasonable, absent even individualized suspicion. *Id.* at 637-38 & n.2.
\(^{46}\) *Id.* at 638.
\(^{47}\) *Id.* at 636-37.
I. CONSTITUTIONAL UNDERPINNINGS OF SEARCH AND SEIZURE

A. Fourth Amendment

The fourth amendment to the United States Constitution protects persons from unreasonable searches and seizures of their "persons, houses, papers, and effects." Additionally, the fourth amendment requires that search warrants be issued only upon a determination of probable cause, and further, that the place to be searched and the persons or things to be seized be particularly described.

While the Framers' intent in drafting the fourth amendment is not clear, they were likely responding to Henry VIII's and later English monarchs' exercise of virtually unlimited search power as a means of restricting the freedom of the press in England. In addition, the issuance of general warrants, which allowed the British government to exercise its search authority arbitrarily in England as well as in the American colonies, surely influenced the Framers. English customs agents in America were using general warrants to enter buildings and search for smuggled goods. The English courts eventually prohibited the flagrant exercise of police power through general warrants. Controversy in America over the use of general warrants continued until the Revolutionary War. With such controversies in mind, the Framers authored the fourth amendment to limit government officials' practice of breaking, entering, and "ransacking" a person or a person's effects.

B. United States Supreme Court Interpretation of the Fourth Amendment

For almost a century after the fourth amendment's creation, the United States Supreme Court had no opportunity to interpret it. In 1886, however, the Supreme Court heard the seminal case on search and seizure, Boyd v. United States. In Boyd, the federal government charged the defendant

49. U.S. CONST. amend. IV.
50. Id.
51. See supra note 2.
52. See 1 W.R. LAFAVE, supra note 3, § 1.1(a), at 3.
53. Id. at 4.
54. Id.
55. In 1765, the most famous case, Entick v. Carrington, 95 Eng. Rep. 807 (1909), held a verdict of trespass against a general warrant.
56. See, e.g., 1 W.R. LAFAVE, supra note 3, § 1.1(a), at 4.
59. 116 U.S. 616 (1886).
with illegally importing certain goods into the United States.\(^6^0\) Boyd challenged the constitutionality of a government order to produce invoices showing the quantity and value of goods.\(^6^1\) Although the government order was found unconstitutional on the grounds that the proceedings violated Boyd's fifth amendment privilege against self-incrimination,\(^6^2\) the Boyd Court considered the fourth and fifth amendments together. Specifically, the Court stated that compelling Boyd to produce his private papers amounted to compelling Boyd to be a witness against himself; therefore, the order resulted in an unreasonable search and seizure.\(^6^3\)

Once the Supreme Court began to find violations of the fourth amendment, the Court substantiated its holdings by mandating that any evidence gathered as a result of an unconstitutional search be inadmissible in criminal proceedings.\(^6^4\) In *Weeks v. United States*,\(^6^5\) the Supreme Court considered the propriety of a warrantless search of Weeks' home. The search produced evidence to convict Weeks in federal court of using the mails to transmit lottery tickets.\(^6^6\) The *Weeks* Court found the search and seizure unlawful, and therefore held that the evidence could not be used in trial.\(^6^7\) While the Supreme Court established the inadmissibility of evidence obtained in violation of the fourth amendment in *Weeks*, the Court had yet to interpret what constituted a fourth amendment violation.

### 1. The Fourth Amendment's Reasonableness Requirement

The fourth amendment protects persons and their effects from unreasonable searches and seizures.\(^6^8\) In order to distinguish reasonable from unreasonable searches and seizures.\(^6^8\) In order to distinguish reasonable from unreasonable searches and seizures.

\(^6^0\) *Id.* at 617.
\(^6^1\) *Id.* at 618.
\(^6^2\) *Id.* at 634-35.
\(^6^3\) *Id.*
\(^6^5\) *Id.*
\(^6^6\) *Id.* at 386.
\(^6^7\) *Id.* at 398. This restriction on the federal courts was extended to the state courts almost fifty years later in *Mapp v. Ohio*, 367 U.S. 643 (1961), where the Supreme Court held that all evidence obtained in violation of the fourth amendment is inadmissible in any court. *Id.* at 659-60.
\(^6^8\) U.S. CONST. amend. IV. The reasonableness clause first requires a determination of whether a search or seizure has actually occurred. If a search or seizure within the meaning of the fourth amendment has occurred, a second determination must be made concerning the reasonableness of the search or seizure. *See Comment, Employee Drug Testing: Guilty Until Proven Innocent?*, 52 Mo. L. Rev. 625, 635 (1987). The Supreme Court, in *Katz v. United States*, 389 U.S. 347, 350-51 (1967), determined that a search within the meaning of the fourth amendment occurred when the governmental intrusion infringed upon an individual's expectation of privacy. Justice Harlan, in his concurrence, posited a two-part test to determine whether the government's intrusion infringed upon an individual's expectation of privacy.
sonable searches, the Supreme Court developed a standard that balances the government's interests against the intrusion upon an individual's privacy interests. Examples of government interests include crime control and safety. Using the balancing test, the Court weighs the extent of the intrusion on the individual's privacy, whether minimally or highly intrusive, against the government's interest, whether weak or compelling, to determine the reasonableness of the search.

One factor bolstering the reasonableness of a search or seizure is the prior procurement of a warrant. Government officials may obtain search warrants from magistrates only after supplying specific information concerning who or what is to be searched or seized. Significant in the warrant process is the fact that an impartial magistrate determines whether probable cause exists to believe an offense was committed, and whether the offense justifies the search or seizure. Supreme Court precedent favors searches pursuant to warrants because a determination of reasonableness is made prior to the search by a "neutral and detached magistrate" rather than by an interested government official. The Court's preference for the warrant is so strong that a search or seizure executed with only a questionable existence of prob-

First, a person must exhibit an "actual (subjective) expectation of privacy." Id. at 361 (Harlan, J., concurring). There can be no expectation of privacy in "what a person knowingly exposes to the public." Id. at 351 (majority opinion). Second, society must recognize this expectation as reasonable. Id. at 361 (Harlan, J., concurring). What society recognizes as reasonable may differ from person to person—especially in the context of employment, where the courts must balance the intrinsic nature of the occupation and the conditions of employment against the individual's expectation of privacy. For a detailed discussion of the expectation of privacy in relation to drug urinalysis, see Adams, supra note 11, at 1346-52. The Supreme Court has already determined that drug testing, via blood and urine testing, qualifies as a fourth amendment search. See also supra note 6 (discussing government involvement as triggering fourth amendment protection).

69. Terry v. Ohio, 392 U.S. 1, 20-21 (1968) (government interest justifying search must be balanced against the intrusion itself).
71. Terry, 392 U.S. at 20-21. A variation on this balancing test involves protecting against any intrusion "up to the point where the community's need for evidence surmounts a specified standard, ordinarily 'probable cause.' " Winston v. Lee, 470 U.S. 753, 759 (1985), and this is factored into the analysis of the magnitude of intrusion, magnitude being the extent to which the person's safety and/or health is threatened. Id. at 761. The Winston Court set limitations on bodily intrusions. Specifically, the Winston Court refused to allow a state to compel a suspect to undergo surgery for the removal of a bullet of evidentiary value. Id. at 766. Notwithstanding the existence of probable cause, the Court determined that this search was so intrusive and potentially dangerous to human life as to be unreasonable. Id. at 763-66.
72. Fed. R. Crim. P. 4(a)-(c), 41(a)-(c).
73. 2 W.R. LaFave, Search and Seizure § 4.2 (2d ed. 1987).
able cause might, nonetheless, be found reasonable if attended by a warrant.\textsuperscript{75}

2. The Fourth Amendment's Warrant and Probable Cause Requirements

The Supreme Court has long respected the safeguards that the fourth amendment warrant requirement places on searches and seizures.\textsuperscript{76} Because a disinterested federal magistrate or state judge issues the warrant,\textsuperscript{77} the critical decision of whether there is probable cause to search is made by a person whose judgment is not swayed by competing law enforcement goals.\textsuperscript{78} Though the fourth amendment does not define probable cause, the Supreme Court has defined the term as "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information [being] sufficient in themselves to warrant a man of reasonable caution" to believe a crime occurred.\textsuperscript{79} More recently, the Court affirmed a totality of the circumstances analysis for determining probable cause, examining the circumstances surrounding the need for the warrant as well as the basis upon which the knowledge of the circumstances was obtained.\textsuperscript{80} When a search is conducted without a search warrant, however, courts must determine whether the search is otherwise reasonable, and whether exceptions to the warrant requirement otherwise allow for such a search.

