1-1-1992

Suspicionless Drug Testing After Skinner and Von Raab: Constitutional Adjudication in the Courts of Appeals

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I. INTRODUCTION

On March 21, 1989, the United States Supreme Court announced two opinions, *Skinner v. Railway Labor Executives' Ass'n*¹ and *National Treasury Employees Union v. Von Raab.*² Both decisions address Fourth Amendment challenges to governmental policies requiring examination of employees' urine to detect the use of certain prohibited drugs.³ The Court in *Skinner* upheld Federal Railroad Administration regulations requiring railroad employees involved in train accidents to submit to blood, urine, and breath testing.⁴ In *Von Raab,* the Court upheld policies of the United States Customs Service requiring employees to submit to urine testing when seeking promotion to positions that involve the interdiction of illegal drugs or the carrying of firearms.⁵ The Court

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³ See U.S. Const. amend. IV.

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

⁴ *Skinner,* 489 U.S. at 633-34.
⁵ *Von Raab,* 489 U.S. at 678-79. The policy also requires urine testing for employees seeking promotions to positions that require the handling of "classified" material. *Id.* at
in both cases found that the challenged governmental policies implicate Fourth Amendment searches; they infringe upon the employee's reasonable expectations of privacy. However, the Court permitted the forced testing, even when governmental officials have no reason to suspect a particular employee of illegal substance use or work-related misconduct. The Court thus upheld what this Article refers to as "suspicionless" Fourth Amendment searches by governmental officials.

*Skinner* and *Von Raab* are significant for two reasons. First, they have been used to clear a path for employment policies requiring numerous individuals working in a variety of occupations and industries to submit to drug testing. Second, the decisions substantially alter Fourth Amendment jurisprudence. These are the first cases in which the Court has permitted governmental officials to search individuals who neither have committed nor are suspected of committing any crime or work-related misconduct.

This Article considers whether *Skinner* and *Von Raab* articulate useful analytical rules for courts facing the task of determining whether a drug testing program is constitutional. Part II concludes that the Court's opinions do articulate consistent guidelines for courts to use when deciding whether governmental officials may proceed with testing without first obtaining a search warrant based on probable cause. However, while the Court set forth clear and

661. The Court stated that such employees could be required to submit to a urine test, "especially if the positions covered under this category require background investigations, medical examinations, or other intrusions that may be expected to diminish their expectations of privacy in respect of a urinalysis test." *Id.* at 677. However, the Court concluded it was unable to assess the reasonableness of the government's testing program with respect to these employees because it was not clear that the category of employees subject to testing included only those persons likely to gain access to sensitive information. *Id.* at 677-78. Therefore, the Court remanded the case for further proceedings. *Id.* at 678.


7. See *Employee Rights and Responsibilities*, 6 LAB. LAW. 786, 789-90 (1990) (estimating that 538,000 employees will be affected by Federal Aviation Administration drug testing rules and three million interstate drivers are covered by Federal Highway Administration drug testing regulations).

8. See *Von Raab*, 489 U.S. at 680 (Scalia, J., dissenting) ("Until today this Court had upheld a bodily search separate from arrest and without individualized suspicion of wrongdoing only with respect to prison inmates, relying upon the uniquely dangerous nature of that environment.") (citing *Bell v. Wolfish*, 441 U.S. 520, 558-60 (1979)).

consistent rules for determining whether *warrantless* drug testing violates the Fourth Amendment, it endorsed two very different standards for determining whether *suspicionless* drug testing programs are constitutional.

In *Skinner* the Court considered three factors when determining if the railroad's suspicionless search regulations were constitutional: (1) whether the testing policies subject the employee to only a minimal privacy intrusion; (2) whether the policies advance important governmental objectives; and (3) whether those objectives would be jeopardized by individualized suspicion requirements.10 *Skinner* established this standard in rather absolute terms. As Part III of this Article demonstrates, however, the federal appellate courts generally have failed to apply *Skinner's* standard.11 Rather, they have engaged in a process of balancing the particular competing interests implicated by drug testing programs.12 There are perhaps two explanations for this development. First, the Court in *Skinner* did not state explicitly that it was devising a new set of standards for adjudicating the constitutionality of suspicionless searches. Upon concluding that the challenged drug testing procedure was a Fourth Amendment search, the Court was forced to develop criteria by which to adjudicate challenges to such searches.13 In doing so, however, it did not candidly acknowledge its new constitutional standard; it simply set forth a set of criteria for evaluating the constitutionality of suspicionless testing programs.14 Second, although the Court in *Von Raab* purported to adopt and apply *Skinner's* standard, it abandoned *Skinner's* demanding analytical scheme and endorsed instead an ad hoc balancing approach.15

In light of the inconsistencies as well as consistencies between

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10. See infra notes 56-57 and accompanying text.
11. See, e.g., infra notes 129-36 and accompanying text.
12. See T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 Yale L.J. 943, 945 (1987) (explaining that “[t]he metaphor of balancing refers to theories of constitutional interpretation that are based on the identification, valuation, and comparison of competing interests”); see also, e.g., infra notes 129-36 and accompanying text. Typically the competing interests raised by drug testing policies are those governmental interests offered to justify the testing program which are “weighed” against the resulting infringement upon individual privacy.
13. Cf. Paul J. Boudreaux, *The D.C. Circuit, The War on Drugs, & Harmon v. Thornberg: A Case Study in Misunderstanding* Skinner & Von Raab, 12 Geo. Mason U. L. Rev. 701, 709 (1990) (concluding that upon a determination that persons subject to urine tests were protected by the Fourth Amendment, the conservative members of the Court had to “conjure up novel theories of judicially created ‘exceptions’ to the constitutional protection”).
14. See infra notes 56-57 and accompanying text.
15. See infra notes 81-83 and accompanying text.
the *Skinner* and *Von Raab* approaches, Part III focuses on two questions when examining decisions of eight courts of appeals that have interpreted and applied the Supreme Court's drug testing decisions: 1) have the appellate courts properly adjudicated the constitutionality of warrantless drug testing schemes, and 2) have these courts discerned that *Skinner* and *Von Raab* adopted different standards for adjudicating the constitutionality of suspicionless testing. Part III also evaluates the quality of balancing performed by the courts of appeals that have opted to balance competing interests.

Part IV provides a summary overview of post-*Skinner* and *Von Raab* decisions and concludes that the circuit courts have been inclined to ignore in many instances, and abbreviate in others, the analytical framework the Supreme Court used to consider the constitutionality of warrantless searches. Most courts expand the generality of the Court's holdings and proceed as if the warrant/probable cause question was predetermined by the Court's holdings that no warrant was required for railroad or Customs officials' use of testing procedures. Part IV also concludes that the courts of appeals generally have misread *Skinner* to require only an ad hoc balancing of interests when deciding the constitutionality of suspicionless testing.\(^\text{16}\) The courts have ignored important constitutional protections and expanded the rationales of *Skinner* and *Von Raab* to justify what appear to be predetermined results. Part IV suggests that suspicionless drug testing programs should be evaluated in light of both opinions. After all, *Skinner* is purported to provide the precedent for *Von Raab*.

A threshold issue in each Fourth Amendment challenge to a drug testing policy should be whether the balancing or non-balancing adjudicatory method is appropriate. Where balancing is selected as the appropriate method, on non-balancing courts should proceed as if the Supreme Court has performed much of the balancing function by assigning qualitative values to each of the interests subject to evaluation.\(^\text{17}\) The circuit courts, however, have viewed the balancing function as a simple evaluation of interests; determining which interest "outweighs" the other. *Skinner* and *Von Raab* demand a different, more demanding view of the balancing function,\(^\text{18}\) entailing an identification of the competing interests, against a constitutional standard, and an evaluation of their particular qualitative values.\(^\text{19}\)

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18. *See infra* notes 56-57, 90-95 and accompanying text.
19. *See* Coffin, *supra* note 17, at 19 (balancing requires more than the simple placement
It is likely that the Supreme Court intended for the balancing and non-balancing approaches to peacefully coexist within Fourth Amendment jurisprudence. Nevertheless, courts still must distinguish and carefully delineate cases for which balancing is the appropriate method for constitutional adjudication rather than proceeding as if balancing is the only constitutional methodology. This the circuit courts have failed to do. Part IV concludes that judicial balancing regarding suspicionless testing programs has radically departed from Fourth Amendment traditions; the judicial evaluation of the respective interests has been conclusory, reflecting too much deference to governmental policies, goals, and objectives. Courts should engage in an exacting review of governmental programs authorizing suspicionless searches.

II. THE SKINNER AND VON RAAB DECISIONS

A. Skinner

In Skinner, a divided Supreme Court upheld the constitutionality of regulations promulgated by the Federal Railroad Administration (FRA). These FRA regulations require the testing of the blood, breath, and urine of certain employees involved in train accidents.

Skinner was initiated by the Railway Labor Executives' Association (RLEA), a labor organization representing railroad workers, against the Secretary of Transportation, Samuel K. Skinner. The RLEA sought to enjoin the FRA from implementing the regulations.

A divided panel of the Ninth Circuit reversed the decision of the district court, and concluded that particularized suspicion is essential for finding that the toxicological examination of employees' body fluids is reasonable. The Ninth Circuit reasoned

of countervailing weights upon a pair of scales and observing in whose favor there is an imbalance).


22. Id. at 609-10.

23. Id. at 612.

24. Id. at 606.

25. Id. at 612.

26. Id.
that individualized suspicion requirements would ensure that testing is confined to detection of current impairment rather than discovery of "the metabolites of various drugs, which are not evidence of current intoxication and may remain in the body for days or weeks after the ingestion of the drug." 27

On appeal, the Supreme Court reversed. The Court recognized two threshold issues in determining whether the drug testing regulations were even subject to the Fourth Amendment's proscriptions. 28 Upon concluding that they were, the Court proceeded to consider the constitutionality of the FRA's drug testing regulations. 29

The Court set forth certain legal principles articulating, in part, the analytical framework it would use to adjudicate the constitutionality of the FRA's regulations. 30 The determination that the railroad's drug testing program implicates a Fourth Amendment search only begins "the inquiry into the standards governing such intrusions." 31 First, the Fourth Amendment "does not proscribe all searches and seizures, but only those that are unreasonable." 32 Second, the reasonableness of a search "depends on all the circumstances surrounding the search or seizure and the nature of the search or seizure itself." 33 Finally, the "permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 34 The Court noted, however, that in most criminal cases this balance is struck in favor of requiring a search warrant. 35 In summary, the Court reaffirmed the settled constitutional principle that except in certain well-defined circumstances, a search or seizure is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause. 36

27. Id. at 613 (quoting Railway Labor Executives' Assn. v. Bunley, 839 F.2d 575, 588-589 (9th Cir. 1988)).
28. Id. at 614. ("Before we consider whether the tests in question are reasonable under the Fourth Amendment, we must inquire whether the tests are attributable to the Government or its agents, and whether they amount to searches or seizures.") See Williams, supra note 3, at 34-43 for a discussion of the Court's analysis of these issues.
30. Id.
31. Id. at 618-19.
32. Id. at 619 (citations omitted).
33. Id. (quoting United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985)).
34. Id. (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).
35. Id.
36. Id.
The Court then focused upon the particular standard it would use to determine the efficacy of requiring governmental adherence to the Warrant Clause.\(^\text{37}\) There were numerous categories of "well-defined circumstances" potentially available for the Court's consideration.\(^\text{38}\) The Court, however, selected the "special needs" exemption as the standard by which it would judge warrantless searches.\(^\text{39}\)

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37. Id.