II. Judicially Crafted Exceptions to the Warrant and Probable Cause Requirements

The United States Supreme Court has recognized a number of types or methods of searches that do not require a law enforcement officer to obtain a warrant. The Supreme Court has upheld warrantless searches incident to a lawful arrest.\textsuperscript{81} The Court has upheld warrantless searches where exigent

\textsuperscript{75} United States v. Ventresca, 380 U.S. 102, 109 (1965) (citing Jones v. United States, 362 U.S. 257, 270 (1960)).
\textsuperscript{76} See id. at 105-06.
\textsuperscript{77} FED. R. CRIM. P. 41(g).
\textsuperscript{78} Johnson, 333 U.S. at 14.
\textsuperscript{79} Carroll v. United States, 267 U.S. 132, 162 (1925); see also supra note 3 (attempting to define "probable cause").
\textsuperscript{81} Incident to a lawful arrest, both the arrestee's person and the immediate area within the person's control may be searched for weapons and for any evidence of a crime that could potentially be concealed or destroyed. Chimel v. California, 395 U.S. 752, 763 (1969). In \textit{Chimel}, pursuant to an arrest procured by warrant, officers searched petitioner's entire home for stolen coins. At trial, the evidence found was used to convict petitioner of burglary. \textit{Id. at 754}. The \textit{Chimel} Court found the search to be unreasonable and expressly limited searches incident to arrests to the person and immediate area. \textit{Chimel} overruled two earlier cases which
circumstances, such as hot pursuit or imminent destruction of evidence, do not allow for an opportunity to obtain a warrant. The Court has also recognized an automobile exception, a plain view exception, and an exigent circumstances exception.


82. Warden v. Hayden, 387 U.S. 294 (1967) (evidence seized when officers entered house in pursuit of an armed robber held to be admissible). But see Welsh v. Wisconsin, 466 U.S. 740, 754 (1984) (limiting the hot pursuit theory, the Supreme Court held unlawful an officer's warrantless entry into a suspect's home to make an arrest for driving while intoxicated).

83. See Cupp v. Murphy, 412 U.S. 291 (1973). The Supreme Court broadened the hot pursuit exception by creating an exigent circumstance exception. Though not clearly defined through facts of various cases, factors have evolved to create an exigent circumstances portfolio, one factor being the destructibility of evidence. Id. at 296. In Cupp, police took fingernail scrapings from the respondent, over his protest and absent a warrant. The seized scrapings were then used as substantive evidence at trial to convict the respondent of the strangulation murder of his wife. Id. at 292. The Court found that the respondent had a privacy interest in the evidence under his fingernails which, therefore, attached a corresponding constitutional protection subject to the reasonableness requirements of the fourth amendment. Id. at 295; see also 1 W.R. LAFAVE, supra note 3, § 2.6(a), at 459-63. The Court found that seizing the scrapings did not violate the fourth amendment. Cupp, 412 U.S. at 295-96. The Court based its opinion on the rationale in Chimel, maintaining that the existence of probable cause, the ready destructibility of the evidence, and the limited intrusion combined to justify the "police in subjecting [the suspect] to the very limited search necessary to preserve the highly evanescent evidence they found under his fingernails." Id. at 296; see also Schmerber v. California, 384 U.S. 757, 770-71 (1966) (the risk of destruction of evidence combined with the existence of probable cause prompted the Court to uphold the admissibility of a blood test taken at the request of a police officer by a physician at a hospital). The testing permitted in Schmerber exceeded the scope of the fingernail scraping in Cupp because the Court allowed an actual intrusion by a physician into the human body. Id. at 767-68. Previously, an intrusion by police into the human body to retrieve evidence swallowed in their presence was held unreasonable as "conduct that shocks the conscience." Rochin v. California, 342 U.S. 165, 172 (1952) (police forced a solution through a tube into the defendant's stomach to induce vomiting). Because the Court had not yet decided Mapp v. Ohio, 367 U.S. 643 (1961), it was unable to apply the exclusionary rule to the state. However, the Court found a violation of the fourteenth amendment due process clause. Rochin, 342 U.S. at 174; 2 W.R. LAFAVE, supra note 73, § 4.1(d), at 127.

Another factor that the court weighs in applying the exigent circumstances exception is the gravity of the offense. See United States v. Davis, 785 F.2d 610 (8th Cir. 1986) (rape); United States v. Salvador, 740 F.2d 752 (9th Cir. 1984) (bank robbery), cert. denied, 469 U.S. 1196 (1985). The exigent circumstances exception, however, does have limits, as evidenced by Mincey v. Arizona, 437 U.S. 385 (1978), where the Court rejected the Arizona Supreme Court's attempt to create a "murder-scene" exception to the search warrant requirement. Id. at 392-95; see also Thompson v. Louisiana, 469 U.S. 17 (1984) (Court applied Mincey to invalidate the warrantless search of the defendant's house). For a catalogue of pertinent factors used in determining whether exigent circumstances exist, see Dorman v. United States, 435 F.2d 385 (D.C. Cir. 1970).


ception based on consent from the person being searched. The Court, furthermore, has exempted from the warrant requirements the investigative stop and frisk, border searches, inventory searches, and administrative searches of closely regulated industries. The administrative search exception evolved from building inspections and now covers personnel inspections.

87. Terry v. Ohio, 392 U.S. 1 (1968). The "stop" and "frisk", is a distinct law enforcement technique with characteristics different from standard practices like arrest and search in that the stop and frisk involves a brief stop for questioning and a limited search for dangerous weapons. 3 W.R. LaFave, Search and Seizure § 9.1(a), at 333-34 (2d ed. 1987). In Terry, an officer observed three men acting in a manner that led him to suspect that a burglary or possible robbery plan was in progress. Terry, 392 U.S. at 5-7. The officer approached the three men to question their unusual actions. Id. at 6. Their response caused the officer to grab petitioner Terry and pat the outside of his clothing in search of weapons. Id. at 7. The Court held that a frisk was reasonable within the meaning of the fourth amendment if an officer possessed reasonable suspicion of ongoing criminal activity and the possibility existed that the person was "armed and presently dangerous." Id. at 30-31. Under these circumstances, the officer need not have had probable cause to believe that the person frisked had committed or was committing a crime; the officer need only have had a reasonable articulable suspicion. Id. at 27. This was the first step away from a probable cause requirement and toward the lesser requirement of particularized suspicion. The Terry Court, however, only authorized a frisk for weapons, and not for evidence. Id. at 25-26, 29.
88. United States v. Montoya de Hernandez, 473 U.S. 531 (1985). The border search exception includes brief, routine stops at permanent checkpoints away from the border, United States v. Martinez-Fuerte, 428 U.S. 543 (1976), even as far away as sixty-six miles, United States v. Ortiz, 422 U.S. 891 (1975). The border search exception allows a brief investigative stop without a warrant or even reasonable suspicion, but further detention or search requires probable cause or consent. United States v. Brignoni-Ponce, 422 U.S. 873 (1975). In Montoya de Hernandez, pursuant to the border search exception, customs officials detained a woman suspected of carrying narcotics in her alimentary canal. Montoya de Hernandez, 473 U.S. at 534-35. During the more than sixteen hours customs officials detained her, she was taken to a hospital, given a pregnancy test, and a physician conducted a rectal examination which revealed balloons filled with narcotics. Id. at 535. Montoya de Hernandez illustrates the parameters of warrantless bodily intrusions. Id. at 545 (Brennan, J., dissenting).
A. The Historical Development of the Administrative Search Exception

1. Residential and Commercial Building Inspections

Judicial scrutiny of warrantless administrative searches developed predominantly in the context of residential and commercial building codes. Although some codes required the inspector to obtain a search warrant when refused admittance, many codes did not require the inspector to obtain a warrant under any circumstances. The Supreme Court initially addressed the constitutionality of these warrantless searches in Frank v. Maryland. In Frank, a Baltimore health official, acting on a complaint by a neighbor, investigated allegations of rat infestation. The health official found evidence of rats around Frank's home, prompting the official to ask Frank for permission to inspect his basement. Frank refused, in violation of the Baltimore City Code, and was convicted for resisting an inspection. Frank challenged the constitutionality of his conviction. The Frank Court held that the City Code, which required that the inspector get permission from the occupier or owner to search the premises, yet which imposed a fine for resisting entry by health officials, did not violate Frank's constitutional protection against official intrusion. The Court based its ruling on several factors. First, the Court reasoned that the building inspector was not seeking evidence for criminal prosecution, thus, Frank was not invoking the Fifth Amendment protection against self-incrimination. Next, the Court found that the Frank inspection was designed solely for the protection of the community's health. The Court refused to acknowledge a Fourth Amendment protection against government intrusion when the intrusion was to maintain minimum community standards of health. Finally, the Court determined

92. See United States v. Biswell, 406 U.S. at 311-12 (Gun Control Act of 1968 authorized officials to enter pawn shop to inspect records and firearms).
93. See 3 W. R. LaFave, supra note 87, § 10.1, at 597-98 (housing codes set minimum standards for habitability by requiring proper maintenance of such things as lighting, ventilation, sinks and toilets, heating, and elimination of rodents; see also Note, Municipal Housing Codes. 69 Harv. L. Rev. 1115, 1116-17 (1956) (discussing the function of housing codes). The success of enforcement depends on the effectiveness of the inspection system. Id. at 1124.
94. See Note, supra note 93, at 1125.
96. Id. at 361.
97. Id.
98. Id. at 361-62.
99. Id. at 362.
100. Id. at 361, 366-67.
101. Id. at 366.
102. Id.
that the inspection was executed in a reasonable manner. The municipal code strictly limited the manner of inspection, requiring inspections to be conducted during convenient hours of the day, and prohibiting investigators from making forcible entries. The Court placed great weight on the regulation's requirement that valid grounds for suspicion of code violations exist before entry may be requested. The Court left unanswered whether or not "valid grounds for suspicion" equated to probable cause.