38. See Williams, supra note 3, at 50 n.312 (enumerating the classes of cases that recognize exceptions to warrant requirement).

39. Skinner, 489 U.S. at 619. The "special needs" exemption to the Fourth Amendment's warrant requirement was initially articulated by Justice Blackmun in his concurring opinion to New Jersey v. T.L.O., 469 U.S. 325, 351 (1985). T.L.O. addresses the Fourth Amendment challenge to the warrantless search of a high school student's purse, based on a suspicion that she had violated the school's prohibition against smoking cigarettes in a nonsmoking area. The student moved to suppress evidence recovered in the search and her confession that she was using and dealing marijuana, claiming the search violated her Fourth Amendment rights. Id. at 328-29. Recognizing the Fourth Amendment's mandate that searches must be reasonable, the Court stated that the determination of reasonableness requires "balancing the need to search against the invasion which the search entails." Id. at 337.

While concurring with the Court's judgment, Justice Blackmun reasoned that the Court had omitted a step by immediately resorting to a balancing of governmental and private interests to decide if the public interest was best served by a lesser standard than probable cause. Id. at 351. He thought that the Court had used the balancing test only when confronted with a "special law enforcement need for greater flexibility," which he phrased the "special needs" exemption. Id. Only 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." Id. Justice Blackmun was particularly troubled that the balancing test would become the rule for constitutional adjudication rather than the exception. Id. at 352. He agreed with the Court's judgment in T.L.O., however, because in his view a "special need" was present. Id. at 353.

The "special needs" concept was rearticulated by Justice O'Connor when writing for the plurality in O'Connor v. Ortega, 480 U.S. 709, 720 (1987). Relying on Justice Blackmun's reasoning in T.L.O., Justice O'Connor expressed the opinion that a warrant requirement would unduly burden the employer who wished to enter an employee's office, desk, or file cabinets, in order to search for a work-related purpose. Id. at 722. However, Justice Blackmun dissented and concluded that the search in question was "investigatory" in nature. Id. at 732. According to Justice Blackmun, there was no "special need." Id.

The criteria for applying the "special needs" exemption were refined in New York v. Burger, 482 U.S. 691 (1987). Writing for the Court, Justice Blackmun focused upon specific criteria rather than a balancing of competing interests when determining "whether the warrantless search of an automobile junkyard, conducted pursuant to a statute authorizing such a search, falls within the exception to the warrant requirement for administrative inspections of pervasively regulated industries." Id. at 693. Initially describing the "special needs" exemption with reference to a balancing function, Justice Blackmun indicated that "special needs" may exist "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened." Id.
As stated by the Court, warrantless searches are appropriate, "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'"\(^{40}\) Citing several decisions where "special needs" had provided an exemption, the Court stated that previously it had not "hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable cause requirements in the particular context."\(^{41}\)

Several points should be noted regarding the Court's articulation and use of the "special needs" exemption. *Skinner* contemplates balancing competing interests when determining the constitutionality of warrantless drug testing or, if no warrant is required, testing undertaken without probable cause.\(^{42}\) Balancing is neither used to determine whether the government could undertake suspicionless drug testing nor whether the Fourth Amendment would

\(^{40}\) See *T.L.O.*, 469 U.S. at 351.

\(^{41}\) Id.

\(^{42}\) Id.
allow governmental officials to search when they have some level of suspicion lower than probable cause, such as reasonable suspicion. Further, balancing decides the constitutionality of warrantless drug testing only for a "particular context"; focusing upon the circumstances peculiar to the drug testing program and the governmental employer. Skinner, therefore, does not suggest that its holding should form the basis for the universal constitutional principle that employment drug testing is never subject to the warrant provision of the Fourth Amendment.

The "special need" identified in Skinner is the governmental interest in regulating the conduct of railroad employees to ensure safety. The objective of gathering and preserving evidence after a train accident was deemed a special need, beyond the normal need for law enforcement, even though the samples could be made available to law enforcement authorities. Note, however, that before the Court would assess the FRA testing program in a light other than its administrative purpose, it would require a demonstration that the administrative scheme was designed to serve as a "pretext" for law enforcement authorities to gather evidence of penal law violations.

The Court's articulation of the "special needs" standard leads one to expect that the next step is a balancing analysis of this special need in light of the impracticality of requiring adherence to the Warrant Clause. The Skinner Court, however, applied analyses developed in earlier decisions such as Camara v. Municipal Court and Schmerber v. California.

Relying on Camara, Skinner considers what, if any, additional protections a warrant might afford employees subject to the search, and whether warrant requirements would frustrate the government's ability to accomplish its legitimate objectives. The Court found that the FRA regulations sufficiently advised employees of the permissible limits of the authorized intrusion and sufficiently limited officials' discretion when performing the search; therefore,
the Court found a warrant "would do little" to protect the privacy interests of the railroad employees.\(^{51}\) Further, "[i]mposing unwieldy warrant procedures . . . upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable."\(^{52}\) Finally, \textit{Skinner} considers whether the warrant requirements would "frustrate the governmental purpose behind the search."\(^{53}\) Analogizing urine testing to the warrantless blood alcohol testing upheld in \textit{Schmerber}, the Court reasoned that delays associated with procuring a warrant could result in the destruction of valuable evidence, and thus would frustrate the governmental purposes behind the search.\(^{54}\)

Having dispensed with the need for a warrant, the Court gave brief consideration to whether the government should be required to have probable cause. Analysis of the need for probable cause was subsumed in the Court's discussion addressing the constitutionality of the testing which, according to railroad regulations, would proceed without any individualized suspicion of drug use or impairment.\(^{55}\)

It was in considering the constitutionality of a drug testing scheme which requires no warrant, probable cause, or individualized suspicion, that the Court set forth a newly fashioned doctrine for judging the constitutionality of suspicionless searches:

\begin{quote}
In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion.\(^{56}\)
\end{quote}

This language and the Court's subsequent analysis support the conclusion that adjudication of the constitutionality of suspicionless searches involves the following inquiry: (1) whether the search implicates minimal privacy interests (a minimal search); (2) whether the search furthers or advances important governmental interests; and (3) whether individualized suspicion requirements would jeopardize important governmental interests.\(^{57}\) Each of these questions must be answered affirmatively for a constitutional search.

As to the first factor, the Court concluded that the railroad's use of urinalysis to detect drug use implicated minimal privacy

\begin{thebibliography}{9}
\bibitem{51} Id. at 622.
\bibitem{52} Id. at 623-24 (quoting \textit{O'Conner v. Ortega}, 480 U.S. 709, 722 (1987)).
\bibitem{53} Id. at 623.
\bibitem{54} Id.
\bibitem{55} Id. at 624.
\bibitem{56} Id.
\bibitem{57} Id.
\end{thebibliography}
interests. The extent to which this testing intrudes upon individual privacy interests is examined from two vantage points: the seriousness of the invasions associated with the government's intrusion and the strengths of the interests associated with the individual's expectations of privacy.

As to the third factor, the Court concluded that individualized suspicion requirements would indeed jeopardize important governmental interests. It characterized the privacy interests implicated by the testing as minimal and the governmental interest in testing without a showing of individualized suspicion as compelling. These conclusions were supported with several rationales which center around the assumption that railroad officials would not be able to form an individualized suspicion in a manner which would permit timely and accurate detection of dangerously impaired employees. The Court found that the employees subject to testing may cause great human loss if impaired and that such losses can occur before any signs of impairment become noticeable to supervisors or others. The scenes after major railway accidents are often "chaotic"; thus, requiring railroads to obtain evidence of individual suspicion in such circumstances would be "unrealistic, and inimical to the governmental goal of assuring safe rail transportation." Individualized suspicion requirements, therefore, would jeopardize accomplishment of governmental objectives.

Finally, the Court considered the second and most troublesome inquiry: whether urinalysis testing furthered the governmental goal of safe railway transportation. The Court stated that it did, in two ways. First, suspicionless drug testing policies further the governmental goal of safe transportation because they deter employees engaged in safety-sensitive tasks from using controlled substances or alcohol in the first place. Six members of the Court agreed that the unpredictability of post-accident testing significantly

58. Id. at 628.
59. Id. at 627-28.
60. Id. at 626-27.
61. Id. at 628 (characterizing this interest as "compelling" although an "important" interest would have sufficed under the language used in articulating the Court's third factor).
62. Id. at 628-29.
63. Id. at 631.
64. Id. at 629-30; cf. id. at 634 (Stevens, J., concurring) (accepting the accident inspection rationale, and rejecting the majority's deterrence reasoning).
65. Id. at 629-30.
increased the deterrent effect of administrative penalties for on-the-job drug use. Second, the testing policies further the governmental goal of preventing railroad accidents because the test results will help railroads obtain invaluable information about the causes of major accidents and assist in developing appropriate measures to safeguard the public.

In conclusion, the Court announced that the government may take all necessary and reasonable regulatory steps to prevent and deter hazardous conditions which can stem from employees' performances of certain functions while concealing drugs in their bodies. The FRA had demonstrated both the reasonableness and necessity for its regulations.

B. Von Raab

In Von Raab, the Court, in a closely divided opinion, upheld the Fourth Amendment constitutionality of the United States Customs Service policy requiring urinalysis to ascertain drug use by employees seeking transfers or promotions to certain positions. The testing scheme in Von Raab is governed by United States Department of Health and Human Services drug testing regulations.

The Von Raab litigation was initiated by a union and a union official, both representing certain individuals employed by the Customs Service, against the Commissioner of the Service, William Von Raab. The National Treasury Employees Union (NTEU) contended that the Customs Service drug testing program violates the Fourth Amendment and sought injunctive relief. The District Court for the Eastern District of Louisiana enjoined the drug testing, holding that while there existed legitimate governmental interests for having a drug-free work force, the drug testing plan was "overly intrusive."
A divided panel of the Fifth Circuit disagreed, finding the searches associated with the drug testing policy were reasonable.\textsuperscript{75} In the court's view, the Customs Service minimized the intrusiveness of the search "by not requiring visual observation of the act of urination and by affording notice to the employee that he will be tested."\textsuperscript{76} Further, the court found that the government has a strong interest in detecting drug use among Custom Service employees because such use raises substantial doubts as to the employees' ability to honestly and vigorously discharge their duties—that undermining public confidence in the integrity of the Service and impairing the Service's efforts in enforcing drug laws.\textsuperscript{77}

The Supreme Court in \textit{Von Raab} concluded that drug testing regulations implicated Fourth Amendment searches.\textsuperscript{78} Like \textit{Skinner}, \textit{Von Raab} sets forth certain legal principles; however, purporting to have assessed prior Supreme Court precedent, \textit{Von Raab} announced that it was reaffirming "the long standing principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance."\textsuperscript{79} The Court then considered the constitutionality of the Customs Service officials' warrantless searches.

As in \textit{Skinner}, the Supreme Court in \textit{Von Raab} relied upon the "special needs" exemption to adjudicate the constitutionality of the Customs Service's drug testing policy.\textsuperscript{80} \textit{Von Raab}, however, articulates a significantly different "special needs" exemption than that set forth in \textit{Skinner}. According to \textit{Von Raab}, "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."\textsuperscript{81} Under \textit{Von Raab}'s articulation of the "special needs" standard, the balancing result determines the necessity for not only a warrant or probable cause but also any level of individualized

\begin{itemize}
  \item \textsuperscript{75} \textit{Id.} at 663 (citing \textit{Von Raab}, 816 F.2d at 170).
  \item \textsuperscript{76} \textit{Id.} at 663-64 (citing \textit{Von Raab}, 816 F.2d at 177).
  \item \textsuperscript{77} \textit{Id.} (citing \textit{Von Raab}, 816 F.2d at 178). According to the Fifth Circuit, employees using illicit drugs are susceptible to bribery and blackmail, can be tempted to divert portions of undetected drug shipments for their own use, and may endanger the safety of themselves and their fellow agents if they carry firearms.
  \item \textsuperscript{78} \textit{Id.} at 665.
  \item \textsuperscript{79} \textit{Id.}
  \item \textsuperscript{80} \textit{Id.}
  \item \textsuperscript{81} \textit{Id.} at 665-66 (emphasis added).
\end{itemize}
suspicion. The constitutionality of the suspicionless searches is not
determined by the tri-factor inquiry posed in *Skinner*; instead the
"special needs" balancing process, previously used only in deter-
mining the constitutionality of warrantless testing, also determines
the constitutionality of the suspicionless testing. The special needs
exemption thus was extended from warrantless to suspicionless
searches.

Applying the "special needs" concept, the Court in *Von Raab*
concluded that it was clear the Customs Service's drug testing
program was designed to deter drug use among those employees
eligible for promotion to sensitive positions within the Service, and
not to serve the ordinary needs of law
enforcement. The test
results cannot be used for criminal prosecution without employees’
consent.

Rather than undertaking balancing at this point, however, the
Court, consistent with its approach in *Skinner*, considered warrant
requirements in light of the *Camara* analytical framework. The
Court concluded that warrant requirements would burden govern-
mental objectives because, even if Customs Service officials are
more familiar with warrant procedures than, for instance, railroad
officials, requiring a warrant in this context would serve only to
divert valuable agency resources from the Service's primary mis-

Furthermore, a warrant would provide employees with little or no additional protections against invasions upon their personal
privacy. Employees are not subject "to the discretion of the
official in the field" because the regulations narrowly and specif-
ically define the circumstances for testing. Moreover, in the view
of the Court, the employees do not need a warrant to be advised
of the lawful limits of the search: the published regulations are
undoubtedly well known to covered employees.

As in *Skinner*, the Court gave perfunctory consideration to the
probable cause requirement. Analogizing the drug testing searches
to routine administrative searches, the Court considered the prob-
able-cause standard "unhelpful" in accomplishing governmental
objectives of preventing hazardous conditions and detecting pos-

82. *Id.* at 666.
83. *Id.*
84. *Id.* The Court's view that it was necessary to discuss the warrant requirement issue
further supports the position that *Skinner* did not decide the issue for all governmental
employment drug testing.
85. *Id.* at 666-67.
86. *Id.* at 667.
87. *Id.* (quoting *Camara v. Municipal Court*, 387 U.S. 523, 532 (1967)).
88. *Id.*
sible violators. These governmental goals are accomplished under circumstances that rarely generate articulable grounds for personal searches.89

Referring to Skinner, the Court articulated the parameters of constitutional suspicionless drug testing programs: “Our precedents have settled that, in certain limited circumstances, the Government’s need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion.”90 This language purports to be an abbreviated articulation of Skinner’s holding. Yet while Von Raab suggests that Skinner’s concepts govern its examination of the constitutionality of suspicionless testing programs, the Court’s earlier “special needs” articulation had already committed it to using a balancing test.91

However, Von Raab’s language does provide some insight into how balancing should be undertaken. The Court’s statement that the governmental interests must be sufficiently “compelling” suggests that the Court assigned a weight of “compelling” to the governmental interest in question thus resulting in a decision in the government’s favor. Under Skinner’s inquiry, the weight assigned to the governmental interest need only be “important.”92 Further, the Court’s reference to the government’s need to discover or prevent the development of latent, hidden conditions suggests that a governmental interest which is of a particular character must be present to justify suspicionless testing. In other words, there must be a compelling governmental interest in detecting and preventing drug use by persons who otherwise would not manifest articulable grounds for forming a reasonable suspicion and whose drug impaired functioning could create hazardous conditions for the public.

One could read Von Raab as endorsing substantial intrusions upon privacy interests by governmental officials as long as those privacy interests are outweighed by countervailing “compelling” governmental interests.93 In contrast to Skinner, Von Raab does not expressly require that the drug testing entail only minimal intrusions upon privacy interests.94 Acceptance of this view of Von Raab leads to the conclusion that the Court accepted a suspicionless

89. Id. at 668.
90. Id.
91. See supra notes 80-81 and accompanying text.
92. See supra notes 56-57 and accompanying text.
93. See Von Raab, 489 U.S. at 668-70.
94. Id.
search standard that is considerably less demanding than that endorsed in *Skinner*; compelling governmental interests in discovering latent or hidden conditions could arguably outweigh substantial intrusions upon privacy. Whether *Von Raab* assigned a particular qualitative value to those privacy interests that would succumb to suspicionless testing is unclear from the Court's articulation of the "special needs" examination. The balancing of interests, as articulated with respect to the "special needs" examination, assigns no particular qualitative values to either the governmental interests or the privacy intrusions. Interpreting *Von Raab* in this fashion permits a simple balancing of countervailing interests to determine the constitutionality of suspicionless searches, ignoring the significant constraints placed upon the use of suspicionless searches in *Skinner*. It is more likely that by endorsing a balancing examination, the Supreme Court expected that the balancing process would be subject to a heightened judicial scrutiny—something more than the simple consideration of which interest "outweighs" the other. It is more reasonable to assume that the Court in *Von Raab* struck the constitutional balance that must be achieved to support suspicionless testing. The governmental interest must be of a particular character—compelling—and the intrusion must implicate only minimal privacy interests.

When balancing competing interests, the *Von Raab* Court recognized "the veritable national crises in law enforcement caused by the smuggling of illicit narcotics." Expounding upon the deceptiveness and the violent tendencies of drug traffickers, the Court concluded that the government has a "compelling interest in ensuring that front-line interdiction personnel are physically fit, and have unimpeachable integrity and judgment." The "Drug War" and all the problems associated with drug trafficking were placed on the governmental interest side of the balancing scale,

95. See New Jersey v. T.L.O., 469 U.S. 325, 342 n.8 (1985). Justice White wrote:
We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion." Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by the search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.' " (citations omitted).


97. *Id.* at 670.
thus creating a compelling legitimate governmental interest. The Supreme Court in *Von Raab* also noted the judicial deference previously afforded government officials when compelling national security interests were at stake.98 National interests could be irreparably damaged if Customs Service employees’ drug use rendered them unsympathetic to their mission of interdicting narcotics.99 Likewise, these same public interest concerns justify preventing promotion of drug users to positions that require the use of deadly force.100 Employees authorized to use deadly force were analogized to the railway crew members in *Skinner* because both groups discharge duties fraught with such risks of injury to others that even momentary lapses of attention may produce disastrous consequences.101

The Court considered these public interests in light of the interference with individual privacy that results from the Customs Service’s urine testing procedures. As in *Skinner*, the Court considered employees’ privacy interests from two vantage points. First, employees’ expectations of privacy were deemed diminished by virtue of previous inquiries into their “trustworthiness and probity.”102 Second, governmental intrusions were deemed minimal since regulatory procedures provided employees advance notice of the testing, required no direct observation of urination, limited the toxicological examination to specific drugs, and only required personal medical information disclosure by those employees who tested positive.103

The Court rejected arguments raised by the union that the testing was unnecessary to further the governmental goals.104 The absence of this factor likely would have been dispositive in *Skinner*, but under the *Von Raab* balancing examination, the “possible harm” which the government seeks to prevent furnishes ample justification for searches “calculated” to advance the government’s goal.105

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98. Id. (discussing cases in which courts upheld suspicionless searches of travelers entering the country).
99. Id.
100. Id.
101. Id. at 670-71.
102. Id. at 671.
103. Id. at 672-73 n.2; see also Edward M. Chen et al. *Common Law Privacy: A Limit on an Employer’s Power to Test for Drugs*, 12 Geo. Mason U. L. Rev. 651, 691-92 (1990) (contrasting the intrusiveness of the *Von Raab* testing with a random testing scheme and noting that *Von Raab* upheld a one-time test initiated only upon the employee’s application for promotion and her final selection for the position).
104. Id. at 673.
105. Id. at 674-75; cf. *New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985) (“Such a search
Unlike *Skinner*, *Von Raab* does not require the government to prove the search demonstrably advances its efforts to address identified governmental concerns.\(^{106}\) *Von Raab* endorses searches that are only calculated to prevent possible societal harms.\(^{107}\) On this point, *Von Raab* significantly departs from the *Skinner* criteria because the factual predicate necessary to demonstrate the government’s compelling interest is only the prevention of “possible harms” rather than the necessity of addressing identified problems.\(^{108}\) Additionally, the Court required no extensive tailoring of the search to address these harms; the testing need only be “calculated” to address governmental objectives.\(^{109}\) These differences in the relationship between the governmental goals to be achieved by drug testing, and the existence of actual problems to be addressed by a drug testing policy, were dispositive for two members of the Court.\(^{110}\)

In contrast to *Skinner*, urinalysis testing in *Von Raab* is declared to be reasonable, not “necessary.”\(^{111}\) The Court concluded that the government “has demonstrated its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees who seek to be promoted to positions which involve the interdiction of illegal drugs or that require the incumbent to carry a firearm.”\(^{112}\)

III. JUDICIAL APPLICATION OF THE *SKINNER* AND *VON RAAB* ADJUDICATORY METHODS

A. The Courts of Appeals

Generally, the federal circuit courts have balanced the interests of the government against the resulting privacy infringements when will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

\(^{106}\) *Id.*

\(^{107}\) *Id.* at 675-76 n.3.

\(^{108}\) *Id.* at 674-75.

\(^{109}\) *Id.*

\(^{110}\) *Id.* at 680-81 (Scalia and Stevens, J.J., dissenting) (declining to join in the Court’s opinion in *Von Raab* because “neither [the] frequency of use nor connection to harm is demonstrated or even likely”). In light of his previous position in *Burger*, one would have expected Justice Blackmun to join the dissenting justices. See *supra* note 39. Had Justice Blackmun adhered to his previous position, the outcome of the *Von Raab* decision would have been different.

\(^{111}\) *Id.* at 677.