In *Camara v. Municipal Court*, the Supreme Court clarified that probable cause is not the sine qua non for an administrative search. In *Camara*, a housing inspector entered an apartment building to make a routine annual inspection, pursuant to the San Francisco Housing Code. The building's manager informed the housing inspector that Camara, a resident, occupied a portion of the ground floor in violation of the building's occupancy permit. Similar to the facts in *Frank*, the housing inspector, without a warrant, demanded entry to inspect Camara's residence, and Camara refused. The Division of Housing Inspection of the San Francisco Department of Public Health filed a complaint against Camara charging him with violating the Housing Code by refusing the inspector's entry. At trial, Camara argued that the Housing Code violated the fourth amendment by authorizing the inspector's warrantless search. The Court employed a balancing test to assess the validity of the administrative search, ultimately finding that the inspector's reasonable belief that a code violation existed justified his limited intrusion. The Court, however, overruled its earlier decision in *Frank*, holding that in the absence of an emergency, when

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103. Id. at 366-67.
104. Id.
105. Id. at 366. The Court found that a half-ton pile of filth constituted reasonable grounds for suspicion. Id. at 361, 366.
107. Id. at 539.
108. Id. at 525-26.
109. Id. at 526.
110. Id.
111. Id. at 526-27.
112. Id. at 527 & n.2.
113. Id. at 533. The Court used a balancing test similar to the one propounded in *Terry v. Ohio*, 392 U.S. 1 (1968). For discussion of the *Terry* balancing test, see *supra* notes 68-71 and accompanying text.
114. *Camara*, 387 U.S. at 528.
115. For discussion of some recognized emergency situations allowing for warrantless search, see *supra* notes 82-83.
the owner or occupant refused to consent to the inspector's entry, the fourth amendment required the inspector to obtain a search warrant.

Historically, commercial as well as residential buildings have been subject to administrative inspections to ensure compliance with fire, health and safety regulations. In 1972, the Court appeared to settle the constitutionality of administrative searches in business settings by upholding the inspection of a licensed gun dealer's storeroom in United States v. Biswell. In Biswell, a Federal Treasury agent visited the dealer's pawn shop to inspect records and the firearms storeroom, as authorized by federal law. As in previous administrative inspections, the agent did not have a warrant. The agent, however, told the dealer that federal law authorized the inspection. As a result, the dealer allowed the agent's entry into a locked gun storeroom. The agent discovered guns that the dealer was not licensed to possess. Subsequently, the government used the guns as evidence to indict and convict Biswell.

While the Court found that federal regulation of firearms was not as deeply rooted as the regulation of other industries, the Court acknowledged that federal firearm regulation was of central importance in effecting certain governmental interests. Specifically, the Court found that the federal agent's intrusion constituted a minimal threat to the dealer's expectation of

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116. The Court has not been offered the opportunity to determine whether consent to an administrative search shall be judged under the same strict factors as consent to a criminal search. See 3 W.R. LAFAVE, supra note 87, § 10.1(f), at 621.
117. Camara, 387 U.S. at 540.
119. 406 U.S. 311 (1972). Note that in previous cases dealing with warrantless administrative inspections on business premises, the Supreme Court skirted the fourth amendment issue by basing its decisions on other grounds. See Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970) (search based on forcible entry into liquor storeroom exceeding congressionally authorized statutory inspection found invalid); Davis v. United States, 328 U.S. 582 (1946) (search of gasoline station for ration coupons based on consent where law required ration coupons be available for inspection at business premises held valid).
120. Biswell, 406 U.S. at 311-12; see Gun Control Act of 1968, Pub. L. No. 90-618, §§ 921-928, 82 Stat. 1213 (codified as amended at 18 U.S.C. §§ 921-928 (1988)). The Gun Control Act of 1968 authorizes the Secretary of the Treasury or his delegate to enter the premises or storage areas of firearms dealers during business hours to inspect the dealers' records or the firearms themselves. Id. §§ 921(a)(18), 923(g), 82 Stat. 1216, 1223 (codified as amended at 18 U.S.C. §§ 921(a)(18), 923(g) (1988)).
122. Biswell, 406 U.S. at 312.
123. Id.
124. Id. at 312-13.
125. Id. at 315.
privacy because the firearms industry is heavily regulated. The Court stated that by "choos[ing] to engage in this pervasively regulated business," the dealer knowingly subjected his premises to inspection. Moreover, the Court found compelling governmental interests in preventing violent crimes and in controlling the sale of firearms; these interests outweighed the limited intrusion on the firearm dealer's privacy. The Biswell Court concluded that requiring compliance with the warrant requirement of the fourth amendment would vitiate the effectiveness of the inspection program by restricting the flexibility of frequent, unannounced inspections. Therefore, the Court upheld the warrantless inspection as specifically authorized by statute.

The Court revisited the constitutionality of warrantless administrative inspections in the context of Occupational Safety and Health Act (OSH Act) regulations. In *Marshall v. Barlow's Inc.*, the OSH Act provision at issue allowed the Secretary of Labor broad discretion to search, at any reasonable time, any place in any factory, plant, construction site, or work environment. The Court determined that such a provision violated the spirit of the fourth amendment. The Court distinguished *Barlow's* from *Colonnade* and *Biswell*, finding that the effectiveness of the inspection program would not be vitiated by requiring OSHA inspectors to obtain warrants prior to administrative searches.

Just as the *Barlow's* Court distinguished *Colonnade* and *Biswell*, the Court in *Donovan v. Dewey* refined the *Barlow's* holding. In *Dewey*, the Supreme Court upheld a warrantless administrative inspection authorized by the Federal Mine Safety and Health Act of 1977 (Mine Safety Act). As in

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126. *Id.* at 316.
127. *Id.*
128. *Id.* at 317.
129. *Id.* at 316-17.
130. *Id.* at 317.
133. Occupational Safety and Health Act of 1970 § 8(a) (codified as amended at 29 U.S.C. § 657(a)).
135. *Id.* at 313. *But see 3 W.R. LaFave, supra* note 87, § 10.2(c), at 639-41 (explaining how the Court erroneously developed its distinguishing analysis of *Colonnade* and *Biswell*).
138. *Id.* at 603.
139. *Id.* at 606; see Federal Mine Safety and Health Act of 1977, Pub. L. No. 95-164, § 103, 91 Stat. 1290, 1297 (codified as amended at 30 U.S.C. § 813 (1988)). The Mine Safety Act provides for a minimum of four inspections per year for underground mines, and a mini-
Biswell, the Court determined that the fourth amendment warrant requirement frustrated the effectiveness of the Mine Safety Act. The Court justified its decision in Dewey by distinguishing the statute in Barlow's, which allowed total discretion as to the parameters of the search. The statute in Dewey, by contrast, provided for a rigid, narrow statutory inspection scheme.

In New York v. Burger, the Court continued abrogating the fourth amendment warrant-probable cause requirement in the administrative context. In Burger, the Court upheld a warrantless inspection of the defendant's junkyard by five Auto Crimes Division officers, effected pursuant to a New York statute. The Court held that, in light of junkyard regulation and the history of regulation of related industries, the statute authorizing warrantless administrative inspections was valid. Moreover, the Court held that states could use administrative programs in conjunction with their criminal statutes to deal with major social problems, such as automobile theft, and that these administrative searches were not unconstitutional simply because administrative agents found evidence of crime during the search.