\(^{112}\) *Id.*
examining the constitutionality of various drug testing policies.\textsuperscript{113} Adopting the balancing approach articulated in \textit{Von Raab}'s "special needs" examination, the courts rarely refer to the analogical reasoning employed in \textit{Skinner}.	extsuperscript{114} They generally ignore the absolute standards advanced in \textit{Skinner}, applying instead a facile approach to balancing, the focus of which is solely to decide which interest "outweighs" the other.\textsuperscript{115} They have consistently rejected attempts by proponents through argument to even engage in \textit{Skinner}'s more exacting examination.\textsuperscript{116}

Additionally, the Supreme Court's reasoning in \textit{Von Raab} invites consideration of whether the circuit courts have discerned the need to assess the particular "weight" of competing interests. This Article concludes that \textit{Von Raab} requires that the governmental interest reach a "compelling" level of concern, and even then a "compelling" interest may offset no greater than a "minimal" intrusion. The rationales and decisions of the courts of appeals suggest they instead have conceived their task as one requiring only the comparison of competing interests to determine which interest outweighs the other rather than a qualitative assessment of interests against a constitutional standard.

\textbf{B. Decisions of the District of Columbia Circuit Court}

The Circuit Court for the District of Columbia (the D.C. Circuit) issued the first federal appellate level decision after \textit{Skinner} and \textit{Von Raab},\textsuperscript{117} and has addressed more drug testing challenges than any other circuit.\textsuperscript{118} Thus, comparison of the jurisprudence of this

\begin{itemize}
\item \textsuperscript{113} See, \textit{e.g.}, Harmon v. Thornburgh, 878 F.2d 484, 488, 493-96 (D.C. Cir. 1989), cert. denied; 493 U.S. 1056 (1990).
\item \textsuperscript{114} See supra notes 56-57 and accompanying text; see also Aleinikoff, \textit{infra} note 12, at 945 (distinguishing balancing as an adjudicatory method from methods of adjudication that look at a variety of factors when reaching a decision).
\item \textsuperscript{115} Balancing, however, does not have to be facile. It can be detailed, careful, and open. See, Coffin, \textit{supra} note 17, at 22-25.
\item \textsuperscript{116} See, \textit{e.g.}, \textit{infra} notes 124-28 and accompanying text. The use of a balancing methodology to decide Fourth Amendment issues, however, has strong support in precedent. See Aleinikoff, \textit{supra} note 12, at 965 (noting the growth and spread of balancing methodology, the author states the "Court has stated and restated the balancing of 'competing interests' is 'the key principle of the Fourth Amendment'") (citations omitted).
\item \textsuperscript{117} See Boudreaux \textit{supra} note 13, at 701 (characterizing \textit{Harmon} as the "first major drug testing ruling" after the Supreme Court's holdings in \textit{Skinner} and \textit{Von Raab}).
\item \textsuperscript{118} \textit{Id.} at 701-02 n.12 (observing that the D.C. Circuit is often called the "second most" important court in the nation and concluding that the court's jurisdiction over most regulatory and administrative decisions of federal agencies has an "outsized" impact on the nation's governmental policies).
\end{itemize}
circuit with that of other circuits permits some assessment of the evolution of drug testing jurisprudence.

1. **Harmon v. Thornburgh**

The D.C. Circuit expressed an early preference for the *Von Raab* balancing approach. In *Harmon v. Thornburgh*, issued shortly after *Skinner* and *Von Raab*, a panel of the D.C. Circuit upheld the constitutionality of the Department of Justice's drug testing program by balancing the governmental interests at stake against the resulting intrusion upon privacy caused by the use of urinalysis.119 The *Harmon* drug testing policy applies to federal prosecutors, workers with access to grand jury proceedings, and employees holding top secret national security clearances.120 Relying on *Von Raab*, the court concluded that testing employees holding top secret national security clearances does not violate the Fourth Amendment.121

Arguably the court's reliance upon *Von Raab* should not be viewed as a preference for a balancing methodology over any other adjudicatory approach; rather, the court distinguished *Skinner*122 and concluded that *Von Raab* was more on point. However, the court's rationale reveals that its decision to apply a balancing test was based upon the misconception that both *Skinner* and *Von Raab* used balancing to adjudicate the constitutionality of suspicionless searches.123

Articulating the "special needs" language used in *Von Raab*, *Harmon* applies a balancing test to determine the constitutionality of both the warrantless and suspicionless elements of the searches associated with the drug testing program. When balancing, *Harmon* does not consider whether the testing policies entail only minimal,

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120. *Id.* (concluding that employees holding top secret national security clearances could be subjected to mandatory suspicionless testing). The court suggested that workers performing duties closely tied to the enforcement of federal drug laws could constitutionally be required to undergo testing but refused to delineate which employees within existing governmental categories could be tested where the government had not drawn such lines. *Id.* at 493-96.
121. *Id.* at 493.
122. *Id.* at 488 (distinguishing *Skinner* because the post-accident drug testing was contingent upon an event, a train accident or rule violation, and suggesting that the event provided an indication that there had been some dereliction of duty or that things had not gone as planned). The court noted that "*Skinner* relied entirely upon a single governmental interest: the protection of the public from immediate threats to physical safety." *Id.*
123. *Id.* (concluding that both *Skinner* and *Von Raab* used balancing to determine the constitutionality of suspicionless searches).
rather than more substantial, intrusions.\textsuperscript{124} Evaluation of the nature and extent of the intrusion should have been one of the court’s threshold issues because the Supreme Court endorsed suspicionless searches only where the testing policies cause minimal intrusion upon employees’ reasonable expectations of privacy.\textsuperscript{125} Instead of assessing the qualitative intrusiveness of the search, \textit{Harmon} simply dismisses the employees’ arguments that the randomness of the testing increases its intrusiveness beyond that endorsed in \textit{Von Raab}.\textsuperscript{126} The court believed that even if the random testing increased the privacy intrusion, such increased intrusion is only a relevant, not dispositive, consideration.\textsuperscript{127} \textit{Harmon} misinterprets the importance of the increased intrusion, however, if one agrees that the balancing test within the context of suspicionless drug testing involves more than deciding which competing interest “outweighs” the other, but instead requires an examination of competing interests to determine if they meet predetermined, prescribed qualitative values.\textsuperscript{128}

\textit{Harmon}’s balancing approach does not require the government to establish that the search advances the governmental interest, an important consideration in \textit{Skinner}.\textsuperscript{129} Further, there is no need for the government to prove that individual suspicion requirements would jeopardize accomplishment of the governmental objectives, another factor considered in \textit{Skinner}.\textsuperscript{130} \textit{Harmon} rejects arguments by the employees that \textit{Von Raab} must be distinguished because the government is able to detect drug-impaired Justice Department employees who work in traditional office settings.\textsuperscript{131} This distinction was considered to be only “one element to be weighed in the balance.”\textsuperscript{132} According to the \textit{Harmon} court, “the \textit{Von Raab} Court

\begin{itemize}
\item \textsuperscript{124} \textit{Id.} at 492. \textit{See also} Boudreaux, \textit{supra} note 13, at 704 (concluding that the court’s rationale was “nonexistent”).
\item \textsuperscript{125} \textit{See supra} notes 58-60, 103 and accompanying text.
\item \textsuperscript{126} \textit{Harmon}, 878 F.2d at 489 (employees arguing that random testing involves a greater intrusion than that approved in \textit{Von Raab}). While the court acknowledged that a “coherent theory” could be constructed that the randomness of the drug testing program at issue would provide a fundamental distinction, the court concluded that \textit{Von Raab} does not require that the search only involve a minimal intrusion. \textit{Id. But see} \textit{supra} note 103 and accompanying text. The extent of the intrusion would only affect the outcome in a particularly close case where that factor might tip the scales in favor of the employee. \textit{Harmon}, 878 F.2d at 489.
\item \textsuperscript{127} \textit{Id.} at 492.
\item \textsuperscript{128} \textit{See Boudreaux}, \textit{supra} note 13, at 703-05 (criticizing the court’s analysis of the extent to which random testing intrudes upon employees’ privacy interests).
\item \textsuperscript{129} \textit{See supra} notes 56-57 and accompanying text.
\item \textsuperscript{130} \textit{Harmon}, 878 F.2d at 492.
\item \textsuperscript{131} \textit{Id.} at 489.
\item \textsuperscript{132} \textit{Id.}
\end{itemize}
gave no indication that it deemed this factor to be one of overriding significance." Yet, the reasoning of Von Raab suggests otherwise.134

The trend toward an expanded level of generality given to the Supreme Court's Skinner and Von Raab holdings surfaced in Harmon.135 Because Harmon lacked any analysis of the constitutionality of warrantless testing, one may assume the court interpreted the Supreme Court's findings that the Skinner and Von Raab governmental employers were exempt from warrant/probable cause requirements as a determination that all warrantless governmental drug testing programs were constitutional. Yet the Court gave no indication that its holdings should be elevated to constitutional principles.

When addressing the warrant issue, the Supreme Court in Skinner and Von Raab engaged in ad hoc decision making.136 If the Supreme Court had attempted to resolve the issue of warrantless drug testing for all governmental employers, it would have encountered difficulties reaching such a decision under the parameters it established for addressing the warrant issue. The Court did not consider the nature of the operations of every governmental employer to reach an informed decision about the problems a warrant requirement would create for each.

Had the Harmon court analyzed the Warrant Clause of the Fourth Amendment, it would have been difficult to support a conclusion that Justice Department officials need not comply with warrant procedures.137 The Justice Department officials in Harmon are not situated similarly to the railway supervisors in Skinner.138

133. Id.
134. See supra note 89-91 and accompanying text.
135. Coffin, supra note 17, at 33-35 (discussing the level of generality within the context of balancing as a method of constitutional adjudication). During the October 1986 Term, the Supreme Court tended to move "the focus of balancing from one individual or small group in some program or institution to an entire category of people and activities." Id. After discussing specific examples where, in Judge Coffin's opinion, the Court has in the past moved the focus from the individual or small group to entire categories of people, he concludes that if the Court should choose to "paint with a broad brush," its choice should be deliberate, addressed, and the justification explained. Id.
136. See supra notes 43-46, 80-81 and accompanying text.
137. See supra notes 52, 84-88 and accompanying text.
138. See supra note 52 and accompanying text. Skinner found that warrant requirements impede the achievement of the government's objective, because railroad supervisors are not "in the business of investigating violations of the criminal laws or enforcing administrative codes and have little occasion to become familiar with the intricacies of this Court's Fourth Amendment jurisprudence." Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 623-24 (1989).
The *Harmon* court easily could have concluded that, unlike the railroad supervisors, supervisors of Justice Department attorneys are indeed familiar with both the “intricacies” of Fourth Amendment jurisprudence and warrant procedures. If supervisors of prosecuting attorneys are not held to the warrant requirement in light of *Skinner*, it is unlikely that any governmental employer would ever satisfy *Skinner*’s rationale.

Alternatively, *Harmon* might have employed *Von Raab*’s reasoning when deciding that Justice Department officials did not need a search warrant. In *Von Raab*, the governmental officials involved were likely to be more familiar with warrant procedures than typical government supervisors, but the Court relied upon assertions by Customs Service officials that warrant procedures would impede the accomplishment of their “pressing responsibilities.”

In *Harmon*, however, the Justice Department officials offered no “pressing responsibilities” to justify their exemption from warrant requirements.