2. Personnel Inspections: Drug Testing of Employees

The administrative search exception, which arose from building inspections, now encompasses employee drug testing. The military was the forerunner in personnel drug testing programs, and the United States Court of Military Appeals reaffirmed the constitutionality of the testing in Unger v. Ziemniak. After weighing the intrusion to the individual of the procedure against the government's compelling need to maintain a ready military

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140. Donovan, 452 U.S. at 602-03.
141. Id. at 603.
142. Id.
144. Id.
145. Id. at 693-94, 708-12.
146. Id. at 706-07, 712.
147. Id. at 708-10.
148. Id. at 716-17.
149. Drug testing of employees is also a common occurrence within the sports industry. See Wong & Ensor, Major League Baseball and Drugs: Fight the Problem or the Player?, 11 NOVA L. J. 779 (1987); see also O'Halloran v. NCAA, 856 F.2d 1375 (9th Cir. 1988) (student athlete sought to enjoin state university's drug testing program).
150. 27 M.J. 349 (C.M.A. 1989).
force, the court held that compulsory urinalysis was reasonable within the
meaning of the fourth amendment.151 The court had previously acknowled-
ged that the drug abuse problem in the military seriously affected not only
the "health, morale and fitness for duty of persons in the [a]rmed [f]orces,"152 but also placed the United States at a serious military and geo-
political disadvantage.153 The military court cautioned, however, that
although compulsory urinalysis may be constitutional, the manner in which
it is performed could still violate the fourth amendment's reasonableness
requirement.154

With few exceptions, the state and federal courts require reasonable suspi-
cion to validate the blood and urinalysis testing of both public and private
sector employees.155 The United States Court of Appeals for the Third Cir-
cuit created an exception, however, in Shoemaker v. Handel.156 Shoemaker
involved New Jersey Racing Commission regulations permitting drug testing
of jockeys, trainers, grooms and track officials.157 In Shoemaker, the Third
Circuit applied the administrative search exception and upheld random
urinalysis even where the State Racing Steward had no reasonable suspicion
of employees' drug or alcohol use.158 The basis of the court's decision was
that, because the horse racing industry is heavily regulated, the employees in
the industry are subject to, and expect, a reduced privacy interest.159 The
court recognized that when jockeys become involved in horse racing, they
implicitly consent to the drug testing based on their knowledge that state

151. Id. at 357. The military court further stated, however, that "the military community
is not necessarily subject to the same limitations that would be applicable in the civilian soci-
ety." Id. at 357 n.17.

Williams, 8 U.S.C.M.A. 325, 327, 24 C.M.R. 135, 137 (1957)).

153. Id.

154. Id. at 358; see also United States v. Middleton, 10 M.J. 123, 127 (C.M.A. 1981)
(unique condition of the military may not apply to the fourth amendment safeguards). For
other examples of compulsory urinalysis found reasonable within fourth amendment require-
ments, see Committee for G. I. Rights v. Callaway, 518 F.2d 466 (D.C. Cir. 1975) (upholding
compulsory urinalysis of Army personnel in Europe); Murray v. Haldeman, 16 M.J. 74
(C.M.A. 1983) (upholding compulsory urinalysis of all military personnel attending an appren-
tice school at the Naval Damage Control Training Center).

155. See, e.g., Amalgamated Transit Union, Local 1277 v. Sunline Transit Agency, 663 F.
Supp. 1560 (C.D. Cal. 1987) (reasonable suspicion required to test bus drivers); Feliciano v.
City of Cleveland, 661 F. Supp. 578 (N.D. Ohio 1987) (individualized suspicion required to
test police officers); Capua v. City of Plainfield, 643 F. Supp. 1507 (D.N.J. 1986) (same for
firemen and policemen).


157. Id. at 1137.

158. Id. at 1142.

159. Id. at 1138, 1144.
licensing requires such testing. In addition, the Third Circuit found that the state had a strong interest in maintaining the integrity of the horse racing industry. Thus, the court determined that the balancing test required by the fourth amendment favored the government's warrantless administrative search.

In another context, the United States Court of Appeals for the Eighth Circuit endorsed random drug testing without requiring a showing of reasonable suspicion. In Rushton v. Nebraska Public Power District, the court upheld drug testing of private employees who had access to protected areas in a nuclear power plant. The court determined that between the employees' reduced expectation of privacy by virtue of employment in the heavily regulated nuclear power industry, and the significant public safety concerns present, a search did not call for a reasonable suspicion requirement.

The administrative search exception, having been found to encompass a broad array of building, work premises, and personal body searches, still did not adequately cover searches of more recent controversy, namely, searches for "special needs." These special needs included such things as searching students for items detrimental to an appropriate learning environment, and searching hospital offices to maintain supervision over medical doctors. In response, the Supreme Court created a further exception to the warrant and probable cause requirements.

B. The Special Needs Exception

An additional exception to fourth amendment warrant and probable cause requirements is the special needs exception. This exception developed in

160. Id. at 1142.
161. Id.
162. 844 F.2d 562 (8th Cir. 1988).
163. Id. at 562.
164. Id. at 566-67. Additionally, the court reasoned that testing was used to determine fitness, not to find evidence for criminal prosecution. Id. In another Eighth Circuit case, the court held that state corrections officers could demonstrate the same need, therefore justifying the use of uniform or systematic random searches without the predicate of reasonable suspicion. McDonell v. Hunter, 809 F.2d 1302 (8th Cir. 1987). The Fifth Circuit also upheld the constitutionality of uniform drug testing without a showing of reasonable suspicion in National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), aff'd in part. 489 U.S. 656 (1989) (The Supreme Court affirmed the portion of the Fifth Circuit's decision which upheld drug testing of employees in positions requiring direct contact with illegal drugs or positions requiring the carrying of firearms, but it vacated the portion of the Fifth Circuit's decision which upheld drug testing employees in positions handling "classified" material.). The Fifth Circuit deemed such searches reasonable because the intrusion was minimal. Id. at 177. Also relevant to the court's analysis was the fact that employees could choose not to seek transfers to sensitive jobs and thereby avoid any drug testing scheme altogether. Id. at 178.
New Jersey v. T.L.O.,165 as the result of a school official's search of a student's purse.166 In T.L.O., a high school teacher discovered a student smoking cigarettes in a school lavatory, in violation of a school regulation.167 When questioned by the assistant vice principal, the student denied the incident.168 The assistant vice principal searched the student's purse, finding cigarettes as well as paraphernalia commonly associated with marijuana.169 Upon finding this evidence, the assistant vice principal searched the purse more thoroughly and found evidence implicating the student in marijuana dealing.170 The student challenged the search as violative of the fourth amendment.171 The United States Supreme Court, however, held the search to be reasonable within the meaning of the fourth amendment.172

The Court based its reasonableness determination on the circumstances surrounding the search.173 The Court assessed both the reasonableness of the search at its inception, and the reasonableness of the intrusion in relation to the purpose that initially justified the search.174 The Court stated that ordinarily, a search would be justified at its inception when the school official possesses reasonable grounds to believe that the search will uncover evidence of a student's violation of either the law or school regulations.175 In striking a balance between the student's expectation of privacy and the school's need to maintain an appropriate learning environment, the Court determined that the school's need must prevail.176 Therefore, the Court concluded that school officials needed neither a warrant nor probable cause to effect such a search.177

Justice Blackmun's concurrence in T.L.O attempted to clarify the specific circumstances which allowed dispensing with the warrant and probable

166. Id.
167. Id. at 328.
168. Id.
169. Id.
170. Id.
171. Id. at 329.
172. Id. at 347-48.
173. Id. at 345-47. The Court relied on Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967), to determine the standard by which to test the reasonableness of the search. T.L.O., 469 U.S. at 337. The Court created this standard by balancing the need for the search against the intrusion. Id.
174. T.L.O., 469 U.S. at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
175. Id. at 342.
176. Id. at 340.
177. Id. The Court cited to Camara, 387 U.S. at 532-33, in determining that the additional burden upon school officials to obtain a warrant prior to searching the student would frustrate the school's purpose behind the search. T.L.O., 469 U.S. at 340.
cause requirements. Justice Blackmun stated that "[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."  

Several years after *T.L.O.*, the Supreme Court again considered the special needs exception in *O'Connor v. Ortega*. In *O'Connor*, state hospital officials accused a doctor managing the psychiatric residency program of possible improprieties. Hospital officials placed the doctor on administrative leave pending their investigation. Incident to the officials' investigation, hospital personnel searched the doctor's office, desk, and file cabinets, seizing both personal and official property. Following completion of the investigation, hospital officials dismissed the doctor. Thereafter, the doctor filed an action against the hospital officials, alleging that the search violated his fourth amendment rights.