The *Harmon* court expressed concerns, in light of *Von Raab*, regarding the proper method of undertaking the balancing examination. The court observed:

> The *Von Raab* majority made no effort to articulate an analytical rule by which legitimate drug-testing programs could be distinguished from illegitimate ones. It simply weighed individual privacy interests against the government’s policy objectives, enumerating several factors that it deemed relevant in performing this balancing process. The Court did not, however, indicate whether it deemed the case a close one, in the sense that minor variations in the facts would have tipped the balance in the other direction. Nor did it indicate which (if any) of the relevant factors would be essential to a constitutional testing plan.

These comments clearly suggest that more direction from the Supreme Court would have been helpful.

An evaluation of competing interests for the purpose of balancing should include consideration of issues such as “the importance of the interests affected, the seriousness of infringement . . . the burden on the government in money, time, and efficacy of operations, and the availability of other feasible means to fulfill governmental interests.” *Harmon* extensively discusses the gov-

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139. National Treasury Employees Union v. *Von Raab*, 489 U.S. 656, 666-67 (1989); see *supra* notes 84-88 and accompanying text.
140. *Harmon* v. Thornburgh, 878 F.2d 484, 488-89 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1056 (1990); see also Willner v. Thornburgh, 928 F.2d 1185, 1187 (D.C. Cir. 1991) (“*Von Raab*’s balancing test is inherently, and doubtless intentionally, imprecise. The Court did not purport to list all of the factors that should be weighed or to identify which factors should be considered more weighty than others.”).
ernmental interests offered to justify the drug testing program; however, it barely assesses the seriousness of the infringement caused by the testing. The entirety of the court’s assessment of the seriousness of the resulting intrusion is its dismissal of the employees’ argument that this random testing program is substantially more intrusive than the program validated in Von Raab.

Had the Harmon court evaluated the seriousness of the infringement upon the individual privacy interests at stake, it would have considered the increased intrusion caused by the testing circumstances: The testing ordinarily proceeded upon short notice; employees were required to remove outer garments; the testing was supervised by a monitor of the same gender who allowed the employee to urinate within a stall or petitioned area; and the random character of the testing could subject employees to repeated intrusions. Each of these factors should have been part of the total mix of information considered when determining the seriousness of the intrusion and whether it exceeded the minimal intrusions upheld in Skinner and Von Raab.

2. National Federation of Federal Employees v. Cheney

In National Federation of Federal Employees v. Cheney, the D.C. Circuit again engaged in judicial balancing when addressing a Fourth Amendment challenge to drug testing, this time of civilian army employees. Even the court’s phrasing of the issue presupposes that balancing would resolve the constitutional question: “Does the government’s need to conduct the suspicionless searches outweigh the privacy interests of the covered employees in such a fashion that it is ‘impractical to require a warrant or some level of individualized suspicion’?”

Unlike Harmon, Cheney does not ignore the analogical reasoning process used in Skinner. While Cheney expressed Skinner’s rea-
soning in terms of the Supreme Court's determination of the reasonableness of the testing at issue, Cheney at least acknowledges that Skinner considers a number of factors when adjudicating the constitutionality of the railroad's post-accident drug testing program. However, the Cheney panel did not resort to application of Skinner's standards when reaching its decision.

In contrast to Harmon, Cheney briefly considers the propriety of requiring governmental officials to comply with the Fourth Amendment's warrant provision. Abbreviating the "special needs" analysis used in Skinner and Von Raab, Cheney simply reviews the government's stated purposes for testing. Concluding that the governmental interests in testing were "clearly other than the ordinary need for law enforcement," the Cheney court held that no warrant is required.

There are a number of similarities between the court's reasoning in Cheney and Harmon. Consistent with its approach in Harmon, the court in Cheney dismisses arguments that the random nature of the Army's testing program results in a more severe invasion of privacy than was the case in the Skinner and Von Raab programs. The Cheney court, while recognizing that the intrusiveness stemming from this type program is a relevant consideration, fails, as in Harmon, to find that the consideration is one requiring a different analysis from that engaged in by the Court in Skinner and Von Raab. Unlike Harmon, however, Cheney does involve some evaluation of the seriousness of the intrusion.

152. See id. (stating that Skinner considered: "(1) the 'limited' intrusions occasioned by the testing procedures; (2) the diminished expectation of privacy that attaches to employment in an 'industry that is regulated pervasively to ensure safety'; and (3) the government's 'compelling' or 'surpassing' interest in railway safety, an interest that could not adequately be protected by testing only upon individualized suspicion" (citations omitted). Characterizations of intrusions as limited are not synonymous with characterization of intrusions as minimal. The court's reference to "limited" intrusions appears to stem from a tendency to equate the concept of "limiting" an intrusion upon privacy interests with the concept of assessing the qualitative severity of the intrusion. Limited intrusions should be thought of as those resulting from policies and procedures which define and circumscribe the scope of the intrusion. Minimal intrusions, however, represent the judgment formed after qualitative assessment of the severity of the intrusion upon individual privacy interests. Policies and procedures could conceivably limit a very substantial intrusion.

153. See supra notes 45-54 and accompanying text.

154. See supra notes 82-88 and accompanying text.

155. Cheney, 884 F.2d at 608 (concluding that the testing program had three stated purposes, none of which appeared related to law enforcement goals: "(1) assisting in determining employee fitness, (2) identifying and treating drug abusers, and (3) maintaining national security and the internal security of the Defense Department").

156. Id.

157. Id.

158. Id. at 609.

159. Id. at 610-15; cf. Williams, supra note 3, at 72-73 (concluding that the diminished
The court’s discussion focuses primarily upon the extent to which existing regulations had previously diminished the workers’ privacy expectations. Balancing as undertaken in Cheney, albeit incomplete, at least includes some assessment of the seriousness of the infringement upon employees’ privacy interests.

3. American Federation of Government Employees v. Skinner

American Federation of Government Employees v. Skinner involved a challenge to a drug testing plan requiring random testing of certain Department of Transportation (DOT) employees. As expected after Harmon and Cheney, the D.C. Circuit focused upon Von Raab “special needs” language. The court stated it would “balance the individual[s’] privacy expectations against the Government’s interest to determine whether it [is] impractical to require a warrant or some level of individualized suspicion in the particular context.”

The court briefly considered the warrant issue. However, as in Cheney, the court abbreviated the “special needs” examination to a consideration of the government’s stated goals for testing. The court then concluded that because the government’s goals did not include law enforcement and because non-consensual disclosure of test results to police authorities was proscribed, special needs existed to forego warrant requirements.

privacy expectation analysis is inconsistent with the intentions of the Framers of the Fourth Amendment and promotes litigation rather than cooperation with employer goals).

160. Id. at 611-15 (concluding that the chemical and nuclear surety employees’ privacy expectations are diminished because they are required to report all prescription drug use and update background information, and are subjected to regular medical exams; noting that civilian guards and police are required to undergo a variety of privacy diminishing tests and investigations as a condition of employment in a high-security, military context; reasoning that drug counselors should expect inquiry into their fitness and probity but not elaborating upon any activities which may have diminished the expectation; and concluding that privacy expectations of those employed in positions involving performance of urinalysis testing of others had not been diminished previously by pre-employment or employment procedures).


162. Id. at 889, 892 (ninety-four percent of the employees subject to the random testing worked for the Federal Aviation Administration, with nearly two-thirds of these individuals working as air traffic controllers; however, the DOT also tested motor vehicle operators who transported visiting foreign dignitaries, key Department officials, and passenger-laden shuttle buses).

163. Id. at 889 (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989)).

164. Id. The court’s statement to the effect that “the testing plan serves needs other than law enforcement, and therefore need not necessarily be supported by any level of
American Federation of Government Employees attempts to apply Skinner's reasoning; unfortunately the court viewed Skinner as a balancing case.165 Thus, instead of considering whether the search advanced important governmental goals that would be jeopardized by individualized suspicion requirements, the court balanced governmental interests against the privacy intrusions to determine the constitutionality of the testing program.

When applying its balancing test, however, the court did not even consider aspects of the testing that increased the seriousness of the privacy intrusion upon the employees tested.166 Instead, the court summarily concluded that those aspects were neither dispositive nor the "sine qua non of constitutionality."167 There was no evaluation of the competing interests; instead the seriousness of the intrusions upon employee's privacy interests was determined solely by reference to Harmon and Von Raab. The court seemed to apply per se rules: Harmon does not require a different weight to be assigned to the individual interests at stake because the testing is random; Von Raab does not mandate testing within a medical environment.168 Random testing was upheld because the job titles and duties of the employees to be tested were similar to those approved for random testing in earlier decisions.169 This adjudication of the constitutional issues, therefore, is based on whether the employees fall within certain categories of jobs which had been approved previously for drug testing.

particularized suspicion,"") suggests that the court might conclude with the adjudication of the constitutionality of the program at this point. However, the court also considered the "reasonableness" of the program; using balancing to decide if "the public interest would be best served by requiring a standard of reasonableness short of particularized suspicion." Id.

165. Id. at 890-91 (observing that Skinner was a natural starting point for determining whether the DOT's safety interests justified the testing; and concluding that the Skinner analysis was "fully applicable").

166. Id. at 891. Noting that the testing program at issue entailed an intrusion different from that approved in Skinner, the court stated: "While it is true that the regulations sustained in Skinner required testing only after a triggering event and in a medical environment, we do not find that either of these facts compels a fundamentally different analysis from that pursued by the Supreme Court. While it is true that random testing may increase employee anxiety and the invasion of subjective expectations of privacy, it also limits discretion in the selection process and presumably enhances drug-use deterrence." Id. (citing Harmon v. Thornburgh, 878 F.2d 484, 489 (D.C. Cir. 1989), cert. denied, 493 U.S. 1056 (1990)).

167. Id.

168. Id. at 891; cf. Hartness v. Bush, 919 F.2d 170, 173 (D.C. Cir. 1990), cert. denied, 111 S. Ct. 864 (1991) (recognizing "per se rules of specialized application which automatically allow searches of pre-determined scope under specified circumstances" and drawing "clear demarcation lines" in drug testing cases).

169. Id. at 891-93 (finding the risks posed by impaired individuals working as hazardous

These cases were considered by the same panel of judges and the opinions were issued on the same day. In *Treasury Employees v. Yeutter*, the National Treasury Employees Union (NTEU), on behalf of motor vehicle operators, challenged a federal program mandating random urinalysis testing of certain United States Department of Agriculture employees. The *Yeutter* court viewed both *Skinner* and *Von Raab* as endorsing balancing as the appropriate means for adjudicating the constitutionality of the suspicionless testing. Noting that the Department of Agriculture's program paralleled the Department of Transportation program upheld in *American Federation of Government Employees*, *Yeutter* concludes that a court need only decide "whether the few distinctions between these situations require . . . a different result." In effect, then, the court adjudicated by comparing the governmental and individual interests with those deemed sufficient to uphold suspicionless testing in *American Federation of Government Employees*.