The United States Court of Appeals for the Ninth Circuit reversed the lower court's finding of a lawful search on the grounds that the search violated the fourth amendment. The Supreme Court reversed and remanded, emphasizing that the issue of whether public employees have a reasonable expectation of privacy in their workplace must be addressed under the specific circumstances of each case. The Court acknowledged that while, generally, a warrantless search is per se unreasonable, circumstances exist that do not require officials to obtain a warrant prior to a search. The Court, relying on *Camara v. Municipal Court*, found that "[i]mposing unwieldy warrant procedures" on the doctor's supervisors in *O'Connor* "would be unduly burdensome," and would frustrate the original reasons for the search. Additionally, the Court relied on Justice Blackmun's concurring opinion in *T.L.O.*, which illustrated the special needs ex-

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179. Id.
182. Id. at 712-13.
183. Id. at 713.
184. Id.
185. Id. at 714.
186. Id.
187. Id. at 715-16.
188. Id. at 720 (citing New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring); Camara v. Municipal Court, 387 U.S. 523, 533 (1967)).
ception to the warrant requirement, to determine that the facts in O'Connor supported application of the same exception. Specifically, the Court stated that there are "special needs, beyond the normal need for law enforcement, [that] make the warrant and probable-cause requirement impracticable." Having determined that the search required neither a warrant nor probable cause, the Court remanded to the United States District Court for the Northern District of California to determine the reasonableness of the search. Further, the Court instructed the district court to judge the reasonableness of the search's inception and scope by looking at the totality of circumstances.

Only three months after O'Connor, the Supreme Court had an opportunity to create yet another special needs exception. In Griffin v. Wisconsin, the issue concerned a state probation department regulation allowing probation officers to search a parolee's home without a warrant or probable cause, provided the officer had supervisory approval and reasonable grounds to believe the home contained contraband. The probation officer in Griffin received information from a police detective indicating that the parolee possessed firearms in his apartment in violation of probation regulations. The probation officer searched the parolee's apartment and seized a gun, which was used as evidence to convict the parolee of felony possession of firearms.

The United States Supreme Court affirmed the Wisconsin Supreme Court's decision upholding the reasonableness of the search. The Court

190. Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 351 (1985) (Blackmun, J., concurring)). Ironically, Justice Blackmun, who penned the special needs exception in T.L.O., dissented from the opinion and judgment in O'Connor. 480 U.S. at 732 (Blackmun, J., dissenting). In summary, Justice Blackmun found that in the O'Connor case, there was no special need, and therefore, the investigatory search should have been evaluated under the traditional standard set by the warrant and probable cause requirements of the fourth amendment. Id. at 732-33.

191. Id. at 729.

192. Id. The Court relied on the Terry two part test to establish this standard of reasonableness. See Terry v. Ohio, 392 U.S. 1, 20 (1968).


194. Id. at 870-71. Cf. Wyman v. James, 400 U.S. 309, 317-18 (1971) (the Court found that a warrantless visit by a caseworker to a welfare benefactor's home did not constitute a search within the meaning of the fourth amendment). In Wyman, even assuming that there had been a search, the Court would have found it reasonable. Id. at 318-24. The Court reasoned that the visit was permissible because it was made by a caseworker for purposes other than criminal investigation. Id. at 323. Compare Wyman, 400 U.S. 309 (1971) with Goldberg v. Kelly, 397 U.S. 254, 262 (1970) (Goldberg, decided just prior to Wyman, held that the government could not require a recipient of government benefits to waive his constitutional rights). See also 3 W.R. LAFAVE, supra note 87, § 10.3(a), at 670-71 (discussing Wyman).

195. Griffin, 483 U.S. at 871.

196. Id. at 871-72.
based its decision on the special needs of the probation system.197 The Court stated that in supervising parolees, probation officers should not be burdened by warrant constraints when protecting the community from parolees who are in violation of their rehabilitation programs.198 Further, the Court acknowledged that the special needs of the probation system justified dispensing with the probable cause requirement. The Court's finding first centered on the fact that the probation regulation contained factors to consider in determining whether the officer had reasonable grounds to believe a probation violation occurred. Second, the Court found that the regulation provided a sufficient substitute for a neutral magistrate’s determination of probable cause.199

The Court's next opportunity to revisit the special needs exception occurred in the context of a mandatory employee drug testing program. The Court addressed the constitutionality of railroad regulations mandating post-accident drug tests of employees in *Skinner v. Railway Labor Executives’ Association*.200

III. *SKINNER v. RAILWAY LABOR EXECUTIVES’ ASSOCIATION: THE SUPREME COURT REVISITS THE SPECIAL NEEDS EXCEPTION*

In 1970, Congress enacted the Federal Railroad Safety Act,201 which empowered the Secretary of Transportation to regulate “all areas of railroad

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197. *Id.* at 873-74. The Court compared the operation of the probation system to the operation of a school, government office or prison, and supervision of a regulated industry, in finding special needs beyond normal law enforcement. *Id.* at 873. Despite this comparison, the special needs cases thus far decided involve only the special needs in operating schools, government offices, and now prisons (probation systems). See *O’Connor v. Ortega*, 480 U.S. 709, 720 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 351 (1985) (Blackmun, J., concurring).


199. *Id.* at 878-79.

200. 489 U.S. 602 (1989). The same day, the Supreme Court decided the companion case *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989), which involved the implementation of a drug testing program for customs employees to be placed in positions requiring direct involvement in drug interdiction, the carrying of firearms, or the handling of classified material. *Id.* at 660-61. The Court affirmed the portion of the United States Court of Appeals for the Fifth Circuit’s decision upholding drug testing employees in positions of direct drug interdiction or positions requiring the carrying of firearms. *Id.* at 664-65.

safety”202 through investigations, inspections, and the testing of railroad equipment, operations, and personnel.203 Subsequently, the Secretary of Transportation delegated this authority to the Administrator of the Federal Railroad Administration (FRA).204 Through this delegation of power, the FRA promulgated numerous safety regulations for the railroad industry.205 Most recently, the FRA promulgated regulations providing for mandatory post-accident drug testing and testing upon reasonable suspicion of drug abuse or violation of certain railroad operating rules.206 These regulations provide for drug testing of railroad employees through blood and urinalysis tests.207

In *Skinner v. Railway Labor Executives' Association*,208 the Railway Labor Executives' Association (RLEA)209 filed suit in the United States District Court for the Northern District of California to enjoin the implementation of the FRA’s employee drug testing regulations.210 The RLEA challenged the regulations on various statutory and constitutional grounds.211 The district court found merit only in the RLEA’s fourth amendment challenge, however, and granted summary judgment for the Secretary of Transportation.212

The RLEA appealed the district court’s decision to the United States Court of Appeals for the Ninth Circuit, where a divided panel reversed the

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203. Id. § 208 (codified at 45 U.S.C. § 437(a)).
204. 49 C.F.R. § 1.49 (1989).
205. See, e.g., 49 C.F.R. §§ 218.1-218.30 (1989) (prescribing safety procedures when co-workers are on rail tracks); id. § 218.37 (prescribing safety procedures when trains run at reduced speed); id. § 220.61 (prescribing safety procedures for transmitting or receiving orders); see also *Railway Labor Executives' Ass’n v. Burnley*, 839 F.2d 575, 593 (9th Cir. 1988) (Alarcon, J., dissenting) (discussing railroad regulations), *rev’d sub nom. Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602 (1989).
206. 49 C.F.R. § 219; see *supra* notes 19-21 and accompanying text.
207. 49 C.F.R. § 219.
209. See *supra* note 22 and accompanying text.
lower court. The Ninth Circuit declared that the regulations violated the fourth amendment on two grounds. First, the court asserted that a particularized suspicion of drug or alcohol impairment is essential for post-accident toxicological testing to be justified at its inception. Second, the Ninth Circuit found that use of blood and urine tests to establish drug use was not reasonably related to the government's purpose for the tests because the tests could not measure current employee drug or alcohol impairment. The government appealed, and the United States Supreme Court granted certiorari.

The Supreme Court reversed the Ninth Circuit, determining that warrantless drug testing of railroad employees without probable cause or particularized suspicion was reasonable within the meaning of the fourth amendment. The Court examined the history of search and seizure jurisprudence, mapped out the warrant and probable cause exceptions, and then extracted pieces from each area of search and seizure law to create yet another “special needs” exception to the fourth amendment search warrant-probable cause requirement.

A. The Majority: Expanding the Special Needs Exception to Persons

Justice Kennedy, writing for the majority, first reviewed the constitutionality of the FRA's drug testing regulations by considering whether the FRA regulations amounted to governmental action sufficient to trigger fourth amendment protections. The Court determined that the government's participation in the creation of these regulations was sufficient to raise fourth amendment concerns.

The Court then looked to whether the blood and urinalysis testing constituted a fourth amendment search. The majority acknowledged the unanimity among the United States Courts of Appeals that urine tests "intrude[] upon expectations of privacy that society has long recognized as

213. *Burnley*, 839 F.2d at 575.
214. *Id.* at 587.
215. *Id.* at 588.
219. *Id.* at 619-25.
220. *Id.* at 620.
221. *Id.* at 614.
222. *Id.* at 615-16. The Court noted that the government regulations removed all legal barriers to the railroads testing their employees under subpart D. Additionally, the government both encouraged testing and prohibited railroads from bargaining away subpart D testing. *Id.* at 615. For an explanation of subpart D, see *supra* note 19.
223. *Skinner*, 489 U.S. at 616; see *supra* note 6 and accompanying text.
reasonable. 224 Therefore, the Supreme Court declared that the testing required by the FRA regulations constituted a search within the meaning of the fourth amendment. 225 Moreover, relying on its own precedent, the Court reaffirmed its characterization of blood and breath tests as fourth amendment searches. 226

Next, the majority reviewed the fourth amendment's prohibition against unreasonable searches. 227 The Court recognized that, because the fourth amendment forbids only unreasonable searches, an examination of the reasonableness of FRA prescribed searches was required. 228 The Court established that normally, the reasonableness test necessitates a balancing between an individual's privacy interest and the government's interest in the search. 229 Justice Kennedy observed that in criminal cases this balancing typically requires that a warrant, based upon probable cause, be issued prior to a search. 230 In Skinner, however, the Court determined that, although the government's search lacked both the warrant and probable cause requirements, the search was still reasonable. 231

In making its reasonableness determination, the Court applied the newest exception to the warrant and probable cause requirements: the special needs exception. 232 The Court noted that it previously had recognized that in some cases "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.' " 233 In

224. Skinner, 489 U.S. at 617.
228. Id.
229. Id.
230. Id.
231. Id. at 634. While Justice Scalia joined Justice Kennedy's opinion in Skinner, he dissented from Justice Kennedy's opinion in the companion case, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), finding that the customs employees drug testing program was an unreasonable search. Id. at 680-87 (Scalia, J., dissenting). Justice Scalia considered the Skinner search to be a less intrusive bodily search. Id. at 680. Further, he found the drug testing program reasonable based upon a demonstrated drug problem among covered railroad employees and upon a demonstrated connection between the drug problem and harm to society. Id.
232. Skinner, 489 U.S. at 620-21; see supra notes 165-200 and accompanying text.
applying the special needs exception to the facts in *Skinner*, the Court found that many railroad employees are engaged in safety sensitive tasks. If these tasks were performed by chemically impaired employees, then the results would directly affect the employees themselves and the traveling public. Therefore, the majority extended the special needs exception to include the need for a safe railroad transportation program.

In addition, the majority relied on its decision in *Camara v. Municipal Court* to assert that a warrant is dispensable where it frustrates the purpose behind the search. The Court determined that, where blood, urine, and breath tests must be taken as soon as possible to preserve evidence in the bloodstream, warrant requirements significantly hinder governmental testing. The majority concluded that the certainty and regularity of testing prescribed by the FRA regulations ensured adequate fourth amendment safeguards without the requirement of a warrant.

After dispensing with the warrant requirements, the Court examined the FRA’s regulations requiring that searches be based on reasonable suspicion rather than on the more stringent probable cause standard. While the majority acknowledged that in some situations the balancing of interests precludes application of the probable cause requirement, the Court noted that some reasonable suspicion requirement still exists in order for the search to system); *O’Connor v. Ortega*, 480 U.S. 709 (1987) (efficient workplace); *T.L.O.*, 469 U.S. at 341 (orderly maintained school system).

235. *Id.*
236. *Id.* at 621. Justice Kennedy cited two additional cases in supporting his special needs exception: New York v. Burger, 482 U.S. 691 (1987), and Bell v. Wolfish, 441 U.S. 520 (1979). These two cases, however, do not conform to the special needs criteria. *Burger*, involving an inspection of a junkyard, was decided based on the theory of a highly regulated industry and falls within the administrative inspection search category. *Burger*, 482 U.S. at 689-703. *Wolfish*, concerning a body cavity search of prison inmates, contemplated whether the visual body-cavity inspection could “ever be conducted on less than probable cause.” *Wolfish*, 441 U.S. at 560. The *Wolfish* Court balanced the prison’s security interests against the inmates’ privacy interests and concluded the inspection could be conducted. *Id.* Additionally, the Court found that, although prison inmates do not relinquish their constitutional rights at the prison gates, nonetheless, these rights may acquire certain restrictions and limitations required by the penal system. *Id.* at 545-46.

240. *Id.* at 624. But compare this rationale with Justice Kennedy’s subsequent comments on the deterrent nature of the drug testing. Justice Kennedy found the drug testing a significant deterrent to drug and alcohol use partly due to the unpredictability of events triggering the drug testing. *Id.* at 630; see also infra notes 281-82 and accompanying text.
be reasonable. After stating this maxim, however, the Court required a quantum of evidence less than reasonable suspicion. The majority asserted that, where the privacy interest threatened by the search is minimal and the government’s interest in the search compelling, the search, absent even reasonable suspicion, is legally permissible.

Weighing the privacy interest against the government’s interest in Skinner, the Court opined that several factors minimized the railroad employees’ privacy interest. First, Justice Kennedy noted that the individual railroad employee’s expectation of privacy was diminished because the employee chose to work in a highly regulated industry. Second, the Court asserted that the challenged regulation, in part, assured the health and fitness of the employees. Not only did the government have a great interest in public safety, the Court reasoned, but public safety also was intimately dependent on the health and fitness of the employees.

Justice Kennedy analogized the FRA regulations’ drug testing procedures to a fire scene investigation. Justice Kennedy noted that the “prompt investigation [for] the cause[] of a fire may uncover continuing dangers and thereby prevent the fire’s recurrence.” Likewise, the Court asserted, the FRA drug testing procedures provide one means of investigating the cause of major railroad accidents and may uncover continuing dangers resulting from drug-impaired employees, thereby preventing additional railroad accidents. In addition, the Court reasoned by extrapolation that test results indicating a lack of employee drug or alcohol impairment would help the

243. Id.
244. Id. Justice Kennedy cited to United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976), when stating that the fourth amendment imposes no minimal requirement of reasonable suspicion. Skinner, 489 U.S. at 624. The Martinez-Fuerte Court, however, limited its holding to the specific facts of the case: a brief questioning of a vehicle occupant at a permanent border checkpoint, no personal contact, and the checkpoint was operating under a magistrate’s warrant of inspection. Martinez-Fuerte, 428 U.S. at 546-47, 567. Additionally, the Martinez-Fuerte Court found that “‘[a]ny further detention . . . must be based on consent or probable cause.’” Id. at 567 (quoting United States v. Brignoni-Ponce, 422 U.S. 873, 882 (1975)).
245. Skinner, 489 U.S. at 627.
246. Id.
247. Id. at 627-28. Agency research indicates that impaired employees can seriously threaten public safety long before supervisors, or even physicians, observe any signs of physical impairment. Thus, drug testing without particularized suspicion is crucial for effecting such a safety program. Id.; see 50 Fed. Reg. 31,526 (1985).
249. Id. (citing Michigan v. Tyler, 436 U.S. 499, 510 (1978)).
250. Id.
industry establish the probability of equipment failure or other potential causes for accidents.\textsuperscript{251}

Finally, the Court recognized that, while FRA regulations detect employee drug and alcohol impairment, the regulations also help to deter drug and alcohol use.\textsuperscript{252} The majority found that the dismissal sanction for using drugs or alcohol on duty, coupled with the unpredictable timing for employee testing, greatly deterred on-the-job impairment.\textsuperscript{253} In summary, the Court determined that "[t]he Government may take all necessary and reasonable regulatory steps to prevent or deter" impaired performance of sensitive tasks that threaten public safety.\textsuperscript{254} In particular, the Court endorsed steps that included submitting employees to body fluid searches in order to protect the government's interest in reducing drug use by railroad personnel.\textsuperscript{255}