The NTEU attempted to diminish the weight assigned to the government's interest in testing FNS drivers by arguing that the governmental interest in this case is much weaker than that presented in *American Federation of Government Employees*. FNS drivers primarily chauffeur officials and deliver documents, while the DOT drivers in *American Federation of Government Employees* routinely drove shuttle buses. The *Yeutter* court, however, refused to engage in what it characterized as "line-drawing" based on the number of passengers that drivers carry each day. It concluded that the governmental interest in testing FNS drivers is no less "compelling" than those interests the court had deemed "compelling" in other instances. The court may have been
correct in observing that artificial distinctions based on the number of passengers carried by a motor vehicle operator do not provide an appropriate basis for constitutional adjudication. However, the court’s comparisons of governmental interests, likewise, were not an appropriate basis for constitutional adjudication. Rather, the court should have focused upon the constitutional standards established by the Supreme Court in *Skinner* and *Von Raab*. Furthermore, the court could have appropriately recognized distinctions between the safety interests implicated by public carriers and those raised by isolated instances where the government provides transportation for individual employees.

The court also found no significant differences in the privacy expectations of FNS drivers and DOT motor vehicle operators, even though FNS drivers do not undergo the extensive background checks experienced by DOT drivers. The court held that the FNS drivers’ expectations of privacy are sufficiently diminished because the drivers are required to submit a physician’s certificate attesting to their physical and mental fitness and that they are free of any drug habits. Again, the focus, when assessing the extent of the resulting intrusion upon employees’ privacy interests, should have been the constitutional standards established in *Skinner* and *Von Raab*: the intrusions upon employees’ privacy interests should have been examined to determine whether they are greater than minimal intrusions.

*Hartness v. Bush* involves a challenge to a governmental testing program mandating random testing for those persons working in the Executive Office of the President who hold “secret” national security clearances. The same panel that decided *Yeutter* noted that the testing procedures for personnel holding “top secret” clearances are identical to the procedures that the court upheld in *Harmon*. Balancing was eschewed in favor of the application of per se rules that would yield a predetermined balancing result.

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177. *Id.*
178. *Id.*
179. *Id.*
181. *Id.* at 171. The three judge panel consisted of Judges Silberman, the author of the majority opinion, Mikva, concurring, and Edwards, dissenting.
182. *Id.*
The opinion of Judge Silberman in *Hartness* interprets prior drug testing holdings as establishing certain propositions:

[U]rinalysis testing is a significant intrusion into the privacy interests of employees and as such is a search within the Fourth Amendment and it does not require a warrant, a probable cause, or any level of individualized suspicion, but is instead governed by the balancing process weighing the interest of the government qua employer against the privacy interests of the employees. Those governmental interests powerful enough to justify urinalysis testing include the public security interests that can be endangered by employees with access to national security information, by personnel who carry firearms in the course of their employment, by personnel with access to drugs or who prosecute drug cases, by employees who control or have access to dangerous instrumentalities. 183

Further, when interpreting the *Harmon* holding, Judge Silberman was of the opinion that *Harmon* may be presumed to have used a balancing test which would always yield only one result. 184 He reasoned that the Supreme Court had in the past “preserved the overall balancing test of ‘reasonableness’ required by the Fourth Amendment while articulating several per se rules of specialized application which automatically allow searches of pre-determined scope under specified circumstances.” 185 In contrast to the *Yeutter* decision, which was authored by Judge Mikva, Judge Silberman concluded that a number of the drug-testing cases of the D.C. Court of Appeals had drawn clear lines of demarcation. 186 Finding no distinction of constitutional significance between persons with top secret clearances and those with secret clearances, Judge Silberman summarily concluded that the judicial balancing process, if performed, would yield a result in favor of the government. 187

Judge Mikva concurred with the judgment. In light of the balancing examination he undertook in *Yeutter*, however, his concurrence appears not to resort to per se rules when deciding the constitutionality issue. Judge Mikva agreed that *Harmon* is a starting point. Therefore, the differences between the governmental interest in testing workers with secret clearances would not be significant enough to “tip the constitutional scales” against testing. 188 Judge Mikva, unlike Judge Silberman, framed the court’s decision within balancing terminology.

183. *Id.* at 172 (citations omitted).
184. *Id.* at 173.
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.* at 174.
Judge Silberman’s opinion in *Hartness v. Bush* draws a rather lengthy dissent from Judge Edwards criticizing the court for embracing a per se rule. Judge Edwards characterized the majority’s approval of the Executive Office’s testing program as a “symbolic victory” in the “war on drugs.” Following a detailed discussion of the evolution of Fourth Amendment jurisprudence, Judge Edwards’s dissent concludes that the balancing test endorsed in *Skinner* and *Von Raab* is a “minimal” Fourth Amendment standard. Assigning a narrow focus to *Von Raab*, Judge Edwards argued that *Von Raab* endorses a “case-by-case, highly contextual approach to weighing the national security interests advanced by particular drug testing programs,” which is the “antithesis” of a bright line rule.

Judge Edwards’ dissent appears more consistent with *Skinner* and *Von Raab* because it appropriately assigns a narrow focus to the Supreme Court decisions. It eschews per se rules which would predetermine the constitutionality of testing individuals according to their job categories or security clearances. In light of the Court’s prior expressions of a balancing examination, which entails a fluid process of weighing the competing interests, it is reasonable to expect Judge Edwards to describe the balancing examination as a minimal constitutional standard. However, as discussed in Part II of this Article, the Supreme Court has already performed most of the balancing task, leaving to lower courts the task of determining the qualitative weights of the competing interests. Judicial balancing within the context of suspicionless drug testing, therefore, should be an exacting examination of governmental and individual privacy interests rather than a minimal constitutional standard.

C. The Ninth Circuit Court of Appeals

The Ninth Circuit, like the D.C. Circuit, has had considerable litigation involving challenges to drug testing programs. *Bluestein v. Skinner* addresses the constitutionality of drug testing regulations promulgated by the Federal Aviation Administration (FAA) that require random testing of flight crew members, maintenance personnel, air traffic controllers, and several other categories of
employees in the private commercial aviation industry. 196

The Ninth Circuit used Von Raab’s “special needs” balancing, but the court considered the warrant issue using an abbreviated “special needs” examination. Finding the goals of the FAA testing program did not involve law enforcement, Bluestein held that a warrant is not necessary and proceeded with balancing.197 As in Harmon, Cheney, and American Federation of Government Employees, the employees in Bluestein argued that the randomness of the testing increases the intrusion: The FAA regulations provided for unannounced immediate testing while the Customs Service’s testing in Von Raab requires at least a five-day notice.198 The employees in Bluestein also argued that the randomness of the program entailed a more extensive intrusion than the program in Von Raab because the Customs Service’s testing is invoked only upon the occurrence of certain events.199 Nevertheless, the Ninth Circuit followed the lead of the D.C. Circuit in Harmon and concluded that although these factors add weight to the “‘invasion of privacy’ side of the Fourth Amendment balance,” they are insufficient to “tip the scales.”200 This view of the balancing process precludes consideration of whether the testing entails greater than the minimal intrusions approved in Skinner and Von Raab. Thus, the balancing result is predetermined in favor of the government if the FAA testing program cannot be “meaningfully distinguished” from the program approved in Von Raab.201 Again, the court utilized adjudication by categorization or the application of per se rules. If the testing program is similar to those approved by previous courts, no balancing is actually necessary; the court may reject the employees’ constitutional challenge to the FAA drug testing program simply because it is so similar to others previously approved.

In a later opinion, IBEW, Local 1245 v. Skinner,202 the Ninth Circuit considered a Fourth Amendment challenge to rules requir-
Suspectionless Drug Testing

ing random drug testing of employees engaged in work involving the production of natural gas, liquified natural gas, and hazardous liquid pipeline operations.\textsuperscript{203} As in Bluestein, the court framed its task in terms of balancing.\textsuperscript{204} In this case, however, the Ninth Circuit's reasoning suggests that the court views the balancing process as more than a comparison of competing interests. The court initially considered whether the government demonstrated a compelling interest to justify the drug testing rules.\textsuperscript{205} The governmental employer identified a safety interest as its justification for the drug testing program.\textsuperscript{206} Acknowledging that Bluestein and Von Raab recognized a compelling governmental interest in deterring drug use and its attendant harms, occurring from abuse in the airline industry and the Customs Service, respectively, the court in IBEW agreed that the threat of harm which could result from a pipeline accident was a "strong" governmental interest.\textsuperscript{207} The court was of the opinion that random drug testing offers the best potential deterrent to drug use, and when coupled with the possibility of a catastrophic accident, is sufficient to establish a "strong governmental interest" in random testing.\textsuperscript{208}

The Ninth Circuit examined the seriousness of the privacy infringement from two vantage points: "(1) whether as a result of other circumstances employees in this industry already have a diminished expectation of privacy; and (2) whether the particular testing program minimizes the intrusion of privacy."\textsuperscript{209} IBEW concludes that the employees had diminished expectations of privacy because of prior regulation of potential safety hazards.\textsuperscript{210} Although the court then merely glossed over the nature of the intrusion implicated by the testing, IBEW's analysis is unique in

\textsuperscript{203} Id. at 1455-56. The rules were promulgated by the Research and Special Programs Administrations (RSPA) of the United States Department of Transportation (DOT).
\textsuperscript{204} Id. at 1461. The opinion stated that "we must therefore 'balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.' " Id. (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665-66 (1989)).
\textsuperscript{205} Id.
\textsuperscript{206} Id. The court stated: "'T]he clear public interest in assuring that certain sensitive safety-related pipeline personnel perform their duties free of prohibited substances provides justification for testing . . . .' " (quoting 53 Fed. Reg. 47, 085 (1988)).
\textsuperscript{207} IBEW, 913 F.2d at 1461.
\textsuperscript{208} Id. at 1462-63.
\textsuperscript{209} Id. (citing Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 626-27 (1989)).
\textsuperscript{210} Id. at 1463 (concluding also that the employees worked in a highly regulated industry).
one respect: The court reasoned that the absence of individualized suspicion increased the intrusiveness of the testing on an employee's privacy. The court, however, offered no explanation of why the absence of individualized suspicion contributes to the seriousness of the intrusion. The Ninth Circuit's discussion did, at least, include a distinct comparison of the governmental interests at stake, with the resulting intrusion upon employees' privacy. The court even gave cursory consideration to regulations it characterized as "unprecedented" because they provided for post-accident testing of employees who are unable to consent to a urine sample due to their injury or unconsciousness. Persuaded by the government's assertion that no intrusion of employees' bodies was intended by the regulations, the court found the regulations constitutional. However, a regulation that carries the potential for invading an employee's body should merit more extensive consideration. It seems untenable that a urine sample may be obtained from an unconscious employee without some invasive process. Yet the court seems to have uncritically accepted the government's assertions that no such invasions were "intended."

D. The Seventh Circuit Court of Appeals

The Seventh Circuit, in Taylor v. O'Grady, addressed a challenge to a Cook County, Illinois drug testing program which requires annual mandatory urine testing for all Department of Corrections employees. The district court had enjoined the testing, finding

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211. Id. at 1464 & n.28 (noting that the petitioners did not contend that the testing procedures themselves were intrusive; the procedures called for the use of stalls or partitioned areas for privacy).

212. Id. at 1463-64 (deciding that regulations concerning performance, medical fitness for duty, or training and ability to perform particular trades "suggest" potential safety hazards of the industry, the court found that these regulations diminish expectations of privacy). The court concluded that the "level of intrusiveness does not justify striking down the random drug testing rule." Id. at 1464.