B. The Dissent: Rejecting the "Patchwork" \textsuperscript{256} Special Needs Exception

Justice Marshall, joined by Justice Brennan, rejected the majority's recognition of a special needs exception to the warrant and probable cause requirements for the drug testing of railroad employees.\textsuperscript{257} Justice Marshall envisioned the majority's special needs exception as potentially permeating every protected area under the fourth amendment.\textsuperscript{258} Justice Marshall

\begin{itemize}
\item \textsuperscript{251} Id.
\item \textsuperscript{252} Id. at 632.
\item \textsuperscript{253} Id. at 629-30. Justice Stevens, however, rejected the deterrence rationale. Id. at 634 (Stevens, J., concurring in part and concurring in judgment). In his concurring opinion, Justice Stevens noted that few railroad employees go to work with the expectation that a catastrophic accident might occur. Thus, he reasoned, few employees would expect to be involved in an event triggering the drug and alcohol testing. Id. Additionally, the consequence of detection is loss of employment; the consequence of using drugs can be serious bodily harm or even death. Id.; see also 53 Fed. Reg. 47,129 (1988) (to be codified at 49 C.F.R. § 219.605) (suspension of employees who test positive). The risk of losing employment, therefore, would seem unlikely to deter one who has already chosen the risk of serious bodily harm. \emph{Skinner}, 489 U.S. at 634.
\item \textsuperscript{254} \emph{Skinner}, 489 U.S. at 633 (majority opinion).
\item \textsuperscript{255} Id.
\item \textsuperscript{256} "In the four years since this Court . . . first began recognizing 'special needs' exceptions to the [f]ourth [a]mendment, the clarity of [f]ourth [a]mendment doctrine has been badly distorted, as the Court has eclipsed the probable-cause requirement in a patchwork quilt of settings . . . ." Id. at 639 (Marshall, J., dissenting).
\item \textsuperscript{257} Id. at 635-55.
\item \textsuperscript{258} Id. at 635-36. Justice Marshall pointed to special needs allowing a search of a home, Griffin v. Wisconsin, 483 U.S. 868, 871-72 (1987) (police officer had reasonable grounds to search probationer's home), a search of papers, O'Connor v. Ortega, 480 U.S. 709, 726 (1987) (hospital officials had individualized suspicion to search physician's office), a search of effects, New Jersey v. T.L.O., 469 U.S. 325, 328, 342 n.8 (1985) (school authorities had individualized suspicion to search student's purse), and now a search of the person with \emph{Skinner}. \emph{Skinner}, 489 U.S. at 636-37.
\end{itemize}
viewed prior Supreme Court case law as supporting the requirement that a search, whether conducted pursuant to a warrant or one of the exceptions, requires a showing of probable cause except when the intrusion is so minimal that there is no full-scale search. The dissent stated, however, that even where an exception to a finding of probable cause exists, a showing of individualized suspicion remains. Thus, the dissent asserted that only the most brief and routine encounters alleviated the need for a showing of at least reasonable suspicion.

Justice Marshall did not categorize intrusions into the human body for drug testing as brief and routine encounters. Justice Marshall opined that categorization of a search as justified by a special need allows the Court almost unlimited discretion to lower the reasonableness requirements of any civil search. Justice Marshall criticized the extreme flexibility of the special needs balancing approach. Here, Justice Marshall asserted that this flexibility allowed government searches for drugs and alcohol to be based solely upon an interest in public safety. The dissent criticized the majority’s decision as permitting intrusions into the human body that were "unsupported by any evidence of wrongdoing."

Having rejected the special needs rationale, the dissent applied Supreme Court precedent evaluating drug testing under the traditional fourth amendment reasonable search framework. First, the dissent noted that a search warrant is required before most government searches. Justice Marshall acknowledged, however, that in some cases exigent circumstances exist that

260. *Id.* at 638.
261. *Id.*
262. *Id.* & nn.1-2. Justice Marshall failed to refer to *Bell v. Wolfish*, 441 U.S. 520 (1979), which did allow the most intricate body cavity search of prison inmates without even particularized suspicion. *Wolfish*, however, is distinguishable from *Skinner* in that the *Wolfish* Court failed to recognize fourth amendment rights in prison.
264. *Id.* at 641.
265. *Id.*
266. *Id.* at 640.
permit searches without obtaining a warrant.\textsuperscript{269} Moreover, the dissent found that collecting blood and urine samples while drug or alcohol traces remain in body fluids fits within the criteria for the exigent circumstances warrant waiver.\textsuperscript{270} Thus, Justice Marshall agreed that requiring a warrant prior to collecting body fluid samples might create a delay sufficient to threaten the destruction of evidence.\textsuperscript{271} The dissent stressed, however, that collecting body fluid samples prior to obtaining a warrant is not the same as testing without a warrant. Justice Marshall concluded that, based on the facts in \textit{Skinner}, the exigency to justify drug testing without a search warrant did not exist.\textsuperscript{272}

In addition, Justice Marshall determined that the FRA regulations violated the fourth amendment's probable cause requirement.\textsuperscript{273} The dissent noted that probable cause is required when a search is highly intrusive.\textsuperscript{274} Contrary to the majority's finding that the drug testing proved a minimal intrusion into employees' privacy, Justice Marshall found the drug tests to be so highly intrusive as to constitute a full-scale search, thus demanding a showing of probable cause.\textsuperscript{275} Specifically, in response to the majority's assertion that railroad employees' expectation of privacy is diminished because they work in a highly regulated industry, Justice Marshall pointed out that other Supreme Court cases using the same rationale concerned the search of an employer's property, not the search of an employee's person.\textsuperscript{276} Further, Justice Marshall asserted that the minimal privacy interest referred to by the majority involved substantial interference in a customarily personal and private function.\textsuperscript{277} Moreover, the dissent recognized that, apart from the

\textsuperscript{269} \textit{Id.} at 642-43. For a brief discussion of the exigent circumstances exception to search warrant requirements, see \textit{supra} note 83.

\textsuperscript{270} \textit{Skinner}, 489 U.S. at 642.

\textsuperscript{271} \textit{Id.} (quoting \textit{Schmerber v. California}, 384 U.S. 757, 770 (1966)).

\textsuperscript{272} \textit{Id.} at 642-43.

\textsuperscript{273} \textit{Id.} at 643.

\textsuperscript{274} \textit{Id.}

\textsuperscript{275} \textit{Id.} at 644-46. The majority stated that blood testing is as commonplace as a routine physical exam and the procedure imposes virtually no risk or pain on the person being tested. \textit{Id.} at 625 (quoting \textit{Schmerber v. California}, 384 U.S. 757 (1966)). Note, however, that while the majority relied on \textit{Schmerber} to find blood and urine tests reasonable absent reasonable suspicion, there was probable cause in \textit{Schmerber}. \textit{Schmerber}, 384 U.S. at 768. In fact, the officer had sufficient probable cause to arrest the petitioner for driving under the influence. \textit{Id.}


strong privacy interests implicated in collecting body fluids, chemical analysis of these body fluids implicates equally strong privacy interests. Specifically, the dissent pointed out that through chemical analysis, railroad officials can uncover not only drug or alcohol use, but also private medical conditions such as epilepsy, diabetes, and clinical depression.

Finally, Justice Marshall dismissed seriatim the majority opinion's two final rationales. First, Justice Marshall questioned the majority's assertion that testing employees after an accident would deter alcohol and drug use. The dissent argued that "[i]t is . . . the fear of the accident, not the fear of a post-accident revelation, that deters." Second, the dissent determined that an interest in diagnosing the cause of an accident, and possibly a crime, did not justify departing from fourth amendment requirements.

IV. SPECIAL NEEDS EXCEPTION: INTO THE ATTIC

The special needs exception, as it is tailored to apply to drug testing employees, belongs in the attic next to other ill-suited case law. The special needs exception permits the government to extend the administrative inspection exception to the warrant requirement to the search of a person's body by way of blood and urine testing. While the administrative inspection allows government officials to dispense with a search warrant, the fourth amendment still requires the government to show some reasonable suspicion to legitimize the search. The creation of the special needs exception, how-

from the identical passage the majority quoted to prove why compulsory urination constituted a search. Id. Justice Marshall observed that the majority relied on this quote to prove there was a search, yet dismissed it when concluding there was a minimal privacy interest. Id.

278. Id.

279. Id.; see also 53 Fed. Reg. 47,106 (1988) (the Epilepsy Foundation of America opposed random testing as an unacceptable intrusion). If desired, railroad officials would also be able to check female employees for pregnancy. In comparison, the companion case, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), deals with a drug testing program that allows testing only for specified drugs and requires the employee to disclose personal medical information only upon a positive test result. Id. at 673 n.2.


281. Id. at 653. Justice Stevens, in his concurring opinion, also rejected the deterrence rationale. For a summary of his reasoning, see supra note 253.


283. Id. at 654.

284. Justice Marshall referred to the Court's historical mistakes that seemed to happen most often during real or perceived emergency situations. Justice Marshall pointed to some extreme curtailments of liberty during the World War II relocation camp cases in Hirabayashi v. United States, 320 U.S. 81 (1943), and Korematsu v. United States, 323 U.S. 214 (1944). Skinner, 489 U.S. at 635 (Marshall, J., dissenting). Consequently, some argue that America is currently in another emergency situation, referred to as a war on drugs. See supra note 8 and accompanying text.