213. Id. at 1464 n.29.

214. Id.

215. 888 F.2d 1189, 1191-92 (7th Cir. 1989). Correctional officers were compelled to produce one urine specimen for drug testing each year. They had no advance notice of the specific day of the testing. Employees scheduled for testing were advised during roll call at the beginning of their shift and were given the remainder of the day to produce a specimen. After notification of selection for testing, employees were taken to a holding area where they remained until the close of their shift. Selected employees, if unable to produce a specimen during that period, could be terminated. Immediately prior to producing the specimen, the employee could specify medical information relating to drug use history which might explain a false positive result. The employee was accompanied by a testing administrator of the same sex into the restroom and was subjected to a pat-down search.
it violated the Fourth Amendment because it failed to advance the government's interests in ensuring that its work force was not impaired and in preventing the smuggling of drugs to prisoners. On appeal, the Seventh Circuit had the benefit of the Supreme Court's intervening decisions in Skinner and Von Raab. Nevertheless, citing Von Raab, the Seventh Circuit resorted to a balancing test to determine the constitutionality of suspicionless searches associated with the drug testing program.

Initially, Taylor observes that the Supreme Court has already recognized some special governmental interests as meritings suspicionless drug testing. Taylor concludes, however, that while these interests may rise to the level of compelling in some instances, such a showing is not required to find a program constitutional. The Seventh Circuit questioned whether certain qualitative weights are necessary for interests to balance in favor of one party or another:

While the governmental interests at issue in Von Raab happened to be compelling, this is not predicate to the holding; it is unclear what the Court would have done if the interest had not been compelling as the Court gave us no indication if this was a close call. Indeed, if Von Raab were read to hold that a compelling interest were [sic] necessary, the balancing test would become almost insignificant. What is clear is that we are to perform a balancing test: if the intrusion on the individual is minimal, then the government need not have a compelling interest. In such a case, a valid or substantial interest would be sufficient.

According to Taylor, Von Raab does not assign a qualitative weight to the governmental interest that must be present for a constitutional suspicionless testing program. This interpretation,
however, is at odds with the express language of *Von Raab.* The *Taylor* court's reference to a "substantial" governmental interest has some support in the Supreme Court's decision in *New York v. Burger.* However, *Burger* concerned the constitutionality of warrantless rather than suspicionless searches. The Seventh Circuit appropriately raised an issue as to whether the interests subject to balancing must conform to qualitative weights of a particular dimension. In resolving this question, however, the court failed to consider that the Supreme Court might have performed most of the balancing required for adjudicating suspicionless drug testing policies.

Incident to applying its balancing test, *Taylor* undertakes a detailed review of the governmental interests served and the privacy intrusions implicated by the drug testing program. *Taylor* discusses three governmental interests advanced by the Corrections Department: "fostering the public's perception of the integrity of its work force; maintaining an unimpaired, physically fit work force; and preventing the smuggling of drugs to prisoners by correctional officers." *Taylor* deems the generalized interest in the integrity of the work force insufficient to justify the privacy invasions associated with drug testing. However, the remaining interests are "more than substantial," and therefore sufficiently weighty to overcome the privacy interests of the tested employees.

In *Taylor,* the Seventh Circuit concluded that "[a]ll urinalysis programs implicate serious privacy concerns regardless of how carefully tailored the program is designed." Characterization of these privacy concerns as "serious," suggests more than "minimal" intrusion; nevertheless, the Seventh Circuit concluded that the intrusion does not outweigh the governmental interests and is not much different from that occurring in *Skinner* and *Von Raab.* Accordingly, neither the short notice given to subjected employees nor the fact that the sample was collected by non-medical personnel

220. *See supra* note 90 and accompanying text.
221. 482 U.S. 691, 702 (1987) (requiring a "substantial" governmental interest to justify the regulatory scheme authorizing warrantless searches).
222. *Id.*
223. *Taylor,* 888 F.2d. at 1196.
224. *Id.; cf. Harmon v. Thornburgh,* 878 F.2d 484, 490-91 (D.C. Cir. 1989), *cert. denied,* 493 U.S. 1056 (1990) (deeming a governmental interest in promoting the public image of integrity as insufficient to overcome the privacy interests of employees).
225. *See Taylor,* 888 F.2d at 1196, 1199 (limiting implicated employees to those with direct prisoner contact).
226. *Id.* at 1197-98 (observing that "[b]eing compelled to urinate while under monitor is intrusive and often embarrassing and uncomfortable."),
227. *Id.* at 1198.
distinguishes the testing in \textit{Taylor} from that approved by the Supreme Court in \textit{Skinner} and \textit{Von Raab}.\textsuperscript{228}

\textit{Taylor}'s application of the balancing test includes a scrutiny of the class of subjected employees, ensuring that their job duties directly implicate the two recognized governmental interests.\textsuperscript{229} Acknowledging the existence of a relationship between the governmental interest and drug testing of employees whose work required regular contact with prisoners, or who would have opportunities to smuggle drugs to prisoners, the Seventh Circuit declined to uphold the district court's injunction.\textsuperscript{230}

\textbf{E. The Sixth Circuit Court of Appeals}

The Sixth Circuit in \textit{Penny v. Kennedy}\textsuperscript{231} addressed the constitutionality of the City of Chattanooga's drug testing program which mandates random urinalysis testing of fire fighters and police officers.\textsuperscript{232} The district court balanced the privacy interests of the employees against those of the city employer and decided that the government officials must have a reasonable suspicion of drug use to impose mandatory testing.\textsuperscript{233} Relying upon the rationales of \textit{Skinner} and \textit{Von Raab}, the Sixth Circuit concluded that the district court's particularized suspicion requirement must fail.\textsuperscript{234} The Sixth Circuit, in contrast to the Ninth and D.C. Circuits, focused on aspects of \textit{Skinner} rather than \textit{Von Raab}. The court applied the Supreme Court's statement in \textit{Skinner} that employees "subject to the tests discharge duties fraught with such risks of injury to others [and themselves] that even a momentary lapse of attention can have disastrous consequences."\textsuperscript{235} The Sixth Circuit, concluding that ensuring that firefighters and police officers were not impaired while on duty is a compelling interest, found that requiring a particularized suspicion of drug or alcohol use would seriously impede the advancement of the established compelling interest.\textsuperscript{236} Therefore, the suspicionless testing could proceed if, on remand,

\begin{itemize}
    \item \textsuperscript{228} \textit{Id.} at 1198-99.
    \item \textsuperscript{229} \textit{Id.} at 1199-1200 (citing American Federation of Government Employees v. Skinner, 885 F.2d 884 (D.C. Cir. 1989) (upholding testing by nonmedical personnel), \textit{cert. denied}, 495 U.S. 923 (1990)).
    \item \textsuperscript{230} \textit{Id.} at 1200.
    \item \textsuperscript{231} 915 F.2d 1065 (6th Cir. 1990).
    \item \textsuperscript{232} \textit{Id.} at 1066.
    \item \textsuperscript{233} \textit{Id.}
    \item \textsuperscript{234} \textit{Id.} at 1068.
    \item \textsuperscript{235} \textit{Id.} at 1067.
    \item \textsuperscript{236} \textit{Id.}
\end{itemize}
the testing was found consonant with other Fourth Amendment standards.\footnote{237}

While the Sixth Circuit purportedly considered \textit{Skinner} when reaching its decision, it clearly omitted aspects of \textit{Skinner}'s analysis. It only assessed the weight of the governmental interest offered to justify the searches, concluding that it was compelling. The court did not correspondingly consider the seriousness of the intrusion upon the employees subject to the testing. It summarily concluded that these compelling governmental interests would be jeopardized by individualized suspicion requirements. It did not consider whether the drug testing program advances the governmental interests within the context of police and fire department working environs. Unlike \textit{Skinner}, there is no independent consideration of whether the warrantless character of the searches renders them unconstitutional. Instead, it appears that the Sixth Circuit simply read \textit{Skinner} and \textit{Von Raab} as permitting drug testing without individualized suspicion. The court's rationale for imposing the \textit{Skinner} and \textit{Von Raab} holdings upon the cases before it is therefore conclusory and perfunctory.

\textbf{F. The Fifth Circuit Court of Appeals}

The Fifth Circuit, in \textit{National Treasury Employees Union v. Bush}, addressed a challenge to the constitutionality of a Presidential Executive Order that mandates random testing for federal workers in sensitive positions and reasonable suspicion testing for other employees.\footnote{238} Because the case involved a facial challenge to the Executive Order, the court did not find that it was required to perform any balancing of privacy and governmental interests.\footnote{239} According to the court, its task was to decide if there were any set of circumstances under which the Order would be valid.\footnote{240} Applying this standard, the court concluded that the Presidential Order was constitutional.\footnote{241} Incident to such conclusion, however, the court offered its view of the \textit{Skinner} and \textit{Von Raab} decisions. Consistent with the D.C., Ninth, and Seventh Circuits, the Fifth Circuit concluded that warrantless drug-testing searches should be evaluated by balancing the individuals' privacy interests against the government's interests in testing.\footnote{242} Citing \textit{Skinner}, however,
the court reasoned that “the tests must be ‘minimally intrusive’ and the government’s interest ‘compelling.’”\textsuperscript{243} While the court’s comments are apparently dicta, they are significant because they assign qualitative weights to the nature of the governmental interest, “compelling,” and the seriousness of the individual intrusion, “minimal.” If the Fifth Circuit would adhere to this interpretation of Skinner, balancing would assume a different perspective. Drug testing programs requiring intrusions that are greater than a “minimal” intrusion, or involving governmental interests that are less than “compelling,” would tip the scales in favor of the individual subject to the testing.

G. The Fourth Circuit Court of Appeals

The Fourth Circuit, in Thompson v. Marsh, rejected a Fourth Amendment challenge to the Army’s performance of random drug tests on certain civilian employees hired to work at a chemical weapons plant.\textsuperscript{244} The Fourth Circuit recognized no distinction between the post-accident testing in Skinner and the Army’s random testing program. According to the Fourth Circuit, Skinner holds that “random drug tests do not violate the Fourth Amendment in limited circumstances where important governmental interests outweigh individuals’ expectations of privacy.”\textsuperscript{245} Thus, unlike some other circuits, the Fourth Circuit acknowledged no distinction between random testing programs and those approved in Skinner and Von Raab.\textsuperscript{246} The court should have recognized that the random character of the Thompson drug testing program potentially subjects employees to more frequent intrusions with less advance notice than the drug testing programs reviewed in Skinner and Von Raab and, therefore, increases the intrusiveness of the search.

The Fourth Circuit did not consider the “special needs” examination or any other rationale for exempting the Thompson program from the Fourth Amendment’s Warrant Clause. When assessing the governmental interest, the court focused only on the specific risks associated with impaired employee performance and the governmental interest—public safety.\textsuperscript{247} This focus is appro-

\textsuperscript{243} Id.
\textsuperscript{244} 884 F.2d 113, 114 (4th Cir. 1989).
\textsuperscript{245} Id. at 114-15. The court also concluded that Von Raab applied the same balancing test when upholding the Customs Service drug testing program. Id.
\textsuperscript{246} See supra notes 22, 70, 127, 157-58, 166-67, 200-01, 227-29 and accompanying text.
\textsuperscript{247} Thompson, 884 F.2d at 114 (discussing the hazards posed by the chemical agents with which the employees worked).
priate and consistent with the Supreme Court’s reasoning in Skinner, which considers the relationship between the employee’s job duties and the risks the governmental employer seeks to avoid by drug testing. When evaluating the seriousness of the resulting privacy intrusion, however, the court focused primarily on factors that diminish privacy expectations,248 failing to assess the increased seriousness of the intrusion associated with the randomness of testing.249 Judicial balancing in this case is insufficient because the court failed to completely assess the competing interests.

H. The Third Circuit Court of Appeals

In Transport Workers’ Union v. Southeastern Pennsylvania Transportation Authority, the Third Circuit upheld random drug testing of employees holding safety sensitive positions within the Southeastern Pennsylvania Transportation Authority (SEPTA) mass transit system.250 Focusing on “extensive evidence of a severe drug abuse problem among [the] operating employees” and concluding that there is an “extraordinarily compelling government interest” in testing the railway operating personnel the court summarily decided the program is constitutional.251 It is not apparent that the court engaged in any form of judicial balancing. Finding that the program had been carefully tailored to cover only employees in safety-sensitive positions, and that the random selection procedures sufficiently protected employees against an abuse of discretion by government officials, the court focused only upon the “extraordinary compelling governmental interest.”252

I. The First Circuit Court of Appeals

The First Circuit, in Guiney v. Roache, vacated a decision of the district court that had found the random drug testing policy of the Boston Police Department unconstitutional under the Fourth Amendment.253 Finding no significant distinction between the police officers, who carried firearms and participated in drug interdiction activities, and the Customs officers in Von Raab, the court found

248. Id. (noting that the employees were required to take annual physicals including both blood and urine tests and that they had been subject to extensive background checks).
249. Id. (noting that the Army’s program complied with the Health and Human Services guidelines and that the Supreme Court in Von Raab had concluded that the guidelines “significantly minimize[d]” the program’s intrusiveness). The Supreme Court in Von Raab did not address the constitutionality of random testing.
250. 884 F.2d 709, 712 (3d Cir. 1988).
251. Id. at 711-13.
252. Id. at 712.
the Police Department’s drug testing scheme constitutional. The court adjudicated the constitutionality of the testing rules by determining whether the employees at issue fell within the categories of employees who previously had been considered as constitutionally subject to testing in *Von Raab*. The problem with this form of adjudication, which focuses on determining whether the employees in question fit within a particular category of employees appropriate for suspicionless testing, is that adjudication by categorization overlooks examination of the particular drug testing procedures at issue.

IV. **Post-Skinner and Von Raab Federal Appellate Court Jurisprudence**

A. The Issues Raised by the Courts’ Decisions

Several issues are raised by the decisions of the eight circuits that have spoken on this topic. The circuit courts of appeals almost uniformly have assigned a broad focus to *Skinner’s* and *Von Raab’s* warrantless testing findings. However, neither of the Court’s opinions, nor the “special needs” examination used to address the warrantless searches, justify reading the opinions expansively as endorsing warrantless employment drug testing programs under all circumstances. Yet, with the exceptions of the D.C. Circuit’s opinions in *Cheney* and *American Federation of Government Employees*, and the Ninth Circuit’s opinion in *Bluestein*, courts generally do not discuss the Fourth Amendment’s Warrant Clause. These inconsistent approaches suggest that there is considerable confusion over the appropriate analytical approach.

The answer lies in the Supreme Court’s decisions in *Skinner* and *Von Raab*. While there are inconsistencies between the Court’s analyses in these two cases, the decision are at least consistent in their approach to the warrant issue. Both consider the warrant question and articulate the “special needs” examination as controlling the constitutionality of warrantless employment drug testing. Furthermore, they both rely upon *Camara’s* rationale, entailing an examination of two criteria: what, if any, additional protections would the warrant afford employees subject to the search; and would the warrant requirement impose burdens upon the government’s ability to accomplish its legitimate objectives. Each circuit has foregone consideration of these inquiries, generally failing to offer any justification for doing so. Yet in some cases, where warrant issues seem to be the grist mill of governmental activities, some explanation should have been offered for absolving government officials from warrant requirements.

254. *Id.* at 1558.

Additionally, the appropriate constitutional standard for evaluating the constitutionality of suspicionless searches is unclear. *Skinner* endorses a tri-factor approach that focuses not only upon the relative weights of the governmental interests at stake and the intrusions upon privacy interests, but also upon other considerations associated with the necessity of a suspicionless search. First, *Skinner* requires that suspicionless drug testing be justified in terms of its utility in advancing the particular governmental interest. Second, *Skinner* demands that the individualized suspicion requirement jeopardize attainment of important governmental objectives. Finally, *Skinner*’s constitutional standard assigns relative weights to the interests at issue; the governmental interest must be “important” and the privacy intrusion “minimal.” In contrast, *Von Raab* endorses the use of a judicial balancing process for evaluating the constitutionality of suspicionless searches. Nevertheless, in doing so, *Von Raab* constrains the judicial balancing examination, noting that only under those “limited circumstances” where the government’s need to discover “latent or hidden conditions,” or to “prevent their development” is “sufficiently compelling” may governmental intrusions proceed without any “measure of individualized suspicion.”

However, the circuits rarely discern any distinction between the adjudicative methods used in *Skinner* and those used in *Von Raab*. The question is, therefore, which method is appropriate for which set of circumstances. Clearly, *Skinner* and *Von Raab* offer little guidance for making this decision; thus, the choice of method must lie somewhere within the rationales of these two cases. It seems that the *Von Raab* balancing standard should be left to those unique and limited circumstances where the governmental employer can demonstrate that latent, hidden conditions accompany employee drug use or intoxication and that such conditions cannot be discovered by the use of traditional supervisory methods. If this view is correct, then the circuits’ routine use of the balancing method to adjudicate constitutional challenges to drug testing programs is inappropriate, particularly where employees work in office settings where their behavior can easily be observed.

When applying the judicial balancing process, however, the circuits generally have failed to raise the issue of relative weights

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257. The D.C. Circuit in National Federation of Federal Employees v. Cheney, 884 F.2d 603, 608 (D.C. Cir.), cert. denied, 110 S. Ct. 864 (1989), was the only circuit to expressly acknowledge that *Skinner* used a distinct set of criteria to adjudicate the constitutionality of the railroad’s drug testing program.
to be assigned the competing governmental and privacy interests.\textsuperscript{258} The Fifth Circuit suggested in dicta that suspicionless searches may proceed only when the government has a compelling interest, and the testing entails a minimal privacy intrusion.\textsuperscript{259} The Seventh Circuit raised the issue but was not inclined to assign a compelling weight to the governmental interest, fearing that doing so would make the balancing examination meaningless.\textsuperscript{260} Instead, it suggested a "valid" or "substantial" interest could justify suspicionless testing when the privacy intrusion was minimal.\textsuperscript{261} Characterization of the governmental interest necessary to support a minimal intrusion accompanying a suspicionless search as "valid" rather than "compelling" arguably permits use of suspicionless drug testing to further such broad governmental interests as efficiency, productivity, and even enhanced morale. However, the Supreme Court's reasoning in \textit{Skinner} and \textit{Von Raab} suggests suspicionless drug testing is constitutionally acceptable only when governmental interests vital to the public interest, public safety, or national security are at risk.

The Seventh Circuit's assessment of the weight of the governmental interest necessary to support suspicionless testing raises another issue. Presumably an "invalid" governmental interest would not support a search or intrusion—even if supported by probable cause. The Seventh Circuit's suggestion that a "valid" interest is sufficient, therefore, lowers the threshold of governmental interest required to support suspicionless testing. This lower threshold could become any legitimate interest.

\textbf{B. The Case for an Exacting Judicial Scrutiny of Drug Testing Programs that Endorse Suspicionless Searches}

The observations and comments in this Article suggest that the trend, as reflected in federal circuit courts of appeals' decisions, is to engage in a relaxed scrutiny of governmental drug testing programs—even programs using suspicionless searches.\textsuperscript{262} However, both the \textit{Skinner} and \textit{Von Raab} rationales suggest that courts should engage in exacting scrutiny when adjudicating the constitutionality of suspicionless searches. In drug testing cases involving

\begin{itemize}
\item \textsuperscript{258} \textit{But see} National Treasury Employees Union v. Bush, 891 F.2d 99, 101 (5th Cir. 1989); Taylor v. O'Grady, 888 F.2d. 1189, 1195 n.8 (7th Cir. 1989).
\item \textsuperscript{259} \textit{Bush}, 891 F.2d. at 101.
\item \textsuperscript{260} \textit{Taylor}, 888 F.2d. at 1195 n.8 (7th Cir. 1989).
\item \textsuperscript{261} Id.
\item \textsuperscript{262} For a recent example of judicial philosophy suggesting that a relaxation in judicial scrutiny is appropriate, see Wilner v. Thornburgh, 928 F.2d 1185, 1188 (D.C. Cir. 1991).
\end{itemize}
suspicionless searches, just as in other cases using a heightened scrutiny standard, courts should require the government to demonstrate that the testing policies are finely tuned to address important or compelling governmental concerns.\textsuperscript{263}

Governmental policies using suspicionless searches are likely to increase. Recent efforts on the part of some members of Congress, if successful, would extend suspicionless drug testing policies to all federal employees.\textsuperscript{264} Concerns regarding the transmission of the Human Immunodeficiency Virus which has been identified as the cause of Acquired Immunodeficiency Syndrome (AIDS), have resulted in repeated calls for suspicionless compulsory testing of numerous classes of individuals.\textsuperscript{265} Thus, it is likely that governmental testing policies involving more substantially intrusive suspicionless personal searches than those associated with drug testing will surface. In addition, these suspicionless searches will impact broader classes of individuals than government employees.

V. CONCLUSION

Suspicionless searches are far removed from traditional principles of Fourth Amendment jurisprudence—principles that historically have based the reasonableness of a governmental search on the presence of individualized suspicion and the necessity of undertaking the search to advance some important governmental concern. Accordingly, we should expect a careful, rather than a casual, judicial review of their constitutionality. \textit{Skinner} and \textit{Von Raab} are useful to courts facing the task of determining the constitutionality of drug testing programs. However, the federal courts of appeals have interpreted these opinions as if they represent a general endorsement of minimal judicial review. The Supreme Court should dispel this belief.

\begin{enumerate}
\item[263.] Cf. \textit{Coffin}, supra note 17, at 26-27 (discussing different levels of judicial scrutiny applied within the context of judicial balancing).
\item[264.] \textit{See Federal Agency Drug Testing}, 6 Ind. Empl. Rts. Rep. (BNA), June 4, 1991, No. 11 at 4 (discussing efforts on the part of various members of Congress to extend drug testing policies to federal personnel at all levels of government).
\item[265.] \textit{See Steven Eisenstat, An Analysis of the Rationality of Mandatory Testing for the HIV Antibody: Balancing the Government Public Health Interests with the Individual's Privacy Interest}, 52 U. Pitt. L. Rev. 327, 337-38 (1991) (discussing proposals for compulsory testing of marriage license applicants, prisoners, individuals arrested or convicted of a sexual or drug related crime, children in state custody, hospital patients, hospital employees, immigrants, residents, employees of mental health facilities, and members of the armed forces).
\end{enumerate}