285. See supra notes 91-164 and accompanying text (discussing the administrative search).
ever, allows a full-scale search without a warrant based on little, if any, showing of probable cause.

Supreme Court cases dealing with administrative inspections purportedly protect the victim from certain regulatory violations. For example, under OSHA regulations, employees were considered the victims of regulatory violations, and therefore, the government searches focused on employers' workplaces, where harm to employees had the potential to occur. Thus, the historical underpinnings of administrative searches conducted on employers' premises provide the backdrop for the Supreme Court's Skinner decision. The Skinner Court, however, extends the administrative search exception to the employee, converting the employee into the object of the search.

The fact that the FRA's drug and alcohol testing regulations allow the use of test results in criminal proceedings and convictions further implicates the potential dangers of this new-found governmental power. The FRA provides, "[t]est results indicating non-medical use of controlled substances are not subject to any recognized privacy interest." The Court, in Skinner and in prior special needs cases, recognized the special needs exception to the warrant and probable cause requirements because the circumstances of the case indicated a need "beyond the normal need for law enforcement" which justified the search. Neither the Skinner Court nor the FRA regulations, however, provide adequate guidelines for distinguishing between an FRA search based on the public's interest in railroad safety and an FRA search based on the public's ordinary law enforcement interest in deterring illegal drug use. The public's interest is sufficient to justify application of the

287. Barlow's, 436 U.S. at 309 & n.l.
288. See supra note 286 and accompanying text.
289. See supra notes 258-66 and accompanying text.
290. 49 C.F.R. § 219.211(d) (1989) (samples available to parties in litigation); see also 53 Fed. Reg. 47,129 (1988) (to be codified at 49 C.F.R. § 219.607) (records of positive test results to be retained for at least two years and summary records of test results to be maintained for at least five years); 53 Fed. Reg. 47,118 (1988) (test results available to government inquiry or discovery request). In comparison, the drug testing program in the companion case, National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), allows for test results to be used in a criminal prosecution of the employee only upon the employee's written consent. Id. at 663. The Court in Von Raab viewed the drug testing program as a means of deterring drug use in sensitive drug interdiction positions and not as a means of prosecuting drug users. Id. at 666.
291. 53 Fed. Reg. 47,118 (1988); see also supra note 279.
several needs exceptions to the fourth amendment's warrant and probable cause requirements; the ordinary law enforcement interest, however, would presumably fall within certain fourth amendment warrant and probable cause requirements. Under the *Skinner* decision, if the government can disguise a search as one falling within the special needs exception, the government may bypass the warrant and probable cause requirements.

Moreover, the type of testing permitted in *Skinner* is analogous to the various types of inspections permitted in a military context. Despite the military court's upholding compulsory urine testing, it has found that all inspections on military bases are searches requiring compliance with the fourth amendment. The military court, however, has also recognized that different types of inspections require different levels of fourth amendment scrutiny. Specifically, the military court has delineated two levels of inspections: “fitness” inspections and “shakedown” inspections. Fitness inspections are performed to evaluate the readiness of persons or equipment, but military officers perform shakedown inspections to find evidence for criminal prosecution. The military court has held that warrantless shakedown inspections violate the fourth amendment's reasonableness standard.

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293. The Court, although finding that broadly interpreted statutes might authorize using test results for criminal prosecutions, did not find this was the intended use. *Id.* at 621 n.5. The Court found insufficient evidence to establish a pretext for allowing criminal prosecution based upon test results and chose not to address whether a pretext would exist were test results routinely used in criminal prosecutions. *Id.*

294. The *Skinner* Court left unanswered the question of whether officers' repeated use of the administrative inspections' drug testing results to prosecute employees would infer a pretext, thus challenging the administrative inspection. However, from the decision in *Skinner*, one could deduce that any challenge to the administrative search and special needs exception would be struck down by this Court. See Sundby, *A Return to Fourth Amendment Basics: Undoing the Mischief of Camara and Terry*, 72 MINN. L. REV 383, 408 (1988) (predicting what eventually came to pass in *Skinner*). But compare the companion case National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), where the same-day Court held that one factor in determining the reasonableness of the Customs Service drug-testing program was that the program prohibits test results used in criminal investigations or convictions. *Id.* at 666; see also Wong Sun v. United States, 371 U.S. 471 (1963) (noting that the police cannot act upon less evidence by avoiding a magistrate); supra note 194 (the *Wyman* Court found reasonableness in part because a caseworker was inspecting to assist, rather than an officer to criminally investigate).

295. United States v. Roberts, 2 M.J. 31 (C.M.A. 1976). Even on a military base where inspections are generally considered reasonable, the need for military preparedness did not render a middle-of-the-night barracks inspection with marijuana detection dogs as reasonable within the meaning of the fourth amendment.

296. *Id.* at 34-36.

297. *Id.* at 36.

298. *Id.* at 35-36.

299. *Id.* at 36.
cause the FRA regulations are based on post-accident testing,\footnote{300} these tests do not conform to the definition of a fitness inspection to determine employees' readiness to perform a specific job.\footnote{301} Rather, these post-accident tests are more in line with a shakedown inspection to investigate for cause and to collect criminal evidence.\footnote{302} As Justice Marshall noted in his dissent, the FRA conceded that urine tests cannot measure current impairment; they can only measure drug or alcohol use within the last two months.\footnote{303} Thus, testing pursuant to the FRA regulations would seem to invoke some of the same concerns as a military shakedown inspection, namely, that drug testing functions more as a person identification process than as an impairment detection process.\footnote{304}

Employee drug testing programs can be reasonable within the meaning of the fourth amendment, provided they have adequate safeguards to ensure reasonableness and to substitute sufficiently for the warrant requirement. The government has taken just such measures with employee searches through polygraph tests and other searches through wiretapping.\footnote{305} Similar safeguards could be created for employee drug testing.

Private sector employees will now encounter the issue of mandatory drug testing in a myriad of situations. Already, such situations as treatment of

\footnote{300}{49 C.F.R. § 219.201 (1989).}
\footnote{301}{See infra note 304 and accompanying text.}
\footnote{302}{See supra note 290.}
\footnote{303} Skinner v. Railway Labor Executives’ Ass’n, 489 U.S. 602, 652 (Marshall, J., dissenting); see 49 C.F.R. § 219.309(b)(2).}
\footnote{304} Identification processes for classifying people have been used throughout history. One of the most infamous identification processes ever used was the Nazi process for identifying Jews. See, e.g., Y. BAUER, A HISTORY OF THE HOLOCAUST (1982). The Nazis identified “non-Aryan” descendants using religious criteria. Id. at 100; see also L. DAWIDOWICZ, THE WAR AGAINST THE JEWS 1933-1945 59-60 (1986) (identification of non-Aryans based upon racial determination or religious affiliation); A. KAHN, THE MATUSOW AFFAIR (1987) (identification of communist party members).
job-related injuries trigger mandatory drug tests. The National Labor Relations Board ruled that any type of mandatory drug and alcohol testing is a valid factor for collective bargaining. The labor unions that compel collective bargaining agreements to resolve the reasonableness of mandatory drug tests will have to share in the responsibility of protecting against unreasonable searches and seizures, a burden once relegated exclusively to the fourth amendment. Many employees, however, who are not protected by collective bargaining agreements, will not be able to share in determining the scope of mandatory drug testing in the workplace. Thus, after Skinner, non-union employees will remain the most vulnerable to intrusions on their privacy interests through mandatory drug tests.

V. CONCLUSION

Skinner extends the special needs exception to the warrant and probable cause requirements from searching objects to searching persons by way of blood and urine tests. The Court's decision reflects current public concern over the nation's epidemic of illegal drug use. In addition, the Court's decision allows the government great deference in dealing with this crisis. Specifically, Skinner allows the government to take whatever steps necessary to effect drug reform. To date, the government is still testing the extent of the Supreme Court's deference.

By applying a special needs exception to the FRA employee drug testing regulations, Skinner provides the means by which the government can conduct a suspicionless human body search and use the evidence for possible criminal prosecution. If the Skinner decision were based solely on the balancing standard of reasonableness, then each employee drug test would still require balancing the intrusiveness of the search against the government's interest. The special needs exception allows a determination of whether a search is reasonable based upon a special need. Thus, where the balancing standard involves a determination of whether the search is reasonable at its
inception and whether the search is reasonably related in scope to the purpose for the government's initial intrusion, the special need addresses only whether the search is reasonable at its inception.

An employee drug testing program can be reasonable where adequate safeguards exist to comply with fourth amendment requirements. But where adequate safeguards do not exist, the onus rests on employee unions to protect against unreasonable searches and seizures, leaving nonunion employees vulnerable to unreasonable searches. Regardless, the special needs exception, when applied to an employee drug testing program, has no place in fourth amendment search and seizure.

